

Approved: August 25, 2011
(Date)

MINUTES OF THE SENATE JUDICIARY COMMITTEE

Chairman Tim Owens called the meeting to order at 9:37 A. M. on March 3, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:

Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Tamera Lawrence, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Conferees appearing before the committee:

Edward Larson, Kansas Supreme Court Justice (Ret.), Kansas Judicial Council
Steve Leben, Kansas Court of Appeals Judge, Kansas Judicial Council

Others attending:

See attached list.

The Chairman recognized Sarah Fertig, Executive Director, Kansas Sentencing Commission, to review the revised prison bed impact statement for **HB 2008 -- Making identity theft a person felony** (Attachment 1).

The hearings on **HB 2028 -- Uniform trust code; insurable interest of trustee** were opened.

Jason Thompson, Staff Revisor, reviewed the bill.

Edward Larson, testified, on behalf of the Kansas Judicial Council, in support of **HB 2028** (Attachment 2). He stated that the bill was introduced in response to a Fourth Circuit federal court opinion in which the court held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of a trust.

Senator King asked, in regard to language on page 1, in line 18, "What is the meaning of the phrase, engendered by loved and affection? Would this phrase add to the potential for litigation?"

Justice Larson said he would provide an answer after checking the comments to the Uniform Trust Code (UTC).

Senator Kelly expressed her concern that the language of the bill conflicted with the provisions of law relating to powers of attorney for health care decisions.

No testimony in opposition to **HB 2028** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2028**.

The Chairman closed the hearings on **HB 2028**.

The Chairman opened the hearings on **HB 2027 -- Rules and regulations filing act**.

Jason Thompson, Staff Revisor, reviewed the bill.

Steve Leben testified, on behalf of the Kansas Judicial Council, in support of **HB 2027** (Attachment 3). He stated that the bill clarifies when an agency must follow the formal procedures for public notice and comment before adopting rules and regulations. The bill also establishes a new process for agencies to inform the public of the agency's present interpretation of the statutes administered by the agency.

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:37 A.M. on March 3, 2011, in Room 548-S of the Capitol.

Senator King expressed concern that exempt rules and regulations adopted prior to the effective date of **HB 2027** under the current provisions of K.S.A. 77-421a could be construed to be invalid. Senator King suggested language similar to the following should be added to the bill: "Any rule and regulation which was adopted validly under the law in effect on the date of its adoption remains valid until amended or revoked under the provisions of this act."

Judge Leben asked for time to respond to Senator King's concern and suggested amendment.

No testimony in opposition to **HB 2027** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2027**.

The Chairman closed the hearings on **HB 2027**.

The Chairman opened the hearings on **HB 2030 -- Continuation of certain exceptions to disclosure under the open records act.**

Jason Thompson, Staff Revisor, reviewed the bill. Mr. Thompson also reviewed a memorandum concerning K.S.A. 45-229, which requires legislative review of exceptions to the Kansas Open Records Act (KORA) (Attachment 4).

No testimony in support of, or opposition to, **HB 2030** was offered.

The Chairman called the committee's attention to the fiscal note for **HB 2030**.

The Chairman closed the hearings on **HB 2030**.

Committee Action:

The Chairman called the committee's attention to **HB 2023 -- Amending the drug schedule by adding additional unlawful substances.**

Senator Vratil moved, Senator Schodorf seconded, that **HB 2023** be passed. The motion was adopted.

The Chairman called the committee's attention to **HB 2027 -- Rules and regulations filing act.**

Senator Kelly moved, Senator Vratil seconded, that the bill be amended so that guidance documents are not required to be filed with the Joint Committee on Administrative Rules and Regulations, but that such documents are provided to the Joint Committee upon request thereof. The motion was adopted.

Senator Kelly moved, Senator Vratil seconded, that the bill be passed as amended.

The Chairman called the committee's attention to **HB 2028 -- Uniform trust code; insurable interest of trustee.**

Senator King asked that action on **HB 2028** be delayed in order to have time to prepare amendments.

The Chairman turned the committee's attention to **HB 2030 -- Continuation of certain exceptions to disclosure under the open records act.**

Senator Vratil moved, Senator King seconded, that **HB 2030** be passed. The motion was adopted.

