

MINUTES OF THE HOUSE GOVERNMENTAL ORGANIZATION AND ELECTIONS COMMITTEE

The meeting was called to order by Chairman Jene Vickrey at 3:30 P.M. on February 7, 2006 in Room 519-S of the Capitol.

All members were present.

Committee staff present:

Mike Heim, Legislative Research Department
Martha Dorsey, Legislative Research Department
Theresa Kiernan, Revisor of Statutes Office
Maureen Stinson, Committee Secretary

Conferees appearing before the committee:

Rep. Barbara Craft
Rodney Barnes, Junction City
Kathy Porter, Office of Judicial Administration
Doug Anstett, Kansas Press Association
Harriet Lange, Kansas Association of Broadcasters
Kevin O'Connor, Office of the District Attorney, Sedgwick County

Others attending:

See attached list.

Chairman Vickrey opened the hearing on:

HB 2759 **Bonded debt limitation; Junction City**

Rep. Barbara Craft testified in support of the bill (Attachment 1). She explained that current law prohibits the bonded indebtedness of cities from exceeding 30.0 percent of the assessed valuation of the city. She said the new language in the bill would allow the city of Junction City to have a 40.0 percent limit for a period of five years, until June 30, 2011.

Rodney Barnes, City Manager, Junction City, testified in support of the bill (Attachment 2). He explained that there is an expansion underway at Fort Riley and that their city is experiencing a rapid growth in population. He said it is expected that 30,000 people will be added to the city's population over the next few years. Mr. Barnes said that in order to address housing needs, an additional 9,000 housing units in the area are to be built over the next three years. He stated that the City is issuing debt to develop streets, sidewalks, storm sewers, water lines, and sewer lines.

Chairman Vickrey closed the hearing on **HB 2759**.

HB 2759 **Bonded debt limitation; Junction City**

Rep. Harold Lane made a motion for the favorable passage of HB 2759 and asked that it be placed on the Consent Calendar. Rep. Jim Yonally seconded the motion. Motion Carried.

HB 2742 **Affidavits and sworn testimony in support of probable cause for the issuance of a warrant are open court records following execution of warrant, certain exclusions**

Kathy Porter, Office of Judicial Administration, presented a fiscal briefing relating to the bill (Attachment 3). She informed the Committee that the enactment of **HB 2742** would create a significant workload increase for judges and clerks because in all felony cases that included affidavits or sworn testimony, the material would need to be reviewed and a redacted copy produced.

Doug Anstett, Kansas Press Association, testified in support of the bill (Attachment 4). He explains that the bill opens probably cause affidavits to public inspection.

Harriet Lange, Kansas Association of Broadcasters, testified in support of the bill (Attachment 5). She said

CONTINUATION SHEET

MINUTES OF THE House Governmental Organization and Elections Committee at 3:30 P.M. on February 7, 2006 in Room 519-S of the Capitol.

that the safeguards in the bill are sufficient to ensure that investigations or prosecutions will not be compromised.

Written testimony in support of the bill was submitted by Sherry Chisenhall, *The Wichita Eagle* (Attachment 6). Richard Gannon presented Ms. Chisenhall's testimony.

Written testimony in support of the bill was submitted by Randy Brown, Kansas Sunshine Coalition for Open Government (Attachment 7).

Kevin O'Connor, Office of the District Attorney, Sedgwick County, testified in opposition to the bill (Attachment 8). He explained that the release of probable cause affidavits, particularly in high profile cases, directly impacts the constitutional rights of the accused.

Following discussion, Chairman Vickrey appointed a subcommittee to review proposed amendments to the language of the bill. Subcommittee Chair is Rep. Steve Huebert. Members of the subcommittee are: Rep. Tom Sawyer, Rep. Mario Goico, Rep. Melody Miller, and Rep. Jim Yonally. Chairman Vickrey suggested that interested parties be invited to participate in the subcommittee meeting(s).

Chairman Vickrey closed the hearing on **HB 2742**.

Approval of Minutes

Rep. Tom Sawyer made a motion to approve the minutes of the February 2, 2006 meeting. Rep. Harold Lane seconded the motion. Motion Carried.

