

JOINT REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW AND CIVIL CODE ADVISORY COMMITTEES
ON HOUSE BILL 2302

DECEMBER 4, 2015

On May 27, 2015, Representative John Barker asked the Kansas Judicial Council to study House Bill 2302 enacting the Kansas right to financial privacy act. See Attachment 1 for a copy of the bill. The Judicial Council referred the study to its Criminal Law Advisory Committee. Because the bill would impact civil, criminal, and administrative subpoenas of financial records, the Civil Code and Criminal Law Advisory Committees later agreed to meet jointly to review the bill.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law and Civil Code Advisory Committees are:

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BACKGROUND

In 1978, Congress passed the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, in response to *United States v. Miller*, 425 U.S. 435, 440-46, 96 S. Ct. 1619 (1976). *Miller* held that the respondent had no legitimate expectation of privacy in his financial records held by the bank. The court found that bank records contain only information that has been voluntarily shared with the third-party financial institution, and the records are business records belonging to the bank in which the customer has no protectable fourth amendment interest. The Federal Right to Financial Privacy Act of 1978 provides for notice and an opportunity to challenge the inquiry before the federal government can access individuals' financial records. See 12 U.S.C. 3405.

By 1993, about one-third of the states had laws that mirrored the Federal Right to Financial Privacy Act, but not Kansas. That same year in *State v. Schultz*, 252 Kan. 819, 850 P.2d 818 (1993), the Kansas Supreme Court cited *Miller* in holding that an individual has no legitimate expectation of privacy in financial records held by a third party. The *Schultz* court noted that Kansas had many years to adopt a privacy act but had not done so.

According to Representative Erin Davis, who requested H.B. 2302, the impetus for the bill was a recent domestic case in which a nonparty subpoena was used to obtain financial records of a nonparty. Under current civil procedure statutes, only the parties must be given notice of a nonparty subpoena. The joint Committee was told that the district court had cited *Schultz* as authority for its refusal to quash the subpoena. While H.B. 2302 might alter the result in *Schultz*, it would not solve the issue of notice of nonparty subpoenas because H.B. 2302 only applies to government entities.

House Bill 2114 more directly addresses the original problem by requiring notice to the nonparty about whom records are subpoenaed under K.S.A. 60-245a. The joint Committee also reviewed H.B. 2114 and prepared a separate report on that bill.

METHOD OF STUDY

The joint Committee met twice during the fall of 2015, once in person and once by telephone conference. In preparation for study, the joint Committee reviewed the original study request and associated materials such as *State v. Schultz*; H.B. 2302 and its fiscal note; minutes

from the House Judiciary Committee on February 18, 2015; and written materials submitted by interested parties at the joint Committee meeting held August 14, 2015. Additionally, the joint Committee invited guests from the Kansas Department of Revenue, the Kansas Office of the Securities Commissioner, the Kansas County and District Attorney Association, and the Kansas Attorney General to attend the August 14 meeting.

JOINT COMMITTEE DISCUSSION OF H.B. 2302

The joint Committee first reviewed the specific provisions of H.B. 2302. Generally speaking, the bill protects the confidentiality of personal financial records by prohibiting state agencies from accessing those records unless authorized by the customer or unless the records are disclosed in response to a subpoena after the agency has provided the customer with notice and an opportunity to object. The joint Committee then heard from the agency representatives who attended its first meeting and who had serious concerns about the bill.

One of the primary concerns expressed by the represented agencies was the effect the bill would have on investigations. Many Kansas agencies conduct both civil and criminal investigations, issuing civil, criminal, and administrative subpoenas as part of the investigative process. It is imperative to these agencies' investigative functions to be able to gather information without tipping off the subject of an investigation.

The joint Committee was in agreement with the agency attorneys who expressed concern about the impact that H.B. 2302's notice provisions would have on investigations. It noted that some agencies, such as the Office of the Kansas Securities Commissioner (KSC) under K.S.A. 17-12a602, are statutorily empowered to conduct "private" investigations. Further, the Kansas Supreme Court has specifically held that the KSC's power to conduct private investigations includes the power to require confidentiality. In *Brant v. Bank of America*, 272 Kan. 182, 31 P.3d 952 (2001), the court held that the KSC has the authority to prohibit a bank from notifying its customers of the KSC's subpoenas. Thus, the notice requirement in H.B. 2302 conflicts with both statutory and case law.

The joint Committee noted that Section 5 of H.B. 2302 also contains a provision that would allow an agency to request court approval of a 90-day delay in providing notice to the customer under appropriate circumstances. The Federal Right to Financial Privacy Act also has exceptions that allow for delayed notice to customers. See 12 U.S.C. 3409.