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for March 4, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

JUDICIARY
~~DUTY COMMISSION GUEST LIST~~

DATE: March 3, 2011

NAME	REPRESENTING
Sarah Fertig	KSC
Christy Molzen	Judicial Council
Steve Leben	Judicial Council
Ed Larson	Judicial Council
Randy Harrell	Judicial Council
Patrick Vegelesberg	KCDAA
Caleb Reid	Sen. Pyle
Kathy Olsen	KS Bankers Assn
Tara Mays	KDOT
Whitney Jaman	KS Bar Assn.
Jim Hall	ACHI
Sandy Braden	KADC
Sean Miller	CAPitol STRATEGIES



Honorable Ernest L. Johnson, Chair
Honorable Richard M. Smith, Vice Chair
Sarah E. Fertig, Executive Director

Sam Brownback, Governor

MEMORANDUM

To: Dennis Taylor, Secretary of Administration
Attn: Brendan Yorkey
From: Sarah Fertig, Executive Director
Date: March 2, 2011
Re: Revised Prison Bed Impact, HB 2008 Identity Theft – *as Amended by House Committee*

BILL SUMMARY

HB 2008 as initially introduced would amend the crime of identity theft from a severity level 8, nonperson felony to a person felony, and from a severity level 5, nonperson felony to a person felony when the monetary loss to the victim is more than \$100,000. This bill would also amend identity fraud from severity level 8, nonperson felony to person felony.

As amended by House Committee, identity theft and identity fraud would be changed to severity level 9, person felonies. Identity theft crimes in which the monetary loss to the victim is more than \$100,000 would remain severity level 5 person felonies as drafted in the initial version of this bill.

KEY ASSUMPTIONS

- The target population of the bill includes offenders who commit the crime of identity theft under K.S.A. 21-4018(a) and identity fraud under K.S.A. 21-4018(b).
- Change from nonperson to person would elevate criminal history scores and offenders convicted under this statute would have increased penalties in the future.
- The projected prison admission growth rate is assumed to be 2.75% in FY 2012 and 2% annually from 2013 and forward, which is the same percentage used in relation to the baseline prison population forecast produced in August 2010 by the Kansas Sentencing Commission.
- The new policy effective date is assumed to be on July 1, 2011.

FINDINGS

- In 2010, 149 offenders were convicted of identity theft and fraud under 21-4018. Of this number,
 - 129 (86.6%) were sentenced at nondrug severity level 8 and
 - 20 were sentenced at nondrug severity level 10.
- In 2010, 42 offenders were admitted to prison under K.S.A. 21-4018. Of this number,
 - 14(33.3%) were new court commitments;
 - 24(57.1%) were probation condition violators and
 - 4 (9.5%) were probation violators with new sentence.

IMPACT ASSESSMENT

- **Current Policy:** If current policy remains unchanged,
 - by the year 2012, 30 prison beds will be needed and

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- by the year 2021, 41 prison beds will be needed.
- **Impact:** If the current severity level 8, nonperson felony changes to a **severity level 9**, person felony and the current severity level 5, nonperson felony changes to a person felony,
 - by the year 2012, 30 prison beds will be needed and
 - by the year 2021, 44 prison beds will be needed.

IMPACT OF THE BILL

- **Impact of Prison Admissions:** This bill would result in no additional prison admissions.
- **Impact of Prison Beds:** This bill would result in **no** additional prison beds needed in FY 2012 because there is an average 11-month delay between the commission of a crime and sentencing for such crime, and two convictions for person felonies would be required before prison would be the presumptive sentence. Thus, it is assumed that the earliest second conviction would occur in FY 2013, with sentencing occurring in FY 2014. **3** additional prison beds needed in FY 2021.
- **Impact on the workload of the Commission:** The amendments of this bill would not increase the workload of the journal entry of the Commission.

HB 2008 as Amended by House Committee - Impact Assessment

Fiscal Year	Current Policy Unchanged	Change N8, Nonperson Felony to N9, Person Felony and N5, Nonperson Felony to Person Felony	Additional Prison Beds Needed
2012	30	30	0
2013	30	30	0
2014	30	35	5
2015	31	36	5
2016	39	41	2
2017	37	44	7
2018	37	42	5
2019	40	45	5
2020	37	42	5
2021	41	44	3



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BRANDY M. WHEELER

MEMORANDUM

TO: Senate Judiciary Committee
FROM: Kansas Judicial Council - Hon. Edward Larson
DATE: March 3, 2011
RE: Judicial Council Testimony on 2011 HB 2028 Relating to the Insurable Interest Amendment to the Kansas Uniform Trust Code

The Judicial Council Probate Law Advisory Committee (PLAC) has had an interest in the *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*, WL 405405 (E.D. Va. 2005) aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006) case since 2005, when a Virginia Federal District Court applied Maryland law and held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of a trust. This holding caused widespread concern among practitioners in the trust and estate planning areas, including the Judicial Council's PLAC. The PLAC initially agreed to study the subject and draft proposed legislation. However, the Committee decided to wait until the appellate process concluded to begin its study.