Chairman Vickrey adjourned the meeting.

The next meeting is scheduled for Thursday, February 9, 2006.

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 REPRESENTATIVE, 65TH DISTRICT
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TOPEKA
 HOUSE OF
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS
 MEMBER: EDUCATION
 FEDERAL AND STATE AFFAIRS
 GOVERNMENTAL ORGANIZATION
 AND ELECTIONS
 HIGHER EDUCATION

Testimony in Support of HB 2759
House Governmental Organization and Elections Committee
February 7, 2006

I am here to speak in support of HB 2759. The bill would amend existing law concerning cities and limitations of bonded indebtedness. Current law prohibits the bonded indebtedness of cities from exceeding 30.0 percent of the assessed valuation of the city. The new language in the bill would allow the city of Junction City to have a 40.0 percent limit for a period of five years, until June 30, 2011, during a period of exceptionally rapid growth. After that date, the limit would drop to 37.0 percent for the next two years (until June 30, 2013) and then to 34.0 percent for the following two years (until June 30, 2015). On July 1, 2015, the limitation would again be 30.0 percent of the assessed valuation.

Junction City and the surrounding area are experiencing rapid growth due to the expansion of Fort Riley. It is anticipated that more than 30,000 people will be added to the population in the next 5 years. Providing enough affordable housing for the soldiers and their families has been and continues to be a top priority, since the majority of these families will be living off post. The cost of providing the infrastructure for new subdivisions is the primary reason for needing a higher debt limit. Currently the city has 22 subdivisions under way, with approximately 15 more under development. We are concerned about reaching our debt limit before the housing needs are satisfied and before our assessed valuation catches up with ongoing construction. HB 2759 would give the city approximately \$11 million in additional debt authority.

House Gov. Org. & Elections
 Date: 2-7-2006
 Attachment # 1

Rodney D. Barnes
City Manager



P.O. Box 287
Municipal Building
Junction City, KS 66441
(785) 238-3103 ext. 300

February 7, 2006

CITY MANAGER'S OFFICE

Testimony Before the
State of Kansas
House of Representatives
Governmental Organization & Elections Committee

RE: Support of House Bill No. 2759

Chairman Vickrey, Representative Craft and other Committee members

Thank you for the opportunity to speak in favor of House Bill 2759. I'm Rod Barnes, City Manager for the City of Junction City. The State of Kansas and the Junction City region have a wonderful opportunity to grow and prosper as the result of expansion at Fort Riley. The Fort will be doubling in size over the next few years, adding over 30,000 people to our population. This rapid growth does provide some challenges for the region. Lt. Governor Moore recognized this early in the process. He convened a regional task force that began meeting in December, 2004. The task force had the responsibility of creating action plans for how the region would handle housing, workforce, schools and transportation. The City Manager of Manhattan and I had the responsibility of working on housing. It became clear that we would need to construct an additional 9,000 housing units in the area over the next 3 years.

The City of Junction City builds housing through the creation of subdivisions, using special assessments. The assessments are paid back by the property owners over 20 years. The City currently has 22 subdivisions under construction, with another 15 in the planning stages. The City has annexed over 650 acres of land as a result of the subdivision development. This means that the City is issuing debt to develop streets, sidewalks, storm sewers, water lines and sewer lines. The debt becomes general obligation debt of the City, retired through the collection of special assessments annually on the housing being constructed.

Our assessed valuation is growing at an accelerated pace, however it lags catching up with our ability to meet the State of Kansas statutory debt capacity. Today, our assessed valuation is \$111,465,383. That means our statutory debt capacity is \$33,439,615. We have outstanding \$26,078,205. This currently provides approximately \$7,361,410 in remaining statutory debt capacity. According to the City's fiscal advisor, George K. Baum, moving our debt limit to 40% of assessed valuation would provide approximately \$11,000,000 additional debt capacity. This would insure the ability of the City to continue to provide special assessment financing as an option to develop subdivisions in our community over the next 5 years.