However, state agency attorneys reported that, in order to obtain court approval for a 90-day delay under H.B. 2302, they would need to open a civil case when administrative subpoenas were issued. For some agencies, this change would require opening a civil case for the majority of investigations. Agency attorneys explained that this is not a problem for federal agencies because resources are available at the federal level. However, Kansas has limited resources, and the requirement to open a civil case for every administrative subpoena issued was the reason for the large fiscal note on H.B. 2302. See Attachment 2.

In addition to cost, agency attorneys were concerned about a number of ambiguities and inconsistencies in H.B. 2302. For example, Sections 8 and 9 of the bill purport to exempt many criminal and civil government investigations from the requirements of the bill; however, those exemptions are not clearly drafted.

Section 8(b)(5) of the bill provides, “Nothing under the Kansas right to financial privacy act prohibits disclosure if the financial records are sought by a government authority under the code of civil procedure or Kansas code of criminal procedure or comparable rules of other courts in connection with litigation to which a government authority is a party.” It is unclear whether this exemption applies to subpoenas issued by state agency attorneys in a pending criminal investigation or to subpoenas issued in an open inquisition pursuant to K.S.A. 22-3101 *et seq.*, since there are technically no parties to an inquisition and it does not involve litigation.

Section 8(b)(15) of the bill provides, “Nothing under the Kansas right to financial privacy act shall apply to a law enforcement inquiry or to a government authority or government employee engaged in a law enforcement inquiry.” The term “law enforcement inquiry” is defined as “a lawful investigation, official proceeding or grand jury proceeding relating to the commission of any crime.” H.B. 2302, Section 1(b)(5). It is unclear what might constitute a “lawful investigation” and whether this section would apply to search warrants for financial records. Furthermore, because the definition of “law enforcement inquiry” is limited to criminal investigations, it seems that it would not apply to the many investigations undertaken each year by the Attorney General’s Consumer Protection Division.

If the exemptions contained in H.B. 2302 are interpreted broadly, those exemptions may swallow the purpose of the act. The joint Committee learned that in Missouri, the state whose law was modeled in drafting H.B. 2302, most agencies find the exemptions so vague that they simply interpret themselves as exempt from the act’s requirements.

After hearing from state agency representatives about the burdens, costs and ambiguities associated with H.B. 2302, the joint Committee questioned whether there was a need for H.B. 2302 at all. *State v. Schultz*, which established expectations for financial privacy, was decided in 1993. While government overreach could provide a justification for the new law, none of the joint Committee members had heard of problems with government overreach since *Schultz* was decided. The joint Committee concurred that if there were no problems in the last 22 years, than it was unfair to place the burdens of H.B. 2302 on investigating agencies.

CONCLUSION

The joint Committee recommends against passage of H.B. 2302. The joint Committee found that the bill would be too burdensome on state agencies and that the delayed notice provision would be too expensive. Additionally, the Joint Committee agrees that the bill contains a number of ambiguities and inconsistencies, and there are no known problems with government overreach that might justify the bill.

HOUSE BILL No. 2302

By Committee on Judiciary

2-11

1 AN ACT concerning financial institutions; enacting the Kansas right to
2 financial privacy act.

3
4 *Be it enacted by the Legislature of the State of Kansas:*

5 Section 1. (a) Sections 1 through 12, and amendments thereto, shall
6 be known and may be cited as the Kansas right to financial privacy act.

7 (b) As used in the Kansas right to financial privacy act:

8 (1) "Customer" means any person or such person's authorized
9 representative who utilized services of a financial institution, or for whom
10 a financial institution is acting or has acted as a fiduciary, in relation to an
11 account maintained in such person's name.

12 (2) "Financial institution" means a bank, savings and loan association,
13 trust company, credit union, consumer credit lender, consumer finance
14 institution, persons who act as lender on loans, persons who are sellers
15 under a retail time contract or retail time transactions and any other
16 persons, including, but not limited to, stockbrokers and brokerage firms,
17 which accept money for deposit to an account on which checks may be
18 drawn by the owner of such account.

19 (3) "Financial record" means an original, a copy or information
20 derived from any record held by a financial institution pertaining to a
21 customer's relationship with the financial institution.

22 (4) "Government authority" means any agency or department of the
23 state of Kansas or any agent thereof.

24 (5) "Law enforcement inquiry" means a lawful investigation, official
25 proceeding or grand jury proceeding relating to the commission of any
26 crime.

27 (6) "Subpoena" means a judicial subpoena, an administrative
28 subpoena or other process expressly authorized by law.

