

## MINUTES

### SPECIAL COMMITTEE ON JUDICIARY

October 22-23, 2009  
Room 143-N—Statehouse

#### Members Present

Representative Lance Kinzer, Chairperson  
Senator Tim Owens, Vice-chairperson  
Senator David Haley  
Senator Julia Lynn  
Representative Elaine Bowers  
Representative Sydney Carlin  
Representative Steve Huebert  
Representative Connie O'Brien  
Representative Annie Tietze

#### Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department  
Lauren Douglas, Kansas Legislative Research Department  
Norm Furse, Office of the Revisor of Statutes  
Gordon Self, Office of the Revisor of Statutes  
Sue VonFeldt, Committee Assistant

#### Conferees

Tim Madden, Kansas Department of Corrections  
Mark Galbraith, State Librarian, State Library  
John Badger, Department of Social and Rehabilitation Services  
Dave Starkey, Kansas Department of Agriculture  
Julia Mowers, Board of Healing Arts  
Tom Day, Kansas Corporation Commission  
Diane Bellquist, State Bank Commissioner  
Ed Bryan, Kansas High Performance Incentive Program  
Susan Andrews, Kansas Department of Aging  
Richard Cram, Kansas Department of Revenue

## Others Attending

See attached list.

## Thursday, October 22

The meeting was called to order by Chairperson Lance Kinzer at 9:00 a.m. in Room 143-N.

Following introductions by the Chairperson, Norm Furse, Revisor Emeritus, and Gordon Self, Office of the Revisor of Statutes, gave an overview of the Interim Study ([Attachment 1](#)). They explained that the Legislative Coordinating Council (LCC) assigned the review of the "Kansas Open Records Act" to the Special Committee on Judiciary, which includes a review of existing exceptions to the Kansas Open Records Act that are scheduled for expiration July 1, 2010. They explained that in recent years, the Legislature has undertaken a comprehensive review of the Open Records Act in order to determine if any statutory exceptions to the law are unnecessary and could be discontinued. In 2009, SB 34 extended the existence of 30 statutory exceptions to the Kansas Open Records Act until July 1, 2014.

They also provided the following documents:

- Legislative Review of Statutory Exceptions.. "Legislative Review of Statutory Exceptions to Disclosure of Public Records - 2009" ([Attachment 2](#));
- Review of KSA 45-229 ([Attachment 3](#));
- Review of the Preparation for Identifying Exceptions ([Attachment 4](#));
- Open Records Review List. A Matrix Summary list of the Open Records Act Exception ([Attachment 5](#)), pages 1 thru 44; and
- Open Records Act Exclusion Section ([Attachment 6](#)). This section, KSA45-221, is summarized on pages 45 thru 53.

Norm Furse and Gordon Self provided answers to the Committee members' questions after the presentation and review by the Committee of all the Open Record Statutes scheduled to expire July 1, 2010.

Richard Gannon, Kansas Press Association, addressed the Committee, regarding Statute KSA 21-2511, with the question: "if after a DNA sample is provided and subsequently the person is not charged or no further probable cause exists, should or is the record expunged." It was explained that if a specific request is made to expunge the record, it will be removed otherwise the record remains. This was a compromise due to concern for clerical resources to review and expunge all such records.

After a Committee member's question, it was determined that on page 21 of 53 (see [Attachment 3](#), Matrix Listing of Exceptions Summary), the wording referencing KSA 60-3333, should be changed to read the "environmental audit report is ***not*** subject to discovery procedures," due to a typographical error.

There was discussion regarding the various exception statutes concerning the Gaming Agency with regard to whether they have been changed or updated due to the new gaming casinos in the state.

Chairperson Kinzer asked the staff to contact and invite various department representatives, if available, to the Committee meeting the next day at 9:00 a.m., instead of 10:00 a.m., to give their presentations and provide additional answers to questions by the Committee.

The meeting was adjourned at 3:30 p.m.

### **Friday, October 23 Morning Session**

The meeting was called to order by Chairperson Lance Kinzer 9:00 a.m.

Tim Madden, Chief Legal Counsel, Kansas Department of Corrections, spoke to Committee members in support of the retention of the exception from disclosure of pre-sentence reports, pre-parole reports, post-release supervision reports and supervision history reports provided by KSA 22-3711. He explained these reports contain personal information regarding family and friends of inmates relevant to decisions regarding the possible residence, employment and associations of offenders proposed to be released, released or persons awaiting sentencing and, these records may also contain medical and mental health information as well as crime victim information. While these records are also exempted from public disclosure pursuant to the provisions of the Open Records Act of KSA 45-221(a)(30) regarding information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of personal privacy, KSA 22-3711 serves the additional purpose of providing authorization for the release of those records to the parole board, judges, attorney general and others entitled to receive the information in the performance of their duties. Therefore, KSA 22-3711 not only reiterates the confidential nature of those records but also provides for the limited release of that information to criminal justice personnel in the performance of their duties (Attachment 7).