On appeal the Fourth Circuit affirmed the federal district court's decision on other grounds and vacated the portion of the federal district court's decision relating to the trust not having an insurable interest in the life of the settlor. However, it was noted by the PLAC and others who practice in the area that the Fourth Circuit did not question or criticize the district court's insurable interest analysis.

Before the PLAC started its study, the Committee became aware that the National Conference of Commissioners on Uniform State Laws was studying the issue and the PLAC decided to wait for the proposal of the Uniform Law Commission.

At the annual meeting of the National Conference of Commissioners on Uniform State Laws held in July of 2010 in Chicago, the Insurable Interest Amendment to the Uniform Trust Code was approved. The PLAC reviewed the proposed amendment and requested 2011 HB 2028 be introduced. The Probate Law Advisory Committee recommends the amendment be adopted and upon adoption be added to the Kansas Uniform Trust Code at K.S.A. 58-113.

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The amendment at lines 26 and 27 was requested by the Judicial Council. The amendment at lines 24 and 25 was not requested by the Judicial Council, but the Council has no objections to it. However, it does appear that in line 24 the article "a" should be changed to "or."

A copy of the Uniform Law Commission's Comment to the Insurable Interest Amendment to the Uniform Trust Code is attached at pages 5 to 10.

Members of the Kansas Judicial Council Probate Law Advisory Committee:

Gerald L. Goodell, Chair	Topeka
Eric N. Anderson	Salina
Cheryl C. Boushka	Kansas City, MO
Hon. Sam K. Bruner	Overland Park
James L. Bush	Hiawatha
Tim Carmody	Overland Park
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Justice Edward Larson	Topeka
Philip D. Ridenour	Cimarron
Jennifer L. Stultz	Wichita
Willard B. Thompson	Wichita
Molly M. Wood	Lawrence



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TO: Senate Judiciary Committee

FROM: Kansas Judicial Council -- Judge Steve Leben

DATE: March 3, 2011

RE: Testimony on 2011 HB 2027 amending the Rules and Regulations Filing Act

The Judicial Council recommends 2011 HB 2027, a bill that was drafted by the Council's Administrative Procedure Advisory Committee. A copy of the Advisory Committee's formal report to the Judicial Council is attached to this testimony. It includes a list of the Advisory Committee members who participated in the study that led to the introduction of HB 2027.

There are two different subjects addressed by the proposed amendments to the Kansas Rules and Regulations Filing Act. First, the bill tries to clear up when an agency must follow the formal procedures for public notice and comment before adopting a regulation. Second, the bill establishes a new process for agencies to let the public know about the agency's present interpretation of the statutes it administers.

Let me start with one quick legal point – in general, what's an agency rule or regulation? In many statutes, you give agencies the authority to adopt rules and regulations that are consistent with the statute but provide additional detail. Those rules or regulations have the force of law, just as a statute does, so long as they are adopted under statutory authority and are not in conflict with the statute. So it's an important thing.

Presently, K.S.A. 77-421 requires that rules and regulations be adopted only after public notice and comment, and that certain other procedures be followed in rulemaking by administrative agencies. The rules they make through this process have the force of law if authorized by statute.

K.S.A. 77-415 defines what is a rule or regulation, and it has a laundry list of exemptions. The list includes things that wouldn't fit within the idea of a rule or regulation, anyway, like rules for the internal management of an agency that do not affect private rights or interests. But the list also defines out of the term "rule and regulation" some things that otherwise *would* be a rule or regulation, which means a rule of general applicability to all.

K.S.A. 77-421a talks about procedures for the adoption of *exempt* regulations, and it says that something that is exempt from the definition of rule and regulation "by virtue of the definition" in K.S.A. 77-415 "shall be adopted in the manner prescribed in K.S.A. 77-421," which is the statute we just talked about that sets out the procedures for public notice for all rules and regulations!

So, at least in one literal reading of these statutes, K.S.A. 77-415 defines what's a rule and regulation and has lots of exemptions. K.S.A. 77-421 tells agencies to follow a detailed set of procedures for the non-exempt rules and regulations. And K.S.A. 77-421a says to use the same procedures for the exempt regulations!

Not surprisingly, when we surveyed state agencies, we found considerable uncertainty about how to apply these statutes. Some felt that exempt regulations could be adopted without following the procedures of K.S.A. 77-421, but there would be a risk in a legal challenge that the regulation might be held to be invalid.

