



Testimony to House Judiciary Committee

HB 2188 Open Records Requirements on Certain Non-Profits

February 12, 2013

James Franko, Vice President / Policy Director

Chairman Kinzer and members of the Committee:

We appreciate this opportunity to present testimony in support of HB 2188, which simply requires that records reflecting how taxpayer money has been spent are fully disclosed and available to citizens.

Legislative intent on open records could not be clearer.

K.S.A. 45-216. Public policy that records be open. (a) 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.

Unfortunately, there is a loophole in the Kansas Open Records Act (KORA) that is being used to deny citizens access to specific details of how their money was spent.

K.S.A. 45-240 says, "...each not-for-profit entity which receives public funds in an aggregated amount of \$350 or more per year, shall, upon request, make available to any requester a copy of documentation of the receipt and expenditure of such public funds received by such not-for-profit entity." However, attorneys representing the Greater Wichita Economic Development Coalition (a non-profit entity controlled by the Wichita Chamber of Commerce) and the Wichita Downtown Development Corporation contend that their obligation to provide documentation of the receipt and expenditure of public funds is negated by another section of the Open Records Act.

These organizations and their attorneys believe that their disclosure requirements are met by providing a summary report only, not the detailed accounting that would be required if the City of Wichita or Sedgwick County had spent the money themselves.

As the law appears to stand today, there is nothing to prevent local units of government from using this loophole in the Kansas Open Records Act to funnel more taxpayer money to

their non-profit partners and shield spending details from citizens. There is no prohibition under KORA for disclosing this information but in our experience local governments have declined requests to release this information. We can only be left to assume that local governments and their economic development partners simply don't want taxpayers to know how their money is being spent.

We've been told that government and their non-profit economic development partners are fearful that disclosure of spending details will make their recruiting work more difficult because the identities of companies they are 'courting' will become known. But that is a false concern. The same code names that economic development agencies routinely use internally when discussing projects and could easily do the same in their accounting records.

We've also been told that transparency may impose an undue recordkeeping burden on these non-profits, but that is also a false concern. Any entity receiving a government contract of this nature is already required to track how the money is spent; it's simply a matter of applying the appropriate accounting code to a transaction.

Health care organizations are already exempt from any reporting requirements, presumably for privacy reasons. We have no objection to also exempting charitable non-profits for privacy reasons. But non-profits that are using taxpayer money to entice companies or tourists should be held to the same Open Records requirements as if the local government spent the money themselves.

Local government and their economic development partners may not want taxpayers to ask questions about how many people they sent to the Paris Air Show or if insiders are being given consulting contracts with taxpayer money, but citizens have a right to know exactly how their money is being spent. The summary reports being provided under current law provide no such details, fall far short of the State's public policy on transparency, and ultimately prevent taxpayers, and in some cases even other elected officials, from knowing how their money is being spent.

Kansas Policy Institute asked the City of Wichita and Sedgwick County to request the information themselves and make it available to the public, but they declined. You will find some of this correspondence attached to my written testimony.

It is therefore left to the Legislature to close this loophole so that taxpayers can see exactly how their money is being spent...in accordance with the declared public policy of the State of Kansas.



KANSAS POLICY INSTITUTE

ADVOCATING FOR FREE MARKETS AND THE PROTECTION OF PERSONAL LIBERTY

August 15, 2012

Mr. Harvey R. Sorenson
Foulston Siefkin LLP
1551 N. Waterfront, Suite 1000
Wichita, KS 67206

Dear Harvey,

The annual reports provided with your August 13 response only complied with Item 1 of our Open Records request submitted to the Wichita Downtown Development Coalition (WDDC).

1. A complete list of all funds received from any government entity in an aggregated amount of \$350 or more per year, specifying the total amount received from each amount entity by year.

Those annual reports identify the funding amounts received from the City of Wichita but the information requested in Item 2 was not provided.

2. A detailed accounting of how the funding from each such entity was spent (or placed into reserve) by year, either in the form of a check register or other detailed listing. To be clear, this request is for a detailed accounting of each individual expenditure, including the date and amount of each payment, payee name and whatever description that exists in your accounting system pertaining to each transaction.

