

Testimony on HB 2549 for the House Judiciary Committee
From the Kansas State Historical Society
February 8, 2011

The Kansas State Historical Society is by state statute the keeper of the state's long-term records. As the state archives we have been concerned about the preservation of new forms of electronic records for some time. Preserving electronic government records with enduring value is one of the most challenging issues impacting government accountability and transparency in the 21st century. In response to this challenge the Historical Society has joined together with the CITO's of all three branches of state government on a project called KEEP to find a cost-effective way to preserve the state's long-term records.

KEEP

The Kansas Enterprise Electronic Preservation (KEEP) System Project will provide an enterprise-wide, trustworthy, digital repository for Kansas government electronic records with long-term value. The digital repository will provide public access to authentic records to support e-Democracy, accountability and transparency in government. KEEP will provide certification of authenticity for specific records on a fee basis when requested by users. The KEEP System will be built on the international standard for trustworthy digital repositories, the Open Archival Information System (ISO 14721:2003).

The partnership for KEEP System is unique because it includes all three branches of Kansas state government cooperating to develop an enterprise-wide solution. The KEEP team includes subject matter and technical experts from the Kansas State Historical Society, the Kansas Legislature, the Kansas Judicial Branch, the Attorney General's Office, and the Division of Information Systems and Communications (DISC)—now OITS. We have successfully built a prototype of KEEP and are now in the process of building the production version of KEEP. Since funding for this project is not secure, there is no timetable for completion of this system. Without KEEP, or a similar active solution, the state of Kansas is not in position to preserve its electronic records.

The 2010 Kansas Legislature passed and the Governor signed into law House Bill 2195: An act concerning state records; relating to maintenance and certification of electronic records. This law (K.S.A. 45-414) authorizes the State Archivist to recommend to the State Records Board standards for preserving and maintaining the authenticity of electronic government records. The statute also states that records preserved in accordance with those standards and certified by the State Archivist will have full legal status. That 2010 law provides the necessary statutory foundation to support the transition to a digital archives and to digital government.

HB 2549

The Kansas State Historical Society **supports the intent** of the changes in this bill. It clarifies that records preservation laws apply to electronic records created and received by executive branch employees and specifically specifies *e-mail, texting or other electronic records*. The Historical Society has always interpreted the current law to include electronic records because of the existing phrase "**regardless of physical form or characteristics.**"

From a records point of view HB 2549 raises a number of questions.

- Does the bill cover other electronic records including instant messaging, twitter posts, etc.? Will the law gradually become out dated by using phrases that are current today such as texting or tweets?
- The amendments add the phrase “*public official*” in addition to the current requirement for these laws to apply to agencies but it does not define public official.

There are several reasons why the ability to preserve “texting and even emailing” done on personal devices is problematical. First, not all e-mail or texting needs to be preserved permanently. It is the content of the e-mail/text that determines how long it should be retained—not just because it is an e-mail. E-mails and texts are, essentially, correspondence. The general records retention schedule that applies to all agencies has two entries for correspondence—policy related and routine. The general schedule, which is approved by the State Records Board, call for policy related correspondence to be transferred to the State Archives for purging after 5 years. Routine correspondence should be retained until no longer useful then destroyed. However, permanent retention correspondence is also contained in a variety of case files, negotiation files, etc. Thus retaining all e-mail—just because it is e-mail—is not required by the general records retention schedule, nor is it practical or cost-effective.

Another issue related to preserving e-mail and texts is how preserve them in a state electronic filing system, much less one with the capability to identify the ones that need to be maintained permanently. New Section 6 (b) “relieves state and local officials of the obligation to permanently retain archival e-mail and texts by transmitting” them to the state historical society. The KSHS is actively pursuing an electronic records management and preservation initiative, however, we do not have the capability to accept and preserve archival e-mails and texts at this time.

The existing law directs the State Records Board to set records retention schedules for the executive branch and county governments. The Board creates advisory records retention schedules for municipalities and other local government entities. However New Sec. 6 includes the phrase “all elected government officials” but the Records Board has not had scheduling authority for elected government officials except for those in the executive branch of state government and in county governments.

Conclusion

The Historical Society applauds the effort to make it clear that executive branch electronic records are government records subject to records preservation laws. However, we suggest additional work on the language of the bill to clarify some of the issues raised in this testimony. If the committee desires, we would be willing to work with your staff on these concerns.

Presented by Patricia Michaelis, Director, State Archives Division, KSHS.