We have tried to simplify the Rule and Regulation Filing Act on these issues so that there will be a clear answer. We have also tried in every case in which a state agency indicated that it still relied upon a listed exemption to make sure that the exemption was preserved in our rewrite.

Under the bill, with only very limited exemptions, only agency rules that follow the public notice-and-comment procedures will have binding legal effect.

We retained exemptions for:

- Things that aren't really rules and regulations at all, like orders entered after an agency adjudication or statements of internal agency management.
- Guidance documents, which I will talk more about in a minute.
- Some specific exemptions from the current list that are needed, like rules adopted by the Secretary of Corrections relating to security procedures in correctional institutions, which need to be adopted quickly in many cases, and parking and traffic regulations on state university campuses. These were previously exempt regulations under the current K.S.A. 77-415.

- We have also provided that if an agency's own authorizing statutes provide for a different procedure for that agency, the more-specific statute for that agency will prevail.

As revised, unless specifically exempted, rules and regulations may be adopted only through the procedures set out in K.S.A. 77-421. K.S.A. 77-421a, which used to say to follow the same procedures for exempt regulations, is deleted. Thus, unless an agency's organic statute requires some specific procedure for adopting a regulation in the limited circumstances we have set out in the amended K.S.A. 77-415, no specific public notice and comment period would be required. That certainly makes sense for the Secretary of Corrections in making changes to security procedures. With respect to the other limited exemptions we have preserved, we believe this is consistent with the Legislature's intention of including them previously in an "exempt" list, which seems to have occurred over the years without regard to K.S.A. 77-421a's requirement that the same procedures be used to adopt exempt regulations as to adopt non-exempt ones.

We also eliminated the requirement that agencies submit their forms to the Joint Committee on Administrative Rules and Regulations for review. That change was considered appropriate by the committee and by the legislators we talked to who had been on that committee.

So that's the first of two areas we've addressed in this bill—clarifying which regulations are subject to notice-and-comment rulemaking and which are truly exempt.

The second area is a proposal for a new statutory provision specifically authorizing agencies to issue what are referred to as guidance documents. These are agency statements in essence about the agency's current approach or interpretation of the law that agency administers—but without having the force of law. Agencies often have interpretative rules or policy statements that are used by the agency's staff in administering the programs under that agency's jurisdiction throughout the state. This new provision would encourage giving broad public access to these documents so that the public will know what an agency's position is. Each agency would have to maintain an index of its guidance documents on its website, and the documents themselves would have to be publicly available.

Doing this will help Kansas citizens and businesses. It's easier for someone to avoid an unintentional violation of a law – or what the agency thinks the law is – if you know the agency's position.

Often, especially in technical areas, the Legislature will give the agency administering a law considerable leeway to determine various things. In the environmental area, KDHE might have to struggle with the specific definition, say, of what a "point source" is for pollution control purposes. If the agency's interpretation is known, and if that interpretation doesn't cause any problem for a private party, that party can simply proceed based on the guidance document rather than engaging in extensive legal consultations, regulatory proceedings, or even litigation.

We had included a longer version of this guidance document provision in the bill we submitted last year. The House Judiciary committee approved it, but it was later deleted in the House before last year's bill came to the Senate, based in part on concerns expressed by Rep. Neufeld. We have revised the provision into one that I believe still accomplishes the purpose we had intended to achieve of giving the public access to agency interpretations of its statutory authority, for the reasons I've noted. Although Rep. Neufeld is no longer in the House, he attended the meetings at which we discussed and adopted this revised guidance-document provision. He was not a voting member of the group but he did not express any objection to this revised proposal.

House Amendments

The bill was amended both in the House Judiciary Committee and on the House floor. The Judicial Council Administrative Procedure Advisory Committee has discussed the amendments via email and has no objection to any of them. The Advisory Committee did want to point out that, as to the amendment to Section 4 providing that all guidance documents be given to the Joint Committee on Administrative Rules and Regulations, we didn't include such a provision because we didn't think the Joint Committee would want to be burdened by having all of these documents come to them. But if that is the Legislature's preference, we certainly have no objection.