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The City does continue to explore ways to finance development without using the City's debt capacity. In addition, not all infrastructure improvements count towards our debt capacity. Junction City is working feverishly to accommodate growth in our area. We are prepared to meet the tremendous housing demand needed at Fort Riley, but not without help from you on this issue.

House Bill 2759 provides the amendment to state law that would provide the City the opportunity to have a 40% limit for the next 5 years. In addition, the bill contains the necessary language to not penalize the City at the end of 5 years, when the limit would return to the statutory 30%, by gradually reducing the limit back to the 30% amount by the year 2015.

I appreciate Representative Craft's assistance with this matter. I would be glad to answer any questions you may have today.

Sincerely,

A handwritten signature in black ink that reads "Rodney D. Barnes". The signature is written in a cursive style with a long, sweeping underline.

Rodney D. Barnes
City Manager



State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507

(785) 296-2256

February 7, 2006

House Governmental Organization and Elections Committee

Testimony Regarding the Fiscal Impact of HB 2742

Kathy Porter, Office of Judicial Administration

HB 2742 would amend K.S.A. 22-2302 to allow affidavits or sworn testimony to be open to the public after a warrant or summons is executed. After execution, the affidavits or sworn testimony shall be public court records following the exclusion of information that would:

- Interfere with any prospective law enforcement action, criminal investigation, or prosecution;
- reveal the identity of any confidential source or undercover agent;
- reveal confidential investigative techniques or procedures not known to the general public;
- endanger the life or physical safety of any persons; or
- reveal the name, address, phone number, or any other information which specifically and individually identifies the victim of any sexual offense.

The enactment of HB 2742 would create a significant workload increase for judges and clerks because, in all felony cases that include affidavits or sworn testimony, the material would need to be reviewed to ensure that the above-stated information is not included. Any information meeting the criteria noted above would need to be redacted from a copy of the original document, and the original document would need to be sealed. Only the copy with the specified material redacted would be available to the public. Unfortunately, this process would take time, and judges would need to perform the affidavit or sworn testimony reviews.

In FY 2005, 19,290 felony cases were filed statewide. If a member of the public requested to view the court record in only seventy-five percent of those cases, which may be an underestimate, the affidavits or sworn testimony included in 14,468 case files would need to be reviewed and redacted as they are requested by a member of the public. If only thirty minutes were allowed for each review and redaction, the Judicial Branch would need an additional four judges, with associated staff, at a cost of \$942,028; one senior judge at a cost of \$28,876; and

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Testimony – HB 2742

February 7, 2006

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four half-time Trial Court Clerk II's at a cost of \$71,600. All amounts noted include fringe benefits. The total cost to the Judicial Branch to implement HB 2742 would be \$1,042,504.

Whether to enact HB 2742 is a policy question to be decided by the Legislature. However, the fiscal impact of enacting the bill would be significant.

Thank you for your consideration of this issue. I would be happy to attempt to answer any questions.



Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

5423 SW Seventh Street • Topeka, Kansas 66606 • Phone (785) 271-5304 • Fax (785) 271-7341 • www.kspress.com

Feb. 7, 2006

To: Rep. Jene Vickrey, chairman of the House Governmental Organization and Elections Committee, and members of the committee

From: Doug Anstaett, executive director, Kansas Press Association

Re: HB 2742

Chairman Vickrey and members of the committee:

Thank you for this opportunity to appear before the committee and address HB 2742, a bill to open probable cause affidavits to public inspection. This bill is designed to right a wrong that sets Kansas apart from just about every other state in the union.

As we have prepared for this testimony today, we have contacted judges, prosecutors, newspaper associations and others across America to collect information on how other states handle probable cause affidavits.

It has been an eye-opening experience. Only in Kansas are probable cause affidavits systematically closed to the public unless a judge rules otherwise. Only in Kansas can suspects be arrested, jailed and even convicted without the public ever seeing the prosecutorial or investigational rationale that led to the suspicion in the first place. Only in Kansas can prosecutors hide behind the law when they make a mistake, leaving the public without the necessary information to judge the efficacy of our system of justice. Kansas' stance on probable cause affidavits is an embarrassment that must be corrected.

