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Government, Military and Veterans Affairs Committee
January 21, 2010

[LB714 LB737 LB742]

The Committee on Government, Military and Veterans Affairs met at 1:30 p.m. on Thursday, January 21, 2010, in Room 1507 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB742, LB737, and LB714. Senators present: Bill Avery, Chairperson; Scott Price, Vice Chairperson; Robert Giese; Charlie Janssen; Russ Karpisek; Bob Krist; and Kate Sullivan. Senators absent: Rich Pahls. []

SENATOR AVERY: We are going to be delayed in starting today until we can get a quorum. So everybody relax for about five minutes. Two of our members are in a meeting and will not be here right at the start time, which is now. So if you'd just stand at ease for a while until we get a quorum, I will start. We now have a quorum, so we will get started. My name is Bill Avery; I'm Chair of the Government, Military and Veterans Affairs Committee. We are going to be hearing three bills today: LB742, LB737, and LB714, in that order. That is the order posted outside the room. Before proceeding, let me introduce the members of the committee. Senator Pahls will not be here today because of pressing business elsewhere, but sitting next to him would have been or is (laugh) Senator Charlie Janssen from Fremont; Senator Robert Giese from South Sioux City; next to him and our new Vice Chairman, Senator Scott Price from Bellevue; legal counsel, to my immediate right, is Christy Abraham; and to my left is Senator Russ Karpisek from Wilber; and next to him will be Senator Sullivan from Cedar Rapids; and Senator Bob Krist will be coming in a few minutes also--he is from Omaha; and our committee clerk is Sherry Shaffer, here. If you wish to testify on behalf of or in opposition to or neutral on a bill, you will need to fill out this form. It is available at each entrance to the room. If you are going to testify, please fill that out. Print very clearly, and give this to the clerk. If you do not wish to testify but you would like to be recorded for or against a bill, this is a form where you can make that designation known, and it will be available to the committee. I would ask you to keep your comments as brief as you can. I have decided not to use the light system yet; we have not needed it. Today may change our minds about that, but it is my hope that we can all agree that if we keep our comments brief, everybody will get their opportunity to say what they want to say without feeling constrained. My academic background really, really makes it difficult for me to say: You can't speak, and you can't speak for more than two minutes--because I usually have 50 minutes to speak. And I got used to that, so I...and it's my belief that a free and open discussion is always good for the development of good public policy. The introducers of each bill will be allowed to make the initial statements, followed by proponents, opponents, and neutral testimony. Closing remarks are reserved for the introducers of bills. Please listen carefully to prior testimony so that you do not repeat things that have been already said. I remember once being in a long meeting where everybody had been speaking over and over, and finally someone got up and says: Everything has been said on this issue, but not everybody has said it, and we obviously aren't going to be able to leave until everybody gets to say it. So keep that in mind: If it's been said, it doesn't need to be said again. Please, if you have cell phones--I presume

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you all do--turn them off or put them on vibrate so that we do not disturb others and the proceedings here. If you have any handouts, we need 12 copies; you give those to the clerk, and the pages will distribute them. The pages are Lisa Cook from Omaha and Mark Woodbury from Oswego, Illinois. With that, I will move to our first bill up for consideration, and that is LB742. Senator McCoy. Welcome, Senator McCoy. This is your first time appearing before this committee, I think. []

SENATOR McCOY: Thank you. Well, thank you, Chairman Avery, and good afternoon, members of the committee. I am Beau McCoy; for the record that's B-e-a-u M-c-C-o-y. And I represent the 39th District in the Legislature. I'm here to introduce to you this afternoon LB742 that calls for increased transparency in settlement agreements involving public funds. I am bringing LB742 because I believe the citizens of Nebraska have a right to know where their tax dollars are being spent and for what reason. Nebraskans sacrifice every day to provide for their families and deserve a government where payments and expenses are transparent and available for review. There are three requirements in LB742. The first is when a public entity enters into a settlement or is party to a claim or potential claim, that the settlement agreement contains a brief description of the claim. This allows citizens to know why a settlement claim exists. The second requirement is when a public entity enters into a settlement agreement, their governing body must include that agreement as an agenda item for the next regularly scheduled public meeting. In doing so, the agreement must also specifically be included as an agenda item in the public notice of the meeting. This second requirement does not include the state, any state agency or employee of the state, or claims filed under the State Tort Claims Act. The reason for the exclusion is because the State Tort Claims Act is more stringent than what LB742 proposes. A claim filed under the State Tort Claims Act goes to the state Risk Manager, who immediately advises the Nebraska Attorney General. In turn, the Nebraska Attorney General then directs a complete investigation of the claim. If the claim award is \$5,000 or more, it must be approved by the State Claims Board; \$10,000 or more requires the unanimous approval of the State Claims Board; over \$25,000, the claim is submitted for approval of the District Court for Lancaster County; and \$50,000 and up, the claim must be viewed and appropriated by the Nebraska Legislature. And I think we can all agree that having a claim viewed and appropriated by the Legislature involves a high level of both transparency and accountability. And I believe we have Chief Deputy Attorney General David Cookson with us this afternoon, who can speak more in depth a little bit later on regarding the legal ramifications of LB742. The third requirement states a confidentiality or nondisclosure clause contained in a settlement agreement which involves a public entity is void and does not prevent an officer or an employee of the public entity or any other party of the settlement agreement from commenting on the substance of the settlement agreement. The one exclusion of this third requirement is where the settlement agreement must be kept confidential and out of public record by law. In closing, I would like to draw attention to the inscription over the north doors of this Capitol Building. The words of this inscription state: The salvation of the state is watchfulness of the citizen.