**REPORT OF THE JUDICIAL COUNCIL
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE
ON "EXEMPT" RULES AND REGULATIONS AND GUIDANCE DOCUMENTS**

BACKGROUND

In 2009, the Judicial Council's Administrative Procedure Advisory Committee conducted a study of the Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.* The Committee recommended a number of amendments to improve public access to and notice of the rulemaking process and to give the Secretary of State's office more flexibility in the filing and publication of rules and regulations. See 2010 H. Sub for SB 213. However, at the time the Committee finalized the proposed legislation, the issue of "exempt" rules and regulations remained on the Committee's agenda for further study. During the 2010 session, a provision relating to guidance documents was deleted from the Committee's proposed legislation, so that issue was also placed on the Committee's agenda.

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee are:

Carol L. Foreman, Chair, Topeka; former Deputy Secretary of the Department of Administration

Yvonne Anderson, Topeka; General Counsel for the Kansas Department of Health and Environment

Martha Coffman, Lawrence; Chief Advisory Counsel for the Kansas Corporation Commission

Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings

James G. Flaherty, Ottawa; practicing attorney

Jack Glaves, Wichita; practicing attorney

Hon. Steve Leben, Fairway; Kansas Court of Appeals Judge

Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law

Camille A. Nohe, Topeka; Assistant Attorney General

Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice

Steve A. Schwarm, Topeka; practicing attorney

John S. Seeber, Wichita; practicing attorney

Mark W. Stafford, Topeka; practicing attorney

Two additional persons with rulemaking expertise also served on a temporary basis during the study of rulemaking statutes:

Rep. Janice Pauls, Hutchinson; State Representative from the 102nd District and ranking Democrat on the Joint Committee on Rules and Regulations

Diane Minear, Tonganoxie; Legal Counsel for the Secretary of State

METHOD OF STUDY

The Administrative Procedure Advisory Committee held several meetings, solicited input from state agencies, and circulated drafts of proposed amendments to state agency legal counsel for comment. The Committee also invited Representative Melvin Neufeld to participate during the study because of his interest in 2010 H. Sub for SB 213 and experience with legislative oversight of the rulemaking process.

COMMITTEE RECOMMENDATION

Exempt rules and regulations: the problem

Current Kansas law defines “rule and regulation” to mean “a standard, statement of policy or general order . . . of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency.” See K.S.A. 77-415(d)(1) (as amended by L. 2010, Ch. 95, Sec. 1). The statute then provides a laundry list of rules and regulations which are not rules and regulations for purposes of the act – in other words, “exempt” rules and regulations. See K.S.A. 77-415(d)(2). The Committee found that the

laundry list of “exempt” rules and regulations in K.S.A. 77-415(d)(2) actually contains two different categories of rules: 1) agency actions, such as policy statements and orders, that are not rules and regulations at all, and 2) specific types of rules and regulations that are subject to only a limited rulemaking process. However, the Act treats both of these categories in the same manner.

The Committee also found the Rules and Regulations Filing Act to be unclear as to what process is required to adopt an “exempt” rule and regulation. K.S.A. 77-421a provides that “exempt” rules and regulations “shall be adopted in the manner prescribed by K.S.A. 77-421 and amendments thereto after notice has been given and a hearing held in the manner prescribed by K.S.A. 77-421 and amendments thereto.” The Committee believes this provision can be interpreted in two different ways. One possible interpretation of the statute is that any exempt rule and regulation listed in K.S.A. 77-415(d)(2) must be adopted using the process set out by K.S.A. 77-421. Another possible interpretation is that K.S.A. 77-421 must be followed only if an agency wants the exempt rule and regulation to be an actual rule and regulation, in other words, to have the force and effect of law. The committee was concerned that, under either interpretation, agency actions that are not rules and regulations (such as adjudicatory orders) might be required to go through procedures that were unnecessary and inappropriate.

The Committee solicited input from state agencies about how they interpret and apply K.S.A. 77-415 and 77-421a, and whether they currently adopt “exempt” rules and regulations. The responses the Committee received indicated that the current statutes have created considerable uncertainty and that agencies understand and apply the statutes in various ways. The responses also indicated that few agencies promulgate “exempt” rules and regulations in reliance on a specific exception in K.S.A. 77-415.

The Solution: Recommended Amendments

In Section 1 of the bill, the Committee recommends amending K.S.A. 77-415 to clarify and simplify the definition of rule and regulation and eliminate the long list of kinds of agency action excluded from the definition of rules and regulations contained in K.S.A. 77-415(d)(2).

The Committee also recommends repealing K.S.A. 77-421a relating to an abbreviated process for the "exempt" rules and regulations listed in K.S.A. 77-415(d)(2). In drafting the proposed amendments, the Committee's primary goals were to resolve the confusion surrounding exempt rules and regulations, to clarify the terminology used in the statutes, and to encourage consistency in agency procedure and practice.