First, let me explain what a probable cause affidavit is: It is basically a sworn statement, usually from an investigator in a criminal case, that lays out the minimum facts necessary to prove to a judge that sufficient grounds exist for filing a criminal charge against a suspect or for issuing a search warrant.

Two recent situations in Wichita merit our attention. The Wichita Eagle — and, therefore, the public — has not yet been allowed to inspect the very documents that led police to wrongly suspect Roger Valadez of Wichita and search his home in connection with the notorious BTK murders back in December of 2004. Valadez was never charged, and the probable cause affidavits have never been opened to public inspection. Valadez had to go to court to fight for the release of the documents, and they were only unsealed when he sued a Wichita television station's owners for invasion of privacy. The attorney for the TV station still is barred from showing the actual probable cause affidavit to his client. The public has never seen it, and that is a travesty.

If that isn't bad enough, the PCA that led to the arrest, 10-count murder charge and subsequent guilty plea of the real BTK killer, Dennis Rader, has remained sealed to this day. The public is not even trusted with the information now that the killer is behind bars for the rest of his life. That shows a callous disregard for the public's right to know. Present law even allows the judge to open the record with a simple written order from the court, but that hasn't happened to this day.

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... distrust of the public is un-American. This is not Iran. This is not North Korea. This is America, where we believe in public access to the kind of information we can use to judge whether our court system is doing its job. Instead, the public is asked to blindly "trust" that investigators, prosecutors and judges know best. As attorney Lyndon Vix wrote last April when trying to remove the "Protective Order of Seal" on the probable cause affidavit in the BTK case, "The notion that a person can be arrested, charged and confined, without the state revealing to the public that it has any basis for doing so, is more consistent with an authoritarian state than the United States."

He went on to argue that such levels of secrecy do nothing to engender public confidence in the system. He quoted *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980): "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing ... In the absence of this basic information, speculation will flourish, cynicism will grow and the people of this community will feel they have no part in the administration of justice."

Two weeks ago, we asked an independent Wichita-area legislator to seek the opinions of judges in that area about our bill to open up probable cause affidavits. We received more than a half dozen responses and asked the legislator to remove the names of those responding so we could concentrate on what they said and not who said it. All but one of the judges said probable cause affidavits should be public documents, at least at some point in the process. Yes, some did argue that there should be an escape valve that would allow for redacting sensitive information, which this bill includes, but none of them argued that PCA's should be presumed to be closed records.

Here are a few of their comments:

- "I'm shocked that we do not make such materials public already, inasmuch as other states do. Allowing the government to operate in secrecy is dangerous. No one should be beyond accountability, and if we keep these affidavits secret, there isn't much accountability."
- "I just read the bill, and I support it. Other states allow public access to charging affidavits, and I do not see why Kansas should not open them as well. I think the restrictions placed in the bill should adequately address any of law enforcement's concerns."
- "Bottom line for me is that, conceptually, I don't have any hard and fast opposition to permitting disclosure in some cases."

The Wichita judge who blocked access to probable cause affidavits in the BTK case said Kansas' distinction as the only state automatically closing PCA's might be because "Kansas is just ahead of its time." That statement is an insult to the people of Kansas. Not a single state surveyed could document a time when the release of a probable cause affidavit ever resulted in a lost prosecution or investigation. Not a single one.

The Montana Supreme Court ruled in 1991 that a law nearly identical to the one in Kansas violated the Montana State Constitution. The judge said: "The perception of fairness in our judicial system, the ability of the criminally accused to defend themselves, and the public's knowledge about criminal proceedings all benefit from allowing public access to affidavits filed in ... support of a charge or warrant."

Even in Kansas, in the Tyrone Baker case in which the affidavit's release was cited by the defense as causing prejudicial pre-trial publicity, the Kansas Supreme Court disagreed. On Oct. 25, 1991, our own Supreme Court ruled that the release did not cause prejudice or prevent the defendant from receiving a fair trial.

The Kansas Press Association, in partnership with the Kansas Association of Broadcasters, the Kansas Sunshine Coalition for Open Government and the League of Women Voters of Kansas, believe the time has come to right this wrong. We ask you to support HB 2742.