29 (7) "Supervisory agency" means any agency or department of Kansas
30 having statutory authority to examine the financial condition or business
31 operations of a financial institution.

32 (8) "Government investigation" means a lawful proceeding inquiring
33 into a violation of any civil statute or any valid regulation.

34 Sec. 2. (a) Except as provided in section 7, and amendments thereto, a
35 government authority shall not have access to or obtain copies of the
36 information contained in the financial records of any customer unless the

1 financial records are reasonably described and:

2 (1) Such customer has authorized such disclosure in accordance with
3 section 3, and amendments thereto;

4 (2) such financial records are disclosed in response to a subpoena
5 which meets the requirements of section 4, and amendments thereto; or

6 (3) such financial records are disclosed in response to a written
7 request which meets the requirements of section 4, and amendments
8 thereto.

9 (b) (1) A financial institution, or officer, employee or agent thereof
10 shall not provide to any government authority access to the financial
11 record of any customer except in accordance with the provisions of the
12 Kansas right to financial privacy act.

13 (2) A financial institution shall not release the financial records of a
14 customer until the government authority seeking such records provides
15 notice in writing to the financial institution that it has complied with the
16 applicable provisions of the Kansas right to financial privacy act.

17 Sec. 3. (a) A customer may authorize disclosure of such customer's
18 financial records if the customer furnishes to the financial institution and
19 to the government authority seeking to obtain such disclosure a signed and
20 dated statement which:

21 (1) Authorizes such disclosure for such period as may be agreed
22 upon;

23 (2) states that the customer may revoke such authorization at any time
24 before the financial records are disclosed;

25 (3) identifies the financial records which are authorized to be
26 disclosed;

27 (4) specifies the purpose and government authority to which such
28 records may be disclosed; and

29 (5) states the customer's rights under the Kansas right to financial
30 privacy act. Such authorization shall not be required as a condition of
31 doing business with any financial institution.

32 (b) The customer has the right to obtain a copy of the information
33 which shall be disclosed to a government authority pursuant to the Kansas
34 right to financial privacy act, and the identity of the government authority
35 to which such disclosure was made.

36 Sec. 4. (a) A government authority may obtain financial records
37 pursuant to a subpoena if:

38 (1) There is reason to believe that the records sought are relevant to a
39 government investigation;

40 (2) a copy of the subpoena has been served upon the customer or
41 mailed to such customer's last known address on or before the date on
42 which the subpoena is served on the financial institution together with the
43 following notice:

1 "Records or information concerning your transactions held by the
2 financial institution named in the attached subpoena (or other process) are
3 being sought by the (agency or department) in accordance with the Kansas
4 right to financial privacy act, sections 1 through 12, and amendments
5 thereto, for the following purpose: (state purpose with reasonable
6 specificity)

7 If you desire that such records or information not be made available,
8 you must:

9 (A) State in writing that you are the customer whose records are
10 being requested and give the reasons you believe the records are not
11 relevant to the law enforcement inquiry stated in this subpoena or any
12 other basis for objecting to the release of the records;

13 (B) file the statement by mailing or delivering it to the clerk of the
14 district court which issued or has the power to enforce the subpoena;

15 (C) serve the government authority requesting the records by mailing
16 or delivering a copy of your statement to it at the address stated in the
17 notice; and

18 (D) be prepared to go to court or to the issuing authority and present
19 your position in further detail. You do not need to have a lawyer to
20 represent yourself, although you may wish to employ one to represent you
21 and protect your rights. If you do not follow the above procedures, upon
22 the expiration of 10 days from the date of service or 14 days from the date
23 of mailing of this notice, the records or information requested therein will
24 be made available. These records may be transferred to other government
25 authorities for legitimate government investigations."; and

26 (3) ten days have expired from the date of service of the notice or 14
27 days have expired from the date of mailing the notice to the customer and
28 within such time period the customer has not filed a statement or a motion
29 to quash in an appropriate court or the customer challenge provisions of
30 section 6, and amendments thereto, have been complied with.

31 Sec. 5. (a) Upon application of the government authority, the
32 customer notice required under section 3, 4 or 7, and amendments thereto,
33 may be delayed by order of the district court for the principal office of the
34 governmental agency if the court finds that:

35 (1) The investigation being conducted is within the lawful jurisdiction
36 of the government authority seeking the financial records;

37 (2) there is reason to believe that the records being sought are
38 relevant to a legitimate government investigation; and

39 (3) there is reason to believe that such notice will result in:

40 (A) Destruction of or tampering with evidence;

41 (B) intimidation of potential witnesses; or

42 (C) otherwise seriously jeopardizing an investigation or official
43 proceeding or unduly delaying a trial or ongoing official proceeding. An

1 application for delay must be made with reasonable specificity.