The central premise of the Committee's recommendation is that, except for a few specific exemptions, only agency rules and regulations that comply with the procedures of the Rules and Regulations Filing Act can have binding legal effect. This premise is expressly stated in new subsection K.S.A. 77-415(b)(1). New subsections K.S.A. 77-415(b)(2)(A) through (D) specify the extent to which agencies may continue to articulate policy through actions that are not rules and regulations, including orders following adjudications, personnel and other internal policies, use of forms, and publication of information and guidance to the public, while specifying that internal policies, forms, and information or guidance may not bind the public. These provisions correspond to some exclusions from the definition of rules and regulations under current law.

After receiving comments from the State Board of Regents, State Board of Education, and Department of Corrections, the Committee also included exemptions for certain policies relating to public educational institutions and certain rules and orders relating to correctional institutions. See new subsection K.S.A. 77-415(b)(2)(E). Again, these provisions correspond to exclusions under current law.

New subsection K.S.A. 77-415(b)(2)(F) provides that, if an agency's organic statutes provide some other procedure for adopting rules and regulations or other policies, those provisions apply instead of the Rules and Regulations Filing Act.

The definitions (which used to be subsections) have been consolidated as numbered paragraphs in subsection (c). The definition of rules and regulations contained in new K.S.A. 77-415(c)(4) has been amended so that it is relatively short and includes any policy with binding legal effects. The definition of person contained in new K.S.A. 77-415(c)(3) has been amended to include an individual or any other legal or commercial entity.

The Committee's recommended amendments would eliminate most of the specific exclusions for particular kinds of "exempt" rules and regulations. Along with eliminating the concept of "exempt" rules and regulations, the Committee recommends repealing K.S.A. 77-421a. The Committee found that statute has proven confusing in its application, as agency comments revealed that different agencies interpret the statute differently. In addition, the provision appeared to have little, if any, actual impact on agency practice.

Sections 2 and 3 of the bill contain some technical clean-up amendments as a result of 2010 H. Sub for SB 213. Section 3 also eliminates references to "exempt" rules and regulations since those will no longer exist under the bill.

Finally, the Committee recommends moving the current language of K.S.A. 77-438 (Section 4) to the beginning of new K.S.A. 77-415(a). This change is technical and not substantive.

Guidance documents

In Section 4 of the bill, the Committee recommends amending K.S.A. 77-438 to add a new guidance document provision to the Rules and Regulations Filing Act. The guidance document provision is designed to encourage agencies to advise the public of their current opinions and approaches by using guidance documents (also often called interpretive rules or policy statements). A guidance document, in contrast to a rule, lacks the force of law and is not binding. The section recognizes the agencies' need to use such documents to guide both agency employees and the public. The statutes and regulations an agency implements often require interpretation or entail discretion in their application, and the public has an interest in knowing the agency's position. Increasing public knowledge reduces unintentional violations and lowers transaction costs. For example, a company may find that an agency has a guidance document and that the company can reasonably comply with the document's interpretation of a statute or regulation. In that case, the company may proceed based on the guidance document rather than engaging in extensive legal consultations, regulatory proceedings, or even litigation.

Section 4 strengthens agencies' abilities to fulfill these legitimate objectives by explicitly excusing them from having to comply with formal rulemaking procedures before issuing nonbinding statements. Meanwhile, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability. The section also encourages broad public accessibility to guidance documents through agency websites.

Section 4 is based, in part, upon section 311 of the Revised Model State Administrative Procedure Act (2010). The above comments are based, in part, upon the Model Act comments to section 311.

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MEMORANDUM


03/03/11

To: Special Committee on Judiciary
From: Jason Thompson, Assistant Revisor
Date: September 13, 2010
Subject: Kansas Open Records Act (KORA)

The committee is asked to conduct any statutorily required legislative review of existing exceptions to the Kansas Open Records Act (KORA) that are scheduled for expiration in 2011. In recent years, the Legislature has undertaken a comprehensive review of KORA in order to determine if any statutory exceptions to the law are unnecessary and could be discontinued. The 2010 Legislature extended the existence of 206 statutory exceptions to KORA until July 1, 2015.

K.S.A. 45-229 provides that all exceptions to disclosure in existence on July 1, 2000, shall expire on July 1, 2005, and any new exception created by the legislature or substantial amendment to an exception, shall expire five years after creation or amendment, unless the legislature acts to continue the exception. In the year prior to the expiration, the Revisor of Statutes is required to certify the language and citation of each exception to the Speaker of the House of Representatives and the President of the Senate.