Thank you for your time.



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Testimony
HB 2742
House Committee on Governmental Organization and Elections
February 7, 2006
By
Harriet Lange, President
Kansas Association of Broadcasters

Mr. Chairman, Members of the Committee, I am Harriet Lange, president of the Kansas Association of Broadcasters (KAB). KAB serves a membership of free-over-the-air local broadcast stations in Kansas. We appreciate the opportunity to appear before you in support of HB 2742.

The high-profile BTK case in Wichita provides an excellent back drop as to why search warrants or probable cause affidavits should be public record in Kansas, just as they are at the federal level and in most other states. As I understand it from one of our members in Wichita, in the BTK case some 30 officers from the Wichita Police Department (WPD), with search warrant in hand, stormed the home of Mr. Roger Valadez. This was the day after the department released an FBI-directed composite of characteristics the department said could match the BTK killer. Questions quite naturally arise as to the quality of the tip which led the police to look at Mr. Valadez, and how it was evaluated. Because no one outside of the WPD and the district attorney's office had access to the probable cause affidavit, there was and is no way to evaluate the quality of the investigation. Mr. Valadez's arrest was part of a murder investigation that was probably the largest in Wichita's history and one which cost taxpayers significant tax dollars. His erroneous arrest occurred without the public's ability to later judge the cause or the reasonableness of his arrest.

Passage of HB 2742 will bring Kansas into the norm among the vast majority of our sister states and will provide an important mechanism for the public to evaluate the actions of law enforcement agencies. The safeguards in the bill are sufficient to ensure that investigations or prosecutions will not be compromised.

We urge you to pass HB 2742. Thank you for your consideration.

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Date: 2-7-2006
Attachment # 5



The Wichita Eagle

Feb. 7, 2006

To: Rep. Jene Vickrey, chairman, and members of the House Committee on Governmental Organization and Elections

From: Sherry Chisenhall, editor, The Wichita Eagle

Re: House Bill 2742

Sometimes laws are put into place for perfectly logical reasons — but they have a longer-term ill effect that wasn't foreseen. Such is the case with the Kansas statute that closes probable-cause affidavits from public inspection in criminal prosecutions.

Though originally seeking to protect criminal investigations that have not been completed, the law has in effect turned these affidavits into sealed documents in perpetuity. As a matter of course, The Eagle has requested these documents in criminal cases. Though current law gives courts the power to open the records, that has not been the result in even a single instance — even in cases with the highest levels of public interest in the prosecution. As one judge told The Eagle, “The law says they should be closed.”

Courts and prosecutors have at times gone to illogical lengths to keep these records under seal, including keeping them secret from defendants themselves — even though the law specifically provides otherwise. In 2002, a defendant was forced to litigate to the state Supreme Court to obtain his own affidavit (*State v. Thomas*) even *after* he was convicted.

In the absence of openness of these court records, the public has no way to determine the basis for charges brought against a defendant. The community therefore does not have the ability to determine whether the criminal investigation and prosecution are being conducted fairly and competently.

This is a vital responsibility citizens are charged with. The U.S. Supreme Court spoke specifically to that responsibility in *Richmond Newspapers v. Virginia*: “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

Simply put, criminal proceedings — from charges to conviction or acquittal — should not be conducted behind a curtain.

When they are, citizens are denied a critical opportunity to assess the effectiveness of the criminal justice system. The proposed changes to K.S.A. 22-2302 seek a balance between protecting criminal investigations and allowing public access to court records. These revisions would ensure that the affidavits are not released until an arrest warrant has been executed, and they would allow judges to seal those records even after an arrest in situations that might endanger an individual or an investigation.

These provisions strike a balance among: the public's right to oversee and assess the performance of the justice system; the accused's right to a fair trial; and the responsibility of law enforcement and the criminal justice system to conduct a fair and competent investigation and prosecution.

The Eagle has undertaken a state-by-state canvass to determine how these records are treated elsewhere. A reporter contacted attorneys general or administrative offices of the Supreme Court in every state to determine how their state laws treated probable-cause affidavits. We've found overwhelming evidence so far that we may stand alone in presuming these records to be closed.