As stated in our original Open Records request, the information requested in Item 2 above pertains to Section 45-240(b) which states: "each not-for-profit entity which receives public funds in an aggregated amount of \$350 or more per year, shall, upon request, make available to any requester a copy of documentation of the receipt and expenditure of such public funds received by such not-for-profit entity. If such not-for-profit entity's accounting practice does not segregate public funds from other fund sources, the not-for-profit entity's entire accounting of its expenditures and receipts shall be open to the public. The reporting requirements of this section shall commence on the first day of the fiscal year of such not-for-profit entity which occurs on or after July 1, 2005, and continue for each fiscal year thereafter."

The WDDC annual reports may satisfy the reporting requirements under Section 45-240(b)(1) for providing information to the government entity that provided the taxpayer funds but Section 45-240(b) obligates WDDC to provide additional and more detailed information upon request. By stipulating "If such not-for-profit entity's accounting practice does not segregate public funds from other fund sources, the not-for-profit entity's entire accounting of its expenditures and receipts shall be open to the public," the legislature is clearly imposing a more detailed and separate burden. Indeed, if an annual report reflecting all receipts and expenditures (included taxpayer funds) would

satisfy all reporting requirements, there would have been no reason to stipulate that an entity's entire accounting shall be open to the public if taxpayer funds are not segregated.

We believe that the Kansas Open Records Act clearly requires WDDC to provide the information requested in Item 2 and again ask that your client fully comply with our request.

Further, we asked in our original request that, if our request is denied in whole or in part, you describe any materials for which exemption from the KORA is asserted, with reference to the specific exemption. Since WDDC failed to comply with our entire request, I must again ask that you explain why WDDC believes that our request in Item 2 is exempt under KORA.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Trabert", written over a horizontal line.

Dave Trabert
President

FOULSTON SIEFKIN LLP

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GERALD SAWATZKY

August 22, 2012

Mr. Dave Trabert
Kansas Policy Institute
250 North Water Street, Suite 216
Wichita, Kansas 67202

Dear Dave:

Thank you for your note of August 17 regarding the WDDC's initial response to the KPI KORA request. I think you have a fundamental misunderstanding of the applicable law.

The Kansas Open Records Act distinguishes between two groups of organizations—public agencies and private organizations. Private for-profit organizations are completely exempt from any disclosure, while not-for-profit organizations are subject to some limited disclosure. The requests that KPI makes of WDDC are those to which the law requires a public agency to respond. But, just as KPI, a not-for-profit tax exempt organization, is afforded a degree of privacy for its expenditures and donors in political affairs, while candidates are required to fully disclose their campaign expenditures and campaign donors, the WDDC's disclosure obligations are a balance between this private interest and the public requirements. Contracts with private companies are completely private and are not subject to disclosures. Not-for-profits are a hybrid.

The Sedgwick County District Attorney has previously determined that the WDDC is not a public agency but is a private "not-for-profit" entity. As your initial inquiry acknowledged, the WDDC is a "not-for-profit" entity under KORA.

For private contracting parties the disclosure obligations are exclusively set forth in K.S.A. 45-240, a copy of which is attached for your reference. K.S.A. 45-240(a) sets forth a general disclosure requirement for not-for-profit entities receiving more than \$350 per year:

Each not-for-profit entity . . . shall be required to document the receipt and expenditure of such funds.

Note this is not a statement of how or in what detail disclosure should occur, just a statutory admonition that the entity is required to disclose, and carries no independent significance separate from the remainder of the statute describing how the disclosure mandate should be carried out.

The disclosure mandate is then set forth:

Subject to subsection (b), each . . . entity . . . shall upon request . . . make available . . . documentation of the receipt and expenditure of such public funds received by such . . . entity. (Emphasis added)

The next sentence is not, as you incorrectly assert, a separate, independent reporting requirement, but rather an explanation of the preceding sentence. The reporting requirement of (a) is fully modified by the "subject to" language in the first sentence.