2 (b)(1) Except as provided by subsection (b)(2), if the court makes the
3 findings required under subsection (a), it may enter an order granting the
4 requested delay for a period not to exceed 90 days and an order prohibiting
5 the financial institution from disclosing that records have been obtained or
6 that a request for records has been made.

7 (2) If the court finds that there is reason to believe that such notice
8 may endanger the lives or physical safety of a person or group of persons,
9 the court may specify that the delay be indefinite. Extensions of the delay
10 of notice of up to 90 days each may be granted by the court upon
11 application, but only in accordance with this section.

12 (c) Upon expiration of the period of delay of notification under this
13 section, the customer shall be served with or mailed a copy of the process
14 or request together with the following notice:

15 "Records or information concerning your transactions which are held
16 by the financial institution named in the attached process or request were
17 supplied to or requested by the government authority named in the process
18 or request on (date). Notification was withheld pursuant to a determination
19 by the (title of court so ordering) under the Kansas right to financial
20 privacy act that such notice might (state reason). The purpose of the
21 investigation or official proceeding was (state purpose in reasonable
22 specificity)."

23 (d) When access to financial records is obtained pursuant to section 3,
24 and amendments thereto, the government authority shall, unless a court
25 has authorized delay of notice, as soon as practicable after such records are
26 obtained, serve upon the customer, or by mail to last known address a copy
27 of the request to the financial institution together with the following
28 notice:

29 "Records concerning your transactions held by the financial institution
30 named in the attached request were obtained by the (agency or department)
31 under the Kansas right to financial privacy act on (date) for the following
32 purpose: Emergency access to such records was obtained on the grounds
33 that (state purpose in reasonable specificity)."

34 (e) Any memorandum, affidavit or other paper filed in connection
35 with a request for delay in notification shall be filed with the court. Upon
36 petition by the customer to whom such records pertain the court may order
37 disclosure of such papers to the petitioner unless the court makes the
38 findings required in subsection (a).

39 Sec. 6. (a) Within 10 days of service or within 14 days of mailing of a
40 subpoena, a customer may file a motion to quash the subpoena, or an
41 action to enjoin a government authority from obtaining financial records
42 pursuant to a written process. A motion to quash the subpoena shall be
43 filed in the court which issued the subpoena or with the court that has the

1 power to enforce the subpoena. Such motion or application shall contain a
2 sworn statement:

3 (1) Stating that the applicant is a customer of the financial institution
4 from which financial records pertaining to such customer have been
5 sought; and

6 (2) stating the applicant's reasons for believing that the financial
7 records sought are not relevant to the legitimate law enforcement inquiry
8 stated by the government authority in its notice or that there has not been
9 substantial compliance with the provisions of the Kansas right to financial
10 privacy act. Service shall be made under this section upon a government
11 authority by delivering or mailing a copy of the papers to the address in
12 the notice the customer received.

13 (b) The government authority may file a response, which may be the
14 subject of a protective order, if the government includes in its response the
15 reason such order is appropriate. The court may conduct such additional
16 proceedings as it deems appropriate. If the court finds that there is
17 substantial and competent evidence that the government investigation is
18 legitimate and a reasonable belief that the records sought are relevant to
19 that inquiry, the court shall deny the motion and order such process
20 enforced. However, the court may order a limitation on the subpoena as a
21 condition of enforcement. If the court finds that there is not evidence that
22 the law enforcement inquiry is legitimate, or that there is no evidence that
23 the records sought are relevant to that inquiry or that there has not been
24 substantial compliance with the provisions of the Kansas right to financial
25 privacy act, it shall order the process quashed or shall enjoin the
26 government authority's subpoena. Any appeal from an order issued under
27 this section shall be in accordance with the code of civil procedure.

28 (c) The governmental authority obtaining the records shall promptly
29 notify the customer if a determination has been made that no legal
30 proceeding against such customer is contemplated. If no decision has been
31 made within 180 days from the date of the order granting access to the
32 financial records, the governmental authority shall notify the court and
33 continue such notification at such intervals thereafter as the court may
34 order.

35 (d) The challenge procedures under the Kansas right to financial
36 privacy act constitute the sole judicial remedy available to a customer to
37 oppose disclosure of financial records pursuant to the Kansas right to
38 financial privacy act.

39 (e) Nothing under the Kansas right to financial privacy act shall
40 enlarge or restrict any rights of a financial institution to challenge requests
41 for records made by a government authority under existing law.