In 44 states, the affidavits are open records after an arrest warrant has been executed. (See attached list for specifics by state.) Kansas is the only state we've found in which the affidavits are closed by statute.

Most of these states make provisions that I believe are reasonable in seeking to protect the integrity of law enforcement investigations. The proposed changes to K.S.A. 22-2302 incorporate those same provisions.

Our reporting has yet to uncover a single case in which a criminal conviction was lost at trial or overturned on appeal because an affidavit was made public as soon as an arrest warrant was executed. In Missouri, Jim Gardner, spokesman for Attorney General Jay Nixon, said he knew of no instances where releasing a probable cause affidavit had harmed a prosecutor's case at trial.

"Probable cause affidavits are an open record here, no question on that one," Gardner told The Eagle last year. "Our office has chosen to construe sunshine laws as openly as possible to give the public access to information."

Courts of other states have made a clear and eloquent case in upholding laws that open these records, such as the Supreme Court in the State of Washington (Cowles Publishing v. James Murphy as Presiding Judge): "The common law presumption of open judicial records is grounded in the generalized belief that maximum public access to all governmental information provides the people, the governed, with the information to understand the functioning of their government and to evaluate the performance of public servants. Furthermore, an informed public is in a better position to exercise the freedom to choose intelligently those who will govern.

"Access to search warrants and affidavits of probable cause can reveal how the judicial process is conducted. The procedures employed by the prosecutor and law enforcement can be evaluated. Access may also disclose whether the judge is acting as a neutral magistrate."

Kansans have a right to determine whether the criminal justice system is fairly and competently carrying out its responsibilities. Opening these records to public inspection is an important step in allowing them to do so.

Results of Wichita Eagle's state-by-state canvass

Probable-cause affidavits are open (but may be closed by judicial order) in:

1. Alabama
2. Alaska
3. Arizona
4. California
5. Colorado
6. Connecticut
7. Delaware
8. Florida
9. Georgia
10. Hawaii
11. Idaho
12. Illinois
13. Indiana
14. Iowa
15. Maine
16. Maryland
17. Massachusetts
18. Michigan
19. Minnesota
20. Mississippi

21. Missouri
22. New Hampshire
23. North Dakota
24. Nebraska
25. Nevada
26. New Jersey
27. New Mexico
28. New York
29. North Carolina
30. Oklahoma
31. Oregon
32. Pennsylvania
33. Rhode Island
34. South Carolina
35. South Dakota
36. Tennessee
37. Texas
38. Utah
39. Vermont
40. Virginia
41. Washington
42. West Virginia
43. Wisconsin
44. Wyoming

45. Arkansas: State law is unclear. Attorney general is currently working on an opinion.
46. Kentucky: No state law speaks to affidavits.
47. Louisiana: No state law. Individual parishes determine whether to open affidavits.
48. Montana: Affidavits are open if they are placed in the court file. Individual jurisdictions determine whether to do so.
49. Ohio: Still awaiting a response.



Posted on Tue, Feb. 07, 2006

Debate to begin on arrest records

Probable cause affidavits, which tell the reason for a person's arrest, are open in most states but closed in Kansas, a survey finds.

BY DION LEFLER
The Wichita Eagle

As a bill to open some arrest records to public view faces a pivotal legislative hearing today, a 50-state survey by The Wichita Eagle has found that Kansas appears to be the only state in the nation where the records are closed by law.

At issue are "probable cause affidavits" that are filed by police officers asking a judge to issue an arrest warrant for an individual.

The affidavit outlines the basic evidence that establishes a case for arresting a person suspected of a crime.

In a series of calls to state courts and prosecuting attorneys across the country, The Eagle found only one state, Kansas, that has a statute making probable cause affidavits a closed record unless opened by a judge.

In 44 states, a law or court precedent makes such affidavits public documents after an arrest is made.

In each of those states, a judge can seal the affidavit on the request of police or prosecutors if disclosure would jeopardize an ongoing investigation or reveal such confidential information as the identities of undercover police officers, informants, juveniles or sex crime victims.

