

March 3, 2021

The Honorable Fred Patton, Chairperson
House Committee on Judiciary
Statehouse, Room 519C-N
Topeka, Kansas 66612

Dear Representative Patton:

SUBJECT: Fiscal Note for HB 2416 by House Committee on Federal and State Affairs

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2416 is respectfully submitted to your committee.

HB 2416 would change current law regarding the Kansas Emergency Management Act. When the Governor determines it is necessary to issue an executive order to promote the security of the civilian population that is not expressly authorized in KSA 48-925(c)(1) through (10), the Governor would be required to have the approval of Legislative Coordinating Council (LCC). Not less than 24 hours prior to making application to the LCC, the Governor would submit the proposed executive order to the Attorney General, who would review and provide an opinion on its legality. The review would be required within 24 hours of the receipt of the proposed executive order and prior to the meeting of the LCC, unless the circumstances of the disaster prevent the review.

Upon receipt of the application by the Governor to the LCC, the chairperson would be required to call a meeting to take place within 24 hours to discuss the proposed executive order. An affirmative vote of five members of the LCC would be required to approve the executive order. The bill would outline procedures if the LCC does not approve the executive order.

An executive order approved by the LCC would be null and void after the period of a state of disaster emergency has ended and may be revoked at any time by a concurrent resolution of the Legislature. An executive order could not exercise a power granted in statute in a way that does not conform with current law or criminalize conduct that is not otherwise criminal. Any party aggrieved by an executive order could file an action in district court of the county where the party resides or in the District Court of Shawnee County, within 30 days after the issuance of the executive order.

The Governor could not exercise a power conferred by KSA 48-925(c) after the initial 15-day state of disaster emergency declared, unless authorized by KSA 48-924(f)(2) to include:

1. Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders or rules and regulations of any state agency which implements

- such statute, if strict compliance with the provisions of such statute, order or rule and regulation would prevent, hinder or delay in any way, necessary action in coping with the disaster;
2. Utilize all available resources of the state government and of each political subdivision as reasonably necessary to cope with the disaster;
 3. Transfer the supervision, personnel or functions of state departments and agencies for the purpose of performing or facilitating emergency management activities;
 4. Commandeer or utilize any private property if the Governor finds such action necessary to cope with the disaster;
 5. Direct and compel the evacuation of all or part of the population from any area of the state stricken or threatened by a disaster, if the Governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;
 6. Prescribe routes, modes of transportation and destinations in connection with such evacuation;
 7. Control ingress and egress of persons and animals to and from a disaster area, the movement of persons and animals within the area and the occupancy by persons and animals;
 8. Suspend or limit the sale, dispensing or transportation of alcoholic beverages, explosives and combustibles;
 9. Make provision for the availability and use of temporary emergency housing;
 10. Require and direct the cooperation and assistance of state and local governmental agencies and officials; and
 11. Perform and exercise such other functions, powers, and duties in conformity with the *Constitution* and the *Bill of Rights* of the State of Kansas and with the statutes of the State of Kansas, except any regulatory statute specifically suspended as necessary to promote and secure the safety and protection of the civilian population.

The bill would provide that during a state of disaster emergency when the Legislature is not in session or adjourned for three or more days during a session, the LCC may extend a state of disaster emergency. Upon application by the Governor, the chairperson of the LCC would be required to call a meeting to occur within 24 hours and the Governor could not exercise the powers conferred by KSA 48-925(c) until an affirmative vote of five members of the LCC. At the meeting of the LCC, the Governor or Governor's designee would be required to appear to provide information related to the application. The LCC may extend the state of disaster emergency for a specified period of time and authorize the Governor to continue to enforce powers as outlined in KSA 48-925(c). The bill would provide a list of items for the LCC to consider when deciding to extend the state of disaster emergency or authorize the powers under KSA 48-925(c).

The bill would remove the state of disaster emergency provisions that relate only to disasters of the spread of contagious or infectious disease among domestic animals. The bill would change the extension process for state of disaster emergency to provide that the extension may only occur by a concurrent resolution of the Legislature. However, an exception would be

provided when the Legislature is not in session or is adjourned for three or more days and upon application of the Governor, where the LCC could extend the disaster for certain periods. If the Legislature would extend a disaster by concurrent resolution, the resolution must state if the Governor is authorized to exercise powers granted by KSA 48-925(c). The Governor could not issue a subsequent proclamation for the same or similar disaster if the original state of disaster emergency was not ratified by the Legislature or extended by the LCC.