42 Sec. 7. (a) Upon receipt of a request for financial records made by a
43 government authority under section 4, and amendments thereto, the

1 financial institution shall, unless otherwise provided by law, proceed to
2 assemble the records requested and must be prepared to deliver the records
3 to the government authority upon receipt of the notice required under
4 section 2, and amendments thereto.

5 (b) Financial records originally obtained pursuant to the Kansas right
6 to financial privacy act, and amendments thereto, shall not be transferred
7 to another agency or department unless the transferring agency or
8 department makes a written finding that there is reason to believe that the
9 records are relevant to a legitimate law enforcement inquiry within the
10 jurisdiction of the receiving agency or department.

11 (c) When financial records subject to the Kansas right to financial
12 privacy act are transferred pursuant to this section the transferring agency
13 or department shall within 14 days send to the customer the following
14 notice:

15 "Copies of, or information contained in, your financial records lawfully
16 in possession of (the agency or department) have been furnished to (the
17 agency or department) pursuant to the Kansas right to financial privacy
18 act, sections 1 through 12, and amendments thereto, for the following
19 purpose (state with reasonable specificity). If you believe that this transfer
20 has not been made to further a legitimate law enforcement inquiry, you
21 may have legal rights under the Kansas right to financial privacy act."

22 (d) Notwithstanding subsection (c), notice to the customer may be
23 delayed if the transferring agency or department has obtained a court order
24 delaying notice or if the receiving agency or department obtains a court
25 order authorizing a delay in notice. Upon the expiration of any such period
26 of delay, the transferring agency or department shall serve the customer
27 the notice specified in subsection (c) and the agency or department that
28 obtained the court order authorizing a delay in notice shall serve the
29 notice.

30 Sec. 8. (a) Nothing under the Kansas right to financial privacy act
31 prohibits any supervisory agency from exchanging examination reports or
32 other information with another supervisory agency. Nothing under the
33 Kansas right to financial privacy act prohibits the transfer of a customer's
34 financial records needed by counsel for a government authority to defend
35 an action brought by the customer. Nothing under the Kansas right to
36 financial privacy act shall authorize the withholding of information by any
37 officer or employee of a supervisory agency from a duly authorized
38 committee of the general assembly.

39 (b) (1) Nothing under the Kansas right to financial privacy act
40 prohibits the exchange of financial records or other information with
41 respect to a financial institution among and between the supervisory
42 agencies of the federal financial institutions examination council, the state
43 banking commissioner and credit union administrator.

1 (2) Nothing under the Kansas right to financial privacy act prohibits
2 the disclosure of any financial records or information which is not
3 identified with or identifiable as being derived from the financial records
4 of a particular customer.

5 (3) Nothing under the Kansas right to financial privacy act prohibits
6 examination by or disclosure to any supervisory agency of financial
7 records or information in the exercise of its supervisory, regulatory, or
8 monetary functions with respect to a financial institution.

9 (4) Nothing under the Kansas right to financial privacy act shall
10 prohibit the disclosure of financial records or information required to be
11 reported in accordance with any federal statute or rule promulgated
12 thereunder.

13 (5) Nothing under the Kansas right to financial privacy act prohibits
14 disclosure if the financial records are sought by a government authority
15 under the code of civil procedure or Kansas code of criminal procedure or
16 comparable rules of other courts in connection with litigation to which a
17 government authority is a party.

18 (6) Nothing under the Kansas right to financial privacy act shall
19 prohibit disclosure of financial records to the department for children and
20 families.

21 (7) Nothing under the Kansas right to financial privacy act shall apply
22 to requests made by the department for children and families to obtain
23 information from the federal parent locator service of the United States
24 department of health and human services.

25 (8) Nothing under the Kansas right to financial privacy act shall apply
26 to prohibit a financial institution from complying with a properly served
27 summons to garnishee or to written interrogatories exhibited to a financial
28 institution which has been properly summoned as garnishee.

29 (9) Nothing under the Kansas right to financial privacy act shall apply
30 to prohibit a financial institution from complying with a properly served
31 income withholding order issued pursuant to the Kansas family law code.

32 (10) The requirements of the Kansas right to financial privacy act
33 shall not apply when a government authority accesses or obtains
34 information by a means described in section 2(a), and amendments thereto,
35 and for a legitimate government investigation is seeking only the name,
36 address, account number and type of account of any customer or
37 ascertainable group of customers associated with a financial transaction or
38 class of financial transactions.