Three states, Montana, Kentucky and Louisiana, leave the decision to local jurisdictions. In two states, Ohio and Arkansas, officials said the law is not clear.

In states where the records are open, problems apparently have been few.

"It helps us," said Merrimack County Attorney Dan St. Hilaire, the chief prosecutor in the jurisdiction covering the capital city of Concord, N.H.

Like most states, New Hampshire court regulations limit the amount of information prosecutors can release.

"So many times, we want to tell a reporter but can't," he said.

He said prosecutors in his state rarely ask for an affidavit to be sealed. Usually, sensitive information can just be blacked out and the rest of the document released, he said.

The proposed bill to change Kansas law is in response to the case of Roger Valadez, who was taken into custody last year as a potential suspect in the BTK serial murder case. Valadez's arrest touched off a media frenzy, but the information as to why he was a suspect has never been made public.

Valadez was cleared of being the BTK killer and Park City code enforcement officer Dennis Rader was later convicted of the 10 slayings.

State Rep. Jene Vickrey, R-Louisburg, said the Valadez case convinced him Kansas law needs to be changed. Vickrey is chairman of the House Governmental Organizations and Elections Committee, where today's hearing is scheduled.

"It took, I understand, several months for him to find out what the probable cause was, if he ever did find out," Vickrey said. "I thought it was a constitutional right to find out what the probable cause was."

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He said he also thinks there is a right for the public to know why someone has been arrested.

House Bill 2742, which Vickrey is supporting, would generally make probable cause affidavits an open record.

The bill allows the exclusion of information that would reveal confidential police sources or agents, interfere with an ongoing investigation, endanger a person or reveal the identity of a sex-crime victim.

In today's hearing, proponents representing The Eagle and the Kansas Press Association are scheduled to testify, he said.

"We in Kansas and in Cuba are about on the same page" by keeping the arrest affidavits closed, said press association lobbyist Rich Gannon. "Isn't that how you'd operate... in a nondemocratic society?"

By Monday night, no one had signed up to speak in opposition to HB 2742, Vickrey said.

Officials of the Kansas District Attorney's Association did not return a phone message seeking comment.

State court officials will be involved in today's hearing to discuss the cost of implementing the bill, Vickrey said.

He said he thinks the bill that emerges from the committee will be crafted so it doesn't carry an unreasonable price tag, although "There is a cost to protect our freedoms and liberties," he said.

The hearing is scheduled for 3:30 p.m. today at the state Capitol in Topeka.

Reach Dion Lefler at 268-6527.



Written Testimony

HB 2742

Submitted to the House Governmental and Elections Committee

Feb. 7, 2006

Randy Brown

Executive Director, Kansas Sunshine Coalition for Open Government

Thanks for allowing the Kansas Sunshine Coalition to offer written testimony today in support of HB 2742. The Coalition is an organization of educators, journalists and other citizens that includes the Kansas Professional Chapter of the Society of Professional Journalists, the Kansas Press Association, the Kansas Association of Broadcasters and the Elliott School of Communication at Wichita State University, at which I am the Senior Fellow. It is dedicated to the principle that open government is essential to the functioning of our democratic society.

HB 2742 is modest change -- with extensive safeguards -- that would right an egregious wrong in Kansas law. Kansas may be the only state that routinely closes to the public probable cause affidavits after arrests are made. At least 44 states make these affidavits public records after they are executed, as does federal law. The experience elsewhere has been virtually the same -- no investigations compromised, no prosecutions hindered, no trials compromised. In short, few, if any, problems.

At the same time, current Kansas law is significantly flawed. A law that allows citizens to be arrested and jailed and questioned, and their property searched and "secured" for all manner of investigative and testing procedures, *with neither citizens nor the public being told what the probable cause is for that arrest*, is not worthy of our state.

Across our land, it is not the American way, and it should not be the Kansas way.

Thanks again for your time and consideration.