If the Governor issues an executive order relating to a state of disaster emergency, the chairperson of the LCC would be required to call a meeting within 24 hours to review the order. If the order suspends the provisions of any regulatory statute, order, or rule and regulation, the order would be required to specify each statute, order, or rule and regulation being suspended. After the initial 15-day state of disaster emergency, if the disaster is extended by the Legislature and the Governor determines it is necessary to exercise the powers in the bill, the Governor may make application to the Speaker of the House and the Senate President when the Legislature is in Session or the LCC when the Legislature is not in session.

Prior to issuing an executive order, the Governor would be required to submit the proposal to the Attorney General, who would be required to review and provide an opinion on the legality of the order within 24 hours. Boards of county commissioners would be able to adopt a less stringent order relating to the public health of humans that is not related to the food supply. If a board of county commissioners would adopt a less stringent order, the local order would be operating in the county in lieu of the Governor's order.

The bill would allow a party aggrieved by an executive order to file an action in district court. The court would be required to conduct a hearing within 72 hours and grant relief, unless the court finds the executive order is necessary to an important interest related to the state of disaster emergency. If the executive order would have the effect of substantially burdening or inhibiting the gathering or movement of individuals or the operation of any religious, civic, business, or commercial activity, the court would grant the request, unless the court finds the executive order is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to achieve that purpose.

If an executive order is affirmed by the State Board of Education that has the effect of closing schools or school attendance centers, the executive order would not apply to private schools.

The provisions of HB 2416 would be severable. Any portion declared invalid would not affect the other provisions of the bill. The bill would become effective upon publication in the *Kansas Register*.

The Adjutant General indicates the enactment of the bill would require no additional funds to implement. However, the agency notes that if the current COVID-19 pandemic emergency is not renewed prior to March 31, 2021, all eligible pandemic response activities that are currently being fully reimbursed by the Federal Emergency Management Agency (FEMA) would cease, leading to an increase in spending from the SGF in the current fiscal year. The agency notes that it spent approximately \$3.2 million during January 2021 that will be reimbursed by FEMA.

The Office of the Attorney General indicates provisions that would require the agency to review and produce opinions on executive orders could be implemented without additional funding or staff. However, the agency notes that certain provisions of the bill would likely be challenged in court as violating the separation of powers, with two branches of state government being on opposing sides of litigation. If that occurs, the agency would be required to hire outside counsel to represent one of the sides at a cost of approximately \$250,000 to \$300,000, all from the State General Fund. This estimate is made from costs of counsel in similar litigation in recent years.

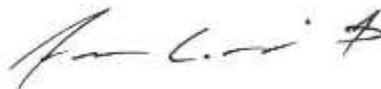
The Division of the Budget estimates HB 2416 would have the potential for increasing litigation in the courts. If it does, there would be a fiscal effect on the operations of the court system. However, it is not possible to estimate the number of additional court cases that would arise or how complex and time-consuming they would be. Therefore, a fiscal effect cannot be determined.

The Department of Education indicates the bill would have no fiscal effect on state aid payments to school districts. The provisions of the bill regarding the State Board of Education could be implemented with its existing staff and budget.

Legislative Administrative Services (LAS) indicates that the enactment of the bill would increase expenditures in the budget of the LCC. LAS estimates additional costs of \$12,385 in FY 2021 and \$61,922 in FY 2022, all from the State General Fund, would be required for an estimated additional three meetings in FY 2021 and an additional 15 meetings in FY 2022. The costs would include legislator salaries, subsistence, and mileage reimbursement. Any fiscal effect associated with SB 273 is not reflected in *The FY 2022 Governor's Budget Report*.

The Kansas Association of Counties states that the limitation of powers included in the bill could defect a response to an emergency; however, a fiscal effect cannot be estimated.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Proffitt", with a stylized flourish at the end.

Adam Proffitt
Director of the Budget

cc: Ryan Wright, Office of the Governor
Karen Clowers, Legislative Services
Debbie Thomas, Judiciary
Jay Hall, Association of Counties
Craig Neuenswander, Education