39 (11) Nothing under the Kansas right to financial privacy act shall
40 preclude any financial institution, or any officer, employee or agent of a
41 financial institution, from notifying a government authority that such
42 institution, officer, employee or agent has information which may be
43 relevant to a possible violation of any statute or regulation. Such

1 information may be disclosed notwithstanding any law or regulation of
2 this state or political subdivision of this state to the contrary. Any financial
3 institution, officer, employee or agent thereof making a disclosure of
4 information shall not be liable to the customer under any law or regulation
5 of this state or political subdivision of this state for such disclosure or for
6 any failure to notify the customer of such disclosure.

7 (12) Nothing under the Kansas right to financial privacy act shall
8 preclude a financial institution, as an incident to perfecting a security
9 interest or proving a claim in bankruptcy or collecting on a debt owing to
10 the financial institution itself or in its role as a fiduciary, from providing
11 copies of any financial record relevant to such action to any court of
12 competent jurisdiction or government authority.

13 (13) Nothing under the Kansas right to financial privacy act shall
14 preclude a financial institution as an incident to processing an application
15 for assistance to a customer in the form of a government loan, loan
16 guaranty, loan insurance agreement, administering or processing a default
17 on a government guaranteed or insured loan from initiating contact with an
18 appropriate government authority for the purpose of providing any
19 financial record necessary to permit such authority to carry out its
20 responsibilities under such loan, loan guaranty or loan insurance
21 agreement.

22 (14) Nothing under the Kansas right to financial privacy act shall
23 preclude a governmental authority from obtaining information that is a
24 part of a public record without regard to the provisions of the Kansas right
25 to financial privacy act even though such information may have been
26 derived from a financial institution.

27 (15) Nothing under the Kansas right to financial privacy act shall
28 apply to a law enforcement inquiry or to a government authority or
29 government employee engaged in a law enforcement inquiry.

30 (16) Nothing under the Kansas right to financial privacy act shall
31 apply to any requests made by any United States agency or department or
32 any official employee or agent thereof authorized to obtain information
33 from any financial institution if such agency or agencies are authorized by
34 the federal financial privacy act of 1978, as amended, to receive such
35 information without compliance with the federal financial privacy act of
36 1978, as amended.

37 (17) The requirements of the Kansas right to financial privacy act
38 shall not apply to the state treasurer or any person appointed by the state
39 treasurer.

40 (18) Nothing under the Kansas right to financial privacy act shall
41 apply to requests made by the department of labor pursuant to the
42 employment security law.

43 (19) Nothing under the Kansas right to financial privacy act shall

1 impose additional requirements upon a financial institution if such
2 requirements are currently mandated under federal law.

3 Sec. 9. (a) Except for section 12, and amendments thereto, nothing
4 under the Kansas right to financial privacy act shall apply when financial
5 records are sought by a government authority:

6 (1) In connection with a lawful proceeding, investigation,
7 examination or inspection directed at the financial institution in possession
8 of such records or at a legal entity which is not a customer; or

9 (2) in connection with the authority's consideration or administration
10 of assistance to the customer in the form of a government loan, loan
11 guaranty or loan insurance program.

12 (b) When financial records are sought pursuant to this section, the
13 government authority shall submit to the financial institution the notice
14 required by section 2, and amendments thereto. For access pursuant to
15 subsection (a)(2), no further certification shall be required for the
16 subsequent access by the applicable government authority during the term
17 of the loan, loan guaranty or loan insurance agreement.

18 (c) On and after July 1, 2015, whenever a customer applies for
19 participation in a government loan, loan guaranty or loan insurance
20 program, the government authority administering such program shall give
21 the customer written notice of the authority's access rights under this
22 section. No further notification shall be required for subsequent access by
23 that authority during the term of the loan, loan guaranty or loan insurance
24 agreement.

25 (d) Financial records obtained pursuant to this section may be used
26 only for the purpose for which they were originally obtained, and may be
27 transferred to another agency or department only when the transfer is to
28 facilitate a lawful proceeding, investigation, examination or inspection
29 directed at the financial institution in possession of such records, or at a
30 legal entity which is not a customer, except that:

31 (1) Nothing under the Kansas right to financial privacy act prohibits
32 the use or transfer of a customer's financial records needed by counsel
33 representing a government authority in a civil action arising from a
34 government loan, loan guaranty or loan insurance agreement;

35 (2) Nothing under the Kansas right to financial privacy act prohibits a
36 government authority providing assistance to a customer in the form of a
37 loan, loan guaranty or loan insurance agreement from using or transferring
38 financial records necessary to process, service or foreclose a loan, or to
39 collect on an indebtedness to the government resulting from a customer's
40 default.

41 (e) Notification that financial records obtained pursuant to this section
42 which may relate to a potential civil, criminal or regulatory violation by a
43 customer may be given to an agency or department with jurisdiction over

1 that violation, and such agency or department may then seek access to the
2 records pursuant to the Kansas right to financial privacy act.