Mr. Madden spoke in support of the retention of the exception from disclosure for psychiatric evaluation reports, by correctional facilities provided by KSA 75-5266. He again explained while the statute reiterates the confidential nature of those records, it also serves the additional purpose of providing authorization to the secretary of corrections to disclose those records to courts, prosecutors, defense counsel, the parole board, wardens and correctional facility classification Committees (Attachment 8).

In addition, Mr. Madden addressed a question regarding KSA 74-7405a which excepted the disclosure of confidential information from the records of the office of ombudsman of corrections or corrections ombudsman board relating to complaints by correctional inmates or employees. Mr. Madden confirmed the position of Ombudsman of Corrections was abolished during the 2003 Legislative Session and 2005 HB 2242 was written to repeal the statute that required the records of the Ombudsman of Corrections be confidential.

Marc Galbraith, Interim State Librarian, State Library, addressed the Committee regarding KSA 45-221(23) in support of the exception to the Open Records Act, because it provides that library patrons and circulation records, which pertain to identifiable individuals, shall not be disclosed. He stated 48 states have passed laws that protect the privacy of library users and the right to privacy

has been recognized as being essential to the exercise of free speech and free thought, and, as such, is guaranteed by the First Amendment. He also supported KSA 45-221 (7), which provides that limitations put on gifts to libraries, archives, and museums not be required to be disclosed (Attachment 9).

John Badger, General Counsel, Kansas Department of Social and Rehabilitation Services, spoke in support of the retention of exception from disclosure for several statutes (as named in sections 38, 39, 59, 65, 72-4311, 75, and 76).

A question and answer session followed. In response to a question regarding KSA 72-4311 regarding rules and regulations, Mr. Badger advised that, since this is 98 percent federally funded, they follow the federal rules and regulations. There also was discussion regarding KSA 38-1664 and if the information excepted should be changed to include reports submitted by a guardian ad litem.

Dave Starkey, Chief Counsel, Kansas Department of Agriculture, addressed the Committee in support of KSA 34-251, which protects certain grain warehouse records from disclosure under the Kansas Grain Warehouse Act. He explained that in carrying out their duties and responsibilities, employees and inspectors obtain information related to the business affairs and transactions of grain warehouses. This information cannot be disclosed except upon written permission of the grain warehouseman, the determination by the Secretary of Agriculture that the requestor is entitled to it, or pursuant to a court order. Any inspector or employee who discloses information except as permitted by this statute is guilty of a misdemeanor.

Mr. Starkey responded to a previous question regarding why a farmer who has a legitimate interest in an insolvent grain elevator has to follow the statute to obtain information. He explained any farmer who has grain in storage at an insolvent elevator, or who is a creditor of the elevator, is entitled to relevant information as authorized by KSA 34-25. ( c). Also, if a grain warehouse is deemed to be insolvent, or does not have sufficient grain in storage, the Secretary is required to petition the district court to appoint a temporary and permanent receiver as provided in KSA 34-2,104. The receivership proceeding is under the supervision of a district court judge and relevant information is available to a farmer from the receiver and court filings. Mr. Starkey stated these procedures appear adequate for all concerned and he did not see a need for any changes (Attachment 10).

Julia Mowers, Legislative Analyst, Kansas State Board of Healing Arts (KSBHA), spoke in support of retaining eight separate Kansas statutes, KSA 40-1128, 45-221( a), 65-118, 65-436, 65-2836, 65-2839a, 65-2898a, and 65-4925. She stated the purpose of the Healing Arts Act is to protect the public against the unprofessional, improper, unauthorized, and unqualified practice of medicine. These statutes ensure the KSBHA's ability to protect the public from the unsafe and unauthorized practice of medicine and also protects the privacy of licensees. According to Ms. Mowers, it is critical the KSBHA has the authority to assure these individuals and licensees that any sensitive, personal, medical information that is provided will remain confidential and that their identities will remain concealed from the public (Attachment 11).

Tom Day, Kansas Corporation Commission, spoke to the Committee to help clarify some various confidentiality questions by Committee members, specifically regarding KSA 55-1,102, 66-151, 66-1,190, and 66-1220a. Mr. Day stated the Corporation Commission uses the same four guidelines Mr. Furse and Mr. Self of the Office of the Revisor of Statutes shared when considering who makes the decisions and what criteria is used to determine confidentiality:

- Whether disclosure will significantly aide the Commission in fulfilling its functions;
- Whether disclosure will cause harm or benefit to the public interest;

- Whether disclosure will cause harm to the corporation, partnership, or sole proprietorship; and
- Whether there are alternatives to disclosure that will serve the public interest and protect the corporation, partnership, or sole proprietorship.