Board of Directors

Ron Keefover, President
Education-Information Officer
Kansas Judicial Center

Doug Anstaett
Executive Director
Kansas Press Association

Nickie Flynn
Assistant News Director
KWCH-TV

Randy Brown
Senior Fellow
Elliott School of Communication

Liz Montano
News Director
WIBW

Nicholas Jungman
Chief of the Universal Desk
The Wichita Eagle

Buzz Merritt
Editor, Retired
The Wichita Eagle

Mike Kautsch
Professor of Law
University of Kansas

Les Anderson
Associate Professor
Elliott School of Communication

Harriet Lange
President
Kansas Association of Broadcasters

John G. Lewis
President
Lewis Legal News, Inc.

House Gov. Org. & Elections

Date: 2-7-2006

Attachment # 7



Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Kevin O'Connor
Deputy District Attorney

February 7, 2006

RE: House Bill 2742

Dear Chairman and members of the Committee,

I appreciate the opportunity to address the Committee on this important subject. My interest in testifying is to correct information so the Committee make a sound decision based upon facts and law. As a prosecutor involved in the investigation, apprehension, and prosecution of Dennis Rader, the self-named BTK killer, I feel a responsibility to answer factual misstatements and inaccurate analogies offered by proponents of this bill. I believe everyone would agree that the Legislature should debate this issue on the facts and the law.

An article in today's Wichita Eagle states that Kansas is the only state that closes probable cause affidavits issued in support of criminal charges. However, the articles does concede that, in 44 states, a judge can seal the affidavit at the request of the police or prosecutors. The Kansas statute performs the same function in a different matter. An affidavit of probable cause can be released upon written order of the Court. The onus to obtain the affidavit is placed upon the person seeking the affidavit. Under Kansas law, the media or anyone else may request the affidavit. Any such request would be reviewed by a Judge and a decision would be made with proper consideration to the accused and the people of the State of Kansas. Kansas law protects the accused from an unwarranted release of information that has not been tested in Court. The requested change would only impact the media's ability to obtain the affidavit. Under current law, the accused has immediate access to the affidavit.

The practice of other jurisdictions is often not the best route to proceed and should not be the overriding reason to change longstanding law that has served justice well. In 1979, the Senate Judiciary Committee recommended the changes currently contained in K.S.A. 22-2302.

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Proponents of the bill fail to suggest why there is a need to change the law other than their own desire to obtain affidavits in high profile cases.

Release of probable cause affidavits, particularly in high profile cases, directly impacts the constitutional rights of the accused. A suggestion that venue can be moved does not take into account the cost and, more importantly, the impact on the victims of a long trial in another jurisdiction.

In the Eagle article, a New Hampshire prosecutor states that the release of probable cause affidavits "helps us." The statement is proof that the affidavits should not be released absent a court order. The fact that the release "helps" prosecutors in New Hampshire do their jobs should be a red flag. The statement indicates that the prosecution is aided by the release of information that is prohibited from release under Rule 3.6 of the Code of Professional Conduct (see attached). The prosecutor was quoted as saying, "So many times, we want to tell a reporter but can't." The prosecutor "can't" because of the provisions of the ethical rules. Prosecutors in Kansas do not need the help of the media to prosecute criminal cases. We prefer to do our jobs in the courtroom.

The Eagle article states that the proposed bill is in response to the case of Roger Valadez. The statement is inaccurate. The proposed bill does not address the Valadez situation. Roger Valadez was not arrested as a suspect in the BTK investigation. If the law allowed for the release of a search warrant affidavit after a warrant has been served, the release of the affidavit in the Valadez matter would have had a negative impact on the investigation of the BTK Killer.

Thank you for your consideration of the facts. Querulous statements, such as those quoted in the Eagle article, that Kansas is like Cuba serve no useful purpose. Cuba has no "Bill of Rights" and no open courts. The Office of the District Attorney hopes that the Committee and the Legislature as a whole can debate the issue based upon facts and the law before changing a law that has served both the interests of defendants and the People of the State of Kansas.

Sincerely,



Kevin O'Connor
Deputy District Attorney

KANSAS COURT RULES AND PROCEDURES
SUPREME COURT RULES, RULE 226. PROFESSIONAL CONDUCT

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or *any* other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.