Subsection (h) further requires the legislature to:

“(1) ...review the exception before its scheduled expiration and consider as part of the review process the following:

- (A) What specific records are affected by the exception;
- (B) whom does the exception uniquely affect, as opposed to the general public;
- (C) what is the identifiable public purpose or goal of the exception;
- (D) whether the information contained in the records may be obtained readily by alternative means and how it may be obtained;

(2) An exception may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An

identifiable public purpose is served if the legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exception and if the exception:

(A) Allows the effective and efficient administration of a governmental program, which administration would be significantly impaired without the exception;

(B) protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. Only information that would identify the individuals may be excepted under this paragraph; or

(C) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

(3) Records made before the date of the expiration of an exception shall be subject to disclosure as otherwise provided by law. In deciding whether the records shall be made public, the legislature shall consider whether the damage or loss to persons or entities uniquely affected by the exception of the type specified in paragraph (2)(B) or (2)(C) of this subsection (h) would occur if the records were made public.”

Attachment A lists the 28 existing statutory exceptions to the Kansas Open Records Act that are scheduled for expiration in 2011 and Attachment B provides a summary of each section.

KANSAS OPEN RECORDS ACT REVIEW - 2010

K.S.A. 45-229; Certified for Calendar Year 2010; Exceptions Expire July 1, 2011

Substantially Amended Exceptions (2006)

22-4906	Criminal offender registration
22-4909	Criminal offender registration
44-1132	Discrimination in employment
60-3333	Environmental audit report
75-712c	Reports of missing persons

New Exceptions (2006)

12-5358	Audits of VoIP providers
12-5611	Topeka/Shawnee county riverfront authority
38-2310	Kansas juvenile justice code records
38-2311	Juvenile treatment records
38-2326	Juvenile offender information system
65-6154	Emergency medical services reports
71-218	Community colleges, employee evaluation documents
75-457	Substitute mailing addresses
75-723	AG abuse, neglect and exploitation of persons unit
75-7c06	Concealed firearms records

New Exceptions (2006) – Expiration by Separate Statute

9-513c	Money transmission business
40-2,118	Fraudulent insurance acts

Exceptions Listed in K.S.A. 45-229(j)

(continued in existence in section 1 of chapter 87 of the 2006 Session Laws)

1-501	Accounting firms, peer review documents
9-1303	Banking code, information sharing with commissioner
12-4516a	Expungement of city ordinance violations
38-1692	Repealed January 1, 2007 (Juvenile Justice Code revised)
39-970	Adult care home licensure act
40-4913	Insurance agents, termination reports and documents
65-525	Child care facilities, maternity centers, family day care homes
65-5117	Home health agency
65-6016	Infectious diseases, disclosure to corrections employees
65-6017	Medical tests or reports on offenders in custody
74-7508	Behavioral sciences regulatory board documents

KANSAS OPEN RECORDS ACT EXCEPTIONS SUMMARY - 2010

Section	Who exception covers (provides protection to):	Government program affected:	Type of information excepted:	Notes & comments:
1-501	firms that provide certain financial statement services	Board of Accountancy	any reports, statements, memoranda, transcripts, findings, records, or working papers prepared and any opinions formulated, in connection with any peer review	
9-513c	persons engaged in money transmission business	State Bank Commissioner	all information or reports obtained by the commissioner in the course of licensing or examining a person engaged in money transmission business	
9-1303	financial institutions	State Bank Commissioner	information sharing and exchange program with a functional regulatory agency that has overlapping regulatory jurisdiction with the department, with respect to all or part of an affiliated group that includes a financial institution	
12-4516a	persons with expunged city ordinance violations	records custodians	whenever records have been expunged, custodian of the records of arrest, incarceration due to arrest or court proceedings related to the arrest, shall not disclose the arrest or any information related to the arrest, except as directed by the order of expungement or when requested by the person whose arrest record was expunged	

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12-5358	VoIP providers (voice over internet protocol)	Secretary of Administration	information provided pursuant to the VoIP enhanced 911 act or the wireless enhanced 911 act treated as proprietary records withheld from the public upon request of the party submitting such records	
12-5611	Topeka/Shawnee county riverfront authority board	Topeka/Shawnee county riverfront authority	documents and records kept or prepared by the board for use in negotiations, actions or proceedings to which the authority is a party.	
22-4906	certain juvenile offenders (sexually violent crime, but not off-grid or severity level 1)	sheriff's offices, KBI	court may order certain juvenile offenders to register with the sheriff, but such registration information shall not be open to inspection by the public or posted on any internet website	
22-4909	crime victims	sheriff's offices, KBI	name, address, telephone number, or other information that specifically/individually identifies victim of offender required to register, other than to law enforcement agencies	
38-1692				Repealed January 1, 2007 (with enactment of Revised Juvenile Justice Code)
38-2310	certain juveniles	law enforcement officers and agencies and municipal courts	limited disclosure of records when offender under 14; same disclosure as for adults when offender over 14; information identifying victims and alleged victims of sex offenses shall not be disclosed or open to public inspection under any circumstances; records, reports and information obtained as part of juvenile intake and assessment process shall be confidential	