3 (f) Nothing under the Kansas right to financial privacy act shall
4 prohibit a government authority from obtaining financial records from a
5 financial institution if the government authority determines that delay in
6 obtaining access to such records would create imminent danger of:

- 7 (1) Physical injury to any person;
- 8 (2) serious property damage; or
- 9 (3) flight to avoid prosecution.

10 (g) Within five days of obtaining access to financial records under
11 this subsection the government authority shall file with the appropriate
12 court a signed, sworn statement of a supervisory official of a rank
13 designated by the head of the government authority setting forth the
14 grounds for the emergency access. The government authority shall
15 thereafter comply with the notice provisions of section 5(d), and
16 amendments thereto. The government authority shall compile an annual
17 tabulation of the occasions in which this subsection was used.

18 (h) Except for records obtained pursuant to section 7, and
19 amendments thereto, a government authority shall pay to the financial
20 institution assembling or providing financial records pertaining to a
21 customer and in accordance with procedures established under the Kansas
22 right to financial privacy act a fee for reimbursement for such costs as are
23 reasonably necessary and which have been directly incurred in searching
24 for, reproducing, or transporting books, papers, records, or other data
25 required or requested to be produced. The state banking commissioner
26 may promulgate rules and regulations concerning the fees for
27 reimbursement and the conditions under which such payments may be
28 made.

29 Sec. 10. (a) An action to enforce any provision of the Kansas right to
30 financial privacy act may be brought in the district court within three years
31 from the date on which the violation occurs or on the date of discovery of
32 such violation, whichever is later.

33 (b) In addition to any other remedy contained under the Kansas right
34 to financial privacy act, injunctive relief shall be available to require that
35 the procedures of the Kansas right to financial privacy act are complied
36 with. In the event of a successful action, costs together with reasonable
37 attorney's fees as determined by the court may be recovered.

38 (c) If any individual files a motion or application under the Kansas
39 right to financial privacy act which has the effect of delaying the access of
40 a government authority to financial records pertaining to such individual,
41 any applicable statute of limitations shall be deemed to be tolled for the
42 period extending from the date such motion or application was filed until
43 the date upon which the motion or application is decided.

1 Sec. 11. (a) Any financial institution or an agency or department of
2 the state of Kansas that knowingly obtains or discloses financial records or
3 information contained therein in violation of the Kansas right to financial
4 privacy act shall be liable to the customer to whom such records relate in
5 an amount equal to the sum of:

- 6 (1) \$1,000, without regard to the volume of records involved;
7 (2) any actual damages sustained by the customer as a result of the
8 disclosure; and
9 (3) in the case of any successful action to enforce liability under this
10 section, the costs of the action together with reasonable attorney's fees may
11 be allowed by the court.

12 (b) Whenever the court determines that any employee of an agency or
13 department of the state of Kansas has knowingly violated any provision of
14 the Kansas right to financial privacy act and the court finds that the
15 circumstances surrounding the violation raise questions of whether an
16 officer or employee of the department or agency acted intentionally with
17 respect to the violation, the agency or department supervising such violator
18 shall promptly initiate a proceeding to determine whether disciplinary
19 action is warranted against the agent or employee who was primarily
20 responsible for the violation. The agency or department after investigation
21 and consideration of the evidence submitted shall submit its findings and
22 recommendations to the administrative authority of the agency concerned
23 and shall send copies of the findings and recommendations to the officer
24 or employee.

25 (c) Any financial institution or agent or employee making a
26 disclosure of financial records pursuant to the Kansas right to financial
27 privacy act in good faith reliance upon a notice by any government
28 authority shall not be liable to the customer or any other person for such
29 disclosure.

30 (d) The remedies and sanctions described under the Kansas right to
31 financial privacy act shall be the only judicially recognized remedies and
32 sanctions for violations of the Kansas right to financial privacy act.

33 Sec. 12. Financial records relating to a customer obtained from a
34 financial institution pursuant to a subpoena issued under the authority of a
35 grand jury:

- 36 (a) Shall be returned and actually presented to the grand jury;
37 (b) shall be used only for the purpose of considering whether to issue
38 an indictment or presentment by that grand jury, or of prosecuting a crime
39 for which that indictment or presentment is issued, or for a purpose
40 authorized by the applicable Kansas code of criminal procedure;
41 (c) shall be destroyed or returned to the financial institution if not
42 used for one of the purposes specified in subsection (b); and
43 (d) shall not be maintained, or a description of the contents of such

1 records shall not be maintained by any government authority other than in
2 the sealed records of the grand jury, unless such record has been used in
3 the prosecution of a crime for which the grand jury issued an indictment or
4 presentment or for a purpose authorized by the Kansas code of criminal
5 procedure.