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Senator George Norris' impassioned advocacy of government's duty to be accountable to the public it serves was the foundation on which our 73-year-old Unicameral Legislature has securely rested. Clearly Nebraskans, through the passage of time, have agreed with Senator George Norris' oft-quoted words: Every act of the Legislature and every act of each individual must be transacted in the spotlight of publicity. Thank you for your time, and I'd be happy to answer any questions, if there are any. [LB742]

SENATOR AVERY: Thank you, Senator. Questions from the committee? Looks like you're getting off easy. [LB742]

SENATOR McCOY: Looks like it. [LB742]

SENATOR AVERY: Are you going to stay around for closing? [LB742]

SENATOR McCOY: I will. [LB742]

SENATOR AVERY: Okay. Thank you. Proponents of this legislation? [LB742]

MIKE FOLEY: Good afternoon, Senator Avery and members of the committee. For the record my name is Mike Foley; I am the Auditor of Public Accounts, here today to voice my support for LB742 as well as my appreciation for Senator McCoy's having taken the lead on this important legislation. As Senator McCoy has already explained the bill quite thoroughly, I'll keep my comments very brief. Since becoming the state Auditor of Nebraska about three years ago, my primary objective has been and continues to be to encourage full public disclosure and openness at all levels of government. Everything that my office does is aimed at helping to foster an atmosphere of government accountability that both enhances and justifies the confidence and trust that the citizens of this state place in their public servants. In the course of my work on the issues underlying the need for LB742, I was shown and was tremendously impressed by a legislative declaration from the state of Washington's open records statutes. Here's what the citizens of Washington state say in their statute books: "The people of this state do not yield their sovereignty to the agencies which serve them. The people in delegating authority do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments that they have created." To me, that single declaration sums up perfectly what openness in government is all about. By providing the public notice of settlement agreements entered into by public entities as well as prohibiting nondisclosure clauses in those agreements, I'm confident that LB742 represents an important step towards achieving this type of openness. LB742 takes us forward by requiring that all 2,500 political subdivisions of this state give public notice of settlement agreements and prohibit nondisclosure clauses in those agreements. The bill applies to basically every unit of local government. In that regard, it is a critically important next step in advancing the

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principles of open government. As Senator McCoy has already explained, the State Tort Claims Act already contains a number of provisions that would make a broader application of the bill's language a bit of a challenge. Despite those difficulties, it's essential that we ultimately address them. I would most certainly encourage the Legislature, perhaps through an interim study hearing, to look more closely at the State Tort Claims Act in light of what LB742 would accomplish. Regardless, adoption of the legislation offered today by Senator McCoy would be, in and of itself, a very meaningful accomplishment, something in which all citizens of this state could take pride and applaud unreservedly. As your Auditor, I already have the statutory authority to access, though not necessarily make public, whatever documents or records I need to do my work. But the public does not enjoy that same level of access. From that perspective, LB742 may not have a direct impact on the functions of my office. Nevertheless, I believe the positive public policy implications of the bill across the various levels of government are enormous, which is why I felt that it's necessary for me to be here in support of the bill. Thank you very much, Senator. [LB742]

SENATOR AVERY: Would you please spell your name for the record. [LB742]

MIKE FOLEY: I'm sorry. Foley; it's F-o-l-e-y. I should know how to do that by now. (Laugh) [LB742]

SENATOR AVERY: I think we could've probably got that. Are there any questions for Auditor Foley from the committee? Senator Giese. [LB742]

SENATOR GIESE: Thank you, Chairman Avery. Mr. Foley, can you cite any other cases where there's been payoffs like the one in Papillion that we--that pretty much, I think, brought this bill to the forefront today? Can you cite any of those or--just for informational purposes? [LB742]

MIKE FOLEY: I can't. What happened in Papillion, I think, was just extraordinary. The lengths that city officials went to to keep that matter hushed up was very disturbing. And I think it begs for the legislation. [LB742]

SENATOR GIESE: Thank you. [LB742]

SENATOR AVERY: Senator Krist. [LB742]

SENATOR KRIST: Senator McCoy (sic), will this legislation allow you in your own investigations to be more public, in terms of the information that you find? [LB742]

MIKE FOLEY: Yes, I think it would, because it would ensure, first of all--take away any uncertainty as to whether or not settlement agreements are public records. They are public records, and they ought to be treated that way--both at the state level, which they

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are now, and also at the political subdivision level. [LB742]

SENATOR KRIST: I note that during your investigation--and several attempts for the press to ask you for information--it seems that you were handcuffed or gagged. [LB742]

MIKE FOLEY: I was, because I had access to all the records, but I couldn't talk about them. [LB742]

SENATOR KRIST: Thank you. Thank you very much. [LB742]

SENATOR AVERY: I have one question. It is the case now that settlement agreements involving the state are made public, right? [LB742]

MIKE FOLEY: That's my understanding, that any settlement agreement entered into by a state agency is public record. [LB742]

SENATOR AVERY: So this would apply to local subdivisions? [LB742]

MIKE FOLEY: Yes. [LB742]

SENATOR AVERY: And what--if you know this--in looking at the bill--and I haven't had a chance to read it yet--but are there measures in this that would protect people from unreasonable disclosure of personal information--Social Security numbers, things that might involve potential identify theft, for example? [LB742]

MIKE FOLEY: Yes. Government officials could take all prudent courses of action to safeguard personal identity information, to the extent that it's necessary. That wouldn't be a problem. [LB742]

SENATOR AVERY: Any more questions from the committee? Seeing none, thank you for your testimony. [LB742]

MIKE FOLEY: Thank you, Senator. [LB742]

SENATOR AVERY: Next testifier? Mr. Cookson. [LB742]

DAVID COOKSON: Chairman Avery, members of the committee, my name is David Cookson; I'm the Chief Deputy Attorney General; my last name is spelled C-o-o-