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38-2311	certain juveniles	courts	limited disclosure of diagnostic, treatment or medical records	
38-2326	juvenile offenders	law enforcement agencies, KBI	limited disclosure of juvenile offender information maintained in the juvenile offender information system	
39-970	applicants for employment in adult care homes	adult care home operators	criminal history record information received by operators	
40-2,118	insurers	Commissioner of Insurance	any antifraud plan, or any amendment thereof, submitted to the commissioner for informational purposes only	
40-4913	insurers	Commissioner of Insurance	any document, material or other information in the control or possession of the department that is furnished by an insurance entity or an employee or agent thereof acting on behalf of such insurance entity, or obtained by the insurance commissioner in an investigation	
44-1132	victims of domestic violence or sexual assault	employers	To the extent allowed by law, employer shall maintain the confidentiality of any employee requesting leave for certain purposes related to domestic violence or sexual assault, as well as the confidentiality of any supporting documentation provided by the employee to the employer relating to such leave	
60-3333	businesses	government employees and regulatory agencies	material that is included in an environmental audit report generated during an environmental audit (a voluntary, internal assessment, evaluation or review)	

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65-525	child care facilities, maternity centers, family day care homes	Department of Health and Environment	records in the possession of the department of health and environment or its agents regarding child care facilities, maternity centers or family day care homes; records containing the name, address and telephone number of a child care facility, maternity center or family day care home in the possession of the department of health and environment or its agents	
65-5117	applicants for employment in home health agency	home health agency operators	criminal history record information received by operators	
65-6016	persons in custody of the commissioner of juvenile justice or the secretary of corrections	corrections employees and physicians	a physician performing medical or surgical procedures on a patient who the physician knows has an infectious disease or has had a positive reaction to an infectious disease test may disclose such information to corrections employees who have been or will be placed in contact with body fluid of such patient; information shall be confidential and shall not be disclosed by corrections employees except as may be necessary in providing treatment for such patient	
65-6017	persons in custody of the commissioner of juvenile justice or the secretary of corrections	corrections employees and courts	results of tests or reports, or information therein, obtained under court order when a corrections employee has been placed in contact with body fluid from one or more offenders while performing duties within the scope of such employee's duties as a corrections employee	

65-6154	persons using emergency medical services	Board of Emergency Medical Services	limited disclosure of emergency medical services information provided to the board	
71-218	full-time employees of community colleges	board of trustees of a community college	Except by order of a court of competent jurisdiction, evaluation documents and responses thereto shall be available only to the evaluated employee, the board, the appropriate administrative staff members designated by the board, the community college attorney upon request of the board, the board and the administrative staff of any community college to which such employee applies for employment, and other persons specified, in writing, by the employee to the employee's board.	
74-7508	practitioners of the behavioral sciences	behavioral sciences regulatory board	limited disclosure of any complaint or report, record or other information relating to a complaint which is received, obtained or maintained by the behavioral sciences regulatory board	
75-457	victims of domestic violence, sexual assault, trafficking or stalking	Secretary of State	any records in a program participant's file except: if requested by a law enforcement agency; if directed by a court order; or if requested by a state or local agency, to verify the participation of a specific program participant, in which case the secretary may only confirm participation in the program	

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75-712c	victims of domestic violence or sexual assault	law enforcement agencies	The law enforcement agency investigating the report shall not give information to the reporting party if the law enforcement agency has reason to believe the missing person is an adult or an emancipated minor and is staying at or has made contact with a domestic violence or sexual assault program and does not expressly consent to the release of this information.	
75-723	abused, neglected, exploited persons	Attorney General; abuse, neglect and exploitation of persons unit	the information obtained and the investigations conducted by the unit shall be confidential as required by state or federal law	
75-7c06	licensees under the personal and family protection act	Attorney General	persons applying for licenses or persons who have had a license denied shall be confidential and shall not be disclosed in a manner which enables identification of any such person	