The statute continues in subsection (b)(1):

[A]ny . . . entity . . . that receives public funds that is required by law or the terms of its grant, contract or other agreement to file a written financial report which includes the receipt of public funds and the expenditure of public funds with . . . any political subdivision [of the state] . . . shall be deemed to have fulfilled the requirements of this section upon filing of such report (Emphasis added.)

There are no independent requirements of subsection (b), and the reference to "the requirements of this section" is (and can only be) a reference to K.S.A. 45-240, of which subsection (a) is the only part of the statute which has any reporting requirements.

Neither of us knows why the legislature chose to construct this particular compromise between the private contractor non-disclosure model and the public agency full-disclosure model for not-for-profits. Allowing a not-for-profit to satisfy a KORA requirement with its reports to its contracting party minimizes the burden placed on the not-for-profit and reasonably assumes that the public agency contractor is satisfied with the information it receives about the disbursement of the contract payments.

For these reasons, I have advised the WDDC that it has fully satisfied its reporting obligations to KPI.

Very truly yours,

FOULSTON SIEFKIN LLP

Harvey R. Sorensen

mlb
Enclosure



KANSAS POLICY INSTITUTE

ADVOCATING FOR FREE MARKETS AND THE PROTECTION OF PERSONAL LIBERTY

August 17, 2012

Mr. Harvey R. Sorenson
Foulston Siefkin LLP
1551 N. Waterfront, Suite 1000
Wichita, KS 67206

Dear Harvey,

The reports provided with your August 16 response only complied with Item 1 of our Open Records request submitted to the Greater Wichita Economic Development Coalition (GWEDC).

1. A complete list of all funds received from any government entity in an aggregated amount of \$350 or more per year, specifying the total amount received from each amount entity by year.

The Excel spreadsheets identify the funding amounts received from the City of Wichita and Sedgwick County but the information requested in Item 2 was not provided.

2. A detailed accounting of how the funding from each such entity was spent (or placed into reserve) by year, either in the form of a check register or other detailed listing. To be clear, this request is for a detailed accounting of each individual expenditure, including the date and amount of each payment, payee name and whatever description that exists in your accounting system pertaining to each transaction.

As stated in our original Open Records request, the information requested in Item 2 above pertains to Section 45-240(b) which states: "each not-for-profit entity which receives public funds in an aggregated amount of \$350 or more per year, shall, upon request, make available to any requester a copy of documentation of the receipt and expenditure of such public funds received by such not-for-profit entity. If such not-for-profit entity's accounting practice does not segregate public funds from other fund sources, the not-for-profit entity's entire accounting of its expenditures and receipts shall be open to the public. The reporting requirements of this section shall commence on the first day of the fiscal year of such not-for-profit entity which occurs on or after July 1, 2005, and continue for each fiscal year thereafter."

The GWEDC reports may satisfy the reporting requirements under Section 45-240(b)(1) for providing information to the government entity that provided the taxpayer funds but Section 45-240(b) obligates GWEDC to provide additional and more detailed information upon request. By stipulating "If such not-for-profit entity's accounting practice does not segregate public funds from other fund sources, the not-for-profit entity's entire accounting of its expenditures and receipts shall be open to the public," the legislature is clearly imposing a more detailed and separate burden. Indeed, if reports reflecting all receipts and expenditures (including taxpayer funds) would satisfy

all reporting requirements, there would have been no reason to stipulate that an entity's entire accounting shall be open to the public if taxpayer funds are not segregated.

We believe that the Kansas Open Records Act clearly requires GWEDC to provide the information requested in Item 2 and again ask that your client fully comply with our request.

Further, we asked in our original request that, if our request is denied in whole or in part, you describe any materials for which exemption from the KORA is asserted, with reference to the specific exemption. Since GWEDC failed to comply with our entire request, I must again ask that you explain why GWEDC believes that our request in Item 2 is exempt under KORA.

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August 27, 2012

Mr. Dave Trabert
Kansas Policy Institute
250 North Water Street, Suite 216
Wichita, Kansas 67202

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August 27, 2012
Mr. Dave Trabert
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FOULSTON SIEFKIN LLP

Harvey R. Sorenson

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