6 Sec. 13. This act shall take effect and be in force from and after
7 January 1, 2016, and its publication in the statute book.

February 18, 2015

The Honorable John Barker, Chairperson
House Committee on Judiciary
Statehouse, Room 149-S
Topeka, Kansas 66612

Dear Representative Barker:

SUBJECT: Fiscal Note for HB 2302 by House Committee on Judiciary

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2302 is respectfully submitted to your committee.

HB 2302 would enact the Kansas Right to Financial Privacy Act to protect the customer's right to financial privacy. The bill prohibits a government authority from accessing financial records of any customer unless they are authorized by the customer, in response to a subpoena, or relevant to a government investigation. The bill details the procedures for a government authority to obtain a subpoena to access financial records and allows a customer to make financial records unavailable under certain conditions. The bill provides a three-year limitation period to bring an action for a violation of the Act and establishes penalty and damages amounts for any violations. The Act would take effect on January 1, 2016.

The Attorney General indicates the direct costs associated with HB 2302 would come from the defense of an action brought under the law as the Attorney General may be required to defend any state agency or department that is sued for violating the Act. The Attorney General estimates the costs to defend any state agency or department could be as high as \$100,000 from the State General Fund in FY 2016. The Attorney General indicates that the bill would have a significant effect on cases under investigation, particularly in the areas of consumer protection, Medicaid fraud, and criminal litigation. While exemptions are made for subpoenas issued under the code of civil procedure and code of criminal procedure, the bill requires these to be in connection with litigation, meaning the Attorney General's ability to issue subpoenas while a case is still in the investigation phase and before litigation is filed. The effect of the limiting of this investigative authority would be a significant decrease in the number of cases that the Attorney General is able to file. For consumer protection and Medicaid fraud cases this would mean a corresponding decrease in the revenues that those cases produce. The Consumer Protection Division recovered nearly \$6.0 million in penalties, fees, and recoveries for the state in calendar year 2013, the last year for which data is available. The Attorney General estimates that revenue from penalties, fees, and recoveries could be decreased by approximately \$200,000 due to the inability to use pre-filing subpoenas.

The bill has the potential for increasing litigation in the courts because of the new procedure for issuing a subpoena to obtain financial records, allowing individuals to make financial records unavailable under certain conditions, and new violations created by the bill. If it does, the Office of Judicial Administration indicates that there would be a fiscal effect on the operations of the court system. However, it is not possible to predict the number of additional court cases that would arise

or how complex and time-consuming they would be. Therefore, a precise fiscal effect cannot be determined. In any case, the fiscal effect would most likely be accommodated within the existing schedule of court cases and would not require additional resources.

The Office of the Securities Commissioner indicates the bill may limit its ability to administer and enforce the Kansas Uniform Securities Act. The bill could increase staff time and administration costs in conducting investigations and serving subpoenas to obtain financial records. The bill includes extended timeframes for obtaining financial records and the costs to prepare and present applications to the district court could be significant. However, the agency does not have data to precisely estimate the additional expenditures or staff time that would be devoted for preparing and processing applications to the district court.

The Department of Revenue indicates the bill may limit its ability to conduct investigations and to serve subpoenas to obtain financial records in tax delinquency cases. However, the agency does not have data to precisely estimate the additional expenditures or staff time that would be necessary for preparing and processing subpoena applications to the district court or the amount of taxes that would not be recovered as a result of this bill.

The Office of the State Bank Commissioner indicates that the bill would not have a fiscal effect on its operations. The bill includes language that allows for financial examinations and the regulation of financial institutions, and exempts supervisory agencies from exchanging examination reports or other information with another supervisory agency.

The Department of Credit Unions would have a negligible fiscal effect on agency operations. The Department anticipates that it would be required to provide each regulated credit union with documentation that the Department has the right to specific financial information regarding any individual member/customer during a financial examination. However, the Department is unable to estimate the additional expenditures or staff time in order to comply with the provision of the Act. Any fiscal effect associated with HB 2302 is not reflected in *The FY 2016 Governor's Budget Report*.

Sincerely,



Shawn Sullivan,
Director of the Budget

cc: Jack Smith, Department of Revenue
Judi Stork, Banking
Steve Wassom, Office of the Securities Commissioner
Mike Baugh, Credit Unions
Glenda Haverkamp, Insurance
Mary Rinehart, Judiciary
Willie Prescott, Attorney General's Office