

Testimony to Senate Standing Committee on Federal and State Affairs as proponent of SB 10: Open meetings; minutes required; open records; charges limited.

Bob Weeks, March 13, 2013

Chairman Ostmeyer and members of the Committee:

Thank you for this opportunity to present testimony on problems with the Kansas Open Records Act regarding high fees for the production of records. In 2008 I personally encountered this problem, as reported in the *Wichita Eagle*:

Open Records Requests Can Spell High Fees (*Wichita Eagle*, March 9, 2008)

Want information from the governor's office? Get ready to pay up. That's what Wichita blogger Bob Weeks says he discovered when he requested four days' worth of e-mails sent and received by Gov. Kathleen Sebelius and her staff.

To get the records, he was told he'd have to pay a lawyer in the governor's office \$27 an hour, for 50 hours, to read the e-mails to make sure they aren't exempt from disclosure. That and 25 cents a page for copies or an unspecified extra charge to get the e-mails in electronic form. "Please make your check for the amount of \$1,350 payable to the state of Kansas and reference your open records request," said a letter Weeks received from JaLynn Copp, assistant general counsel to the governor.

State Sen. Timothy Huelskamp, R-Fowler, said he was aware of Weeks' case. He said he thinks the fees are excessive. "It doesn't mean much for it to be an open record if you can't afford it," he said. In addition, he said a sluggish response to the request from the governor's office appears to have violated the state Open Records Act. Huelskamp said the law requires state agencies to fulfill records requests within three business days or provide a detailed reason why that can't be done. Weeks mailed his request on Feb. 7 and got an initial response Feb. 13. His cost estimate didn't come until Feb. 26, and neither letter explained the delay, Huelskamp said. "It's really in violation of the letter and the spirit of the law and I've seen that happen more than once," he said. (Full article available online at <http://bit.ly/openrecordsks001>)

Based on this and other experience, it is difficult to obtain email records at reasonable cost. If one makes a very narrowly-defined request that is affordable, there is a chance that the request will not produce the desired documents. If the request is broad enough to catch the records one needs, it is likely to be very expensive.

Kansas could use as a model the federal Freedom of Information Act (5 USC § 552), which provides for a limit on fees in certain cases: "*Fees shall be limited to reasonable standard charges for document duplication* when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media." (emphasis added)

There are other problems with the Kansas Open Records Act. Enforcement is weak. In my case, the Sedgwick County District Attorney took 14 months to produce a ruling that I believe is contrary to the intent of this Legislature. As the Kansas attorney General refers all cases to the local District Attorney, I have no other avenue for enforcement except for a private lawsuit at my expense.

Cities and other local governmental bodies have set up non-profit organizations to conduct business such as economic development. These agencies, as in the case of the Wichita Downtown Development Corporation, may receive up to 98

percent of their revenue from taxation, have only government as clients, and perform functions that are governmental in nature, yet they are judged not to be a public agency for purposes of the Kansas Open Records Act. This flies in the face of the Legislature's declared intent in the preamble of the Act: "It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and *this act shall be liberally construed* and applied to promote such policy."

While the Kansas Open Records Act requires agencies to respond to the request within three business days, a response might be "This will take more time." At that point, as far as I know, there is nothing to prevent an agency from stalling indefinitely in fulfilling the records request.

In some jurisdictions, if three or more records requests are received on the same topic, the agency must post the records. Kansas should go a step farther and require that governmental agencies post online *all* documents and records produced in response to records requests. In this way, the work done to fulfill requests could be leveraged and appreciated by a broader audience. An example of an agency doing this is Community Unit School District 300 in Illinois, at <http://www.d300.org>.

Elected officials and bureaucrats often are either misinformed regarding the Open Records Act, or have a poor attitude towards open government. This Wichita school district, for example, has told me that my records requests are a "burden" that interferes with the education of children. A Wichita city council member argued that if the city manager was satisfied with the level of service that an agency provided, there was no need for the agency to produce records.

The council member then extended that argument, wondering if any company the city contracts with that is providing satisfactory products or service would be subject to "government intrusion" through records requests. He must not have been aware that the Kansas Open Records Act contains a large exception, which excepts: "Any entity solely by reason of payment from public funds for property, goods or services of such entity." So companies that sell to government in the ordinary course of business are not subject to the open records law.

In 2007 the Better Government Association and National Freedom of Information Coalition gave Kansas a letter grade of "F" for its open records law. In 2011 State Integrity Investigation looked at the states, and Kansas did not rank well there, either.

There is much that Kansas can, and should do, to strengthen its Open Records Law to give citizens and journalists better access to records and documents. Reining in the ability of agencies to erect a protective wall of high fees is a first step.

I have additional information about the Kansas Open Records Act and its problems at:
<http://wichitaliberty.org/open-records/>

Respectfully submitted,

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