Mr. Day confirmed there are specific rules, regulations and procedures that cover the confidentiality issue and also assured the Committee that they also perform regular reviews of the confidentiality regulations. He explained that sometimes companies provide detailed information as confidential under seal and yet, if this same information has been filed with the Securities Commission and therefore is already public information, they can release that document. He also explained that if a company claims “trade secrets” regarding some information, then they respect that. If other parties dispute that, then a further review would be made. He also stated that while rates may be public information, the details and work papers themselves may be confidential. Most of the time communication contracts have rates, including what they are paying to other companies or contractors, and that information is confidential, but they may provide the contract in a redacted format in order to make the document public.

Diane Bellquist, General Counsel, Office of the State Bank Commissioner, presented testimony on behalf of Tom Thull, Bank Commissioner, in support of retaining the following exceptions to the Kansas Open Records Act, KSA 9-1712, 9-1137, 9-2217, and 16a-2-304. Their office is responsible for regulating a wide range of financial service providers, including state-chartered banks, trust companies, finance companies, mortgage brokers and lenders. The confidentiality is critical due to inclusion of information generated, including data such as social security and tax identification numbers, loan numbers, and audit information, that could increase the risk of identify theft and loss or damage to the customers as well as the businesses themselves (Attachment 12).

Ed Bryan, Program Director of the Kansas High Performance Incentive Program (HPIP), spoke on behalf of the Kansas Department of Commerce in support of the exception covered by KSA74-50,13. He stated the HPIP program is one of the state’s most effective economic development tools and provides generous tax credit incentives to those companies that are willing to pay higher than average wages, invest in employee training, and make significant capital investments in either expansion or relocation from another state. He told the Committee the proprietary information supplied to the Department of Commerce by an entity, for the purpose of qualifying for this program, is of such highly confidential nature that if it were made public, current business advantages would be lost resulting in injury to the company in the competitive marketplace. In order to get companies to participate in this program, they must be able to guarantee confidentiality to their clients (Attachment 13).

Susan Andrews, Legal Counsel, Department on Aging, spoke in support of the confidentiality exception covered under KSA 39-934. The Department receives information for adult care homes that includes licensing information, field reports, inspection reports, surveys and complaint programs that includes confidential information of residents as well as other family members or individuals. These residents as well as the others must be assured of the confidentiality of information included in the information that is provided the agency.

Richard Cram, Director, Office of Policy and Research, Kansas Department of Revenue, addressed the Committee in support of retaining the various statutes that must be retained to assure individuals and companies of confidentiality protection. He explained the state also exchanges tax information with the Internal Revenue Service, and if they could not assure confidentiality, the program would come to a halt. Mr. Cram also explained to the Committee that in order to provide strict

confidentiality, the Department has an elaborate system in place that tracks who is accessing any tax records and all employees must sign an oath (Attachment 14).

There was a question and answer session after the final presentation to ensure all questions from the Committee had been addressed.

Chairperson Kinzer told the Committee he was advised by Carol Williams, Executive Director, Kansas Governmental Ethics Commission, that they are supportive of legislation that actually would alter the existing KAR 19-6-1, which deals with the Governmental Ethics Commission regarding disclosure and confidentiality procedure. There was discussion on KSA 25-4161 and KSA 25-4165 regarding the Ethics Commission. In the discussion, it was stated that whomever makes the complaint has a First Amendment right to disclose that they made a complaint and so there were questions by the Committee if this changed the exception status.

Chairperson Kinzer suggested the Committee proceed with two separate votes, one to request a bill be drafted and the other to prepare a list of items the Committee is recommending for further study.

*Representative Hubert made the motion to draft a bill in support of extending the items scheduled for expiration in the coming year with the exception of the following:*

- *KSA 74-7405a referring to Ombudsman of Corrections since this position no longer exists;*
- *KSA 79-1437f, Kansas Department of Revenue testified these records regarding real estate appraisal validation should be public information; and*
- *Correcting language to include guardian ad litem to KSA 38-1664.*

*The motion was seconded by Senator Haley. The motion carried.*

*Senator Owens made a motion that a list be prepared of items recommended by the Committee for further study. Representative Carlin seconded the motion. The motion carried.*

Norm Furse advised he will prepare a field draft listing these items and forward it to the Committee members.

Meeting was adjourned at 11:45 a.m.

Prepared by Sue VonFeldt  
Edited by Jerry Donaldson

Approved by Committee on:

April 23, 2010  
(Date)