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Senate Judiciary Committee

Testimony in Opposition to SB 213

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Chairman Wilborn and members of the committee, thank you for the opportunity to appear before the committee today.

I am Martha Coffman, General Counsel for the Office of Judicial Administration. My department facilitates requests for representation for judicial branch employees who are sued for conduct occurring during the performance of their jobs. I oppose Senate Bill 213 because it compromises protections given state employees acting within the scope of their employment who are sued under the Kansas tort claims act. K.S.A. 75-6101, et al.

Let me explain why I am here by discussing a case currently pending in one of our district courts. In that case, a deputy court clerk has been sued under the tort claims act for an alleged violation of the Kansas open records act (KORA). The petitioner filing the lawsuit has asked for \$500,000 in nominal damages and \$5 million in punitive damages. The clerk's current annual salary is \$34,497. I'll use this case to illustrate what could happen if SB 213 is passed.

SB 213 is described as "an Act concerning open government." When the tort claims act was passed in 1979, the act included the requirement that a defense be provided to a state employee sued for conduct that was performed in the scope of her employment, as long as she was not acting with actual fraud or malice. The tort claims act was amended in 1999 to make clear that defense for a state employee could be made available by "providing representation" by hiring outside counsel. Thus, defense of the lawsuit can be by an assistant attorney general or by outside counsel the attorney general has hired to provide the defense. K.S.A. 2018 Supp. 75-6108(a)-(c).

The tort claims act requires that a request for representation be made in writing within 15 days of service of process that notifies the employee of the lawsuit. For a state employee, that request must be submitted to the office of the attorney general. K.S.A. 2018 Supp. 75-6108(e). If a state employee makes a timely request for representation to the office of the attorney general

and that office either fails to respond or refuses to provide representation, the employee has the option to retain counsel to defend the action and is then "entitled to recover from the [office of the attorney general] reasonable attorney fees, costs and expenses" that are necessarily incurred to defend the action. K.S.A. 2018 Supp. 75-6108(d).

Sections 1 and 2 of SB 213 will change this process. The attorney general can already refuse to defend a state employee if the lawsuit alleges a violation of KORA or KOMA. But historically, attorneys general who have declined to use an assistant to defend a state employee retained outside counsel to provide representation. And if the attorney general declined to provide a defense or retain counsel, the employee still had the ability to retain counsel and seek reimbursement under 75-6108(d) for "reasonable attorney fees, costs and expenses" arising out of her actions.

If adopted, SB 213 will give the attorney general complete discretion to decide whether to defend a state employee sued under the tort claims act if allegations mention a violation of KORA or the open meetings act (KOMA). Under SB 213, if a state employee requests representation and the attorney general declines to defend, the state will not defend the employee in the lawsuit. This results from the first sentence of Section 1, lines 7 to 13, and of Section 2, lines 16 to 22, which states "the attorney general may refuse to provide legal representation to or indemnification of a public agency or employee[.]" But even more alarming, if the attorney general declines to defend and the employee hires her own attorney, she will not be able to ask for reimbursement for "reasonable attorney fees, costs and expenses" that are necessarily incurred to defend the action as is now allowed under K.S.A. 2018 Supp. 75-6108(d). Section 1, lines 13-15, and Section 2, lines 22-24, state that the provision of the tort claims action that permits reimbursement if a state employee who hires counsel after the state has refused – which is contained in subsection (d) of 75-6108 – "shall not apply to a refusal under this section." This means that if the attorney general decides not to defend, the state will not provide a defense and the state employee cannot seek reimbursement under 75-6108(d) if she hires counsel to defend herself.

In my current position, I often see unusual KORA requests that district court clerks send to my office asking for guidance on how to respond. I'll mention two KORA requests we saw last week. One requested all correspondence between a judicial district and US Customs and Enforcement (ICE) or the Department of Homeland Security (DHS). The second was a request from an inmate sent to a judge – who was not the judge that conducted the inmate's trial – to provide hospital and ambulance records, nursing charts, police reports, and other documents that may or may not be in the criminal case file. My concern is that no matter what records the judicial branch has, or what response is made to either of these requests, nothing will prevent the person seeking this information from suing the employee responding. If the petition alleges a violation of KORA, under SB 213 the attorney general –without knowing the facts - can decline to defend. And that decision will prevent a judicial branch employee from receiving a defense and from being reimbursed if she hires an attorney to provide one.

Also, any perceived internal conflict in the office of the attorney general based upon the obligation to enforce KORA and KOMA and the obligation to provide a defense to a state employee can be addressed by hiring outside counsel. But even if the attorney general decides not to defend a state employee, we should still be concerned that the lawsuit against a state employee is being defended by skilled counsel. Under K.S.A. 2018 Supp. 75-702, the attorney general is required to appear for the state in actions in which the state has an interest. If a monetary judgment could be entered against a state employee – such as one with an annual salary of less than \$35,000 -- I would expect the attorney general to want to be sure the action was defended by a knowledgeable and skilled attorney. A state employee acting within the scope of her employment and without fraud or malice should be defended in a lawsuit under the tort claims act regardless of whether the petition alleges a violation of KORA or KOMA.

If the Judicial Branch, as the employer, cannot use the office of the attorney general for these cases and needs to hire outside counsel for these employees, the branch would incur additional unplanned expenses. As a result, we would request an additional appropriation from the Legislature for these expenditures.

I want to return to the \$5.5 million case against our deputy court clerk. When I first requested representation for this employee, the office of the attorney general declined to represent her. I was told it was because a violation of KORA was alleged in the petition. I was faced with telling her that she would not be defended. Then I had the option to discuss the ability for her to hire counsel and seek reimbursement for that cost. But by this time we knew the inmate had been released and was living in the area. Before I called the clerk, I asked the attorney general's office to reconsider. This time the office agreed. Outside counsel was hired to defend the clerk. And I am very grateful that the changes to the tort claims act that are proposed in SB 213 were not in place then.

For the reasons discussed above, I oppose approval of SB 213. I will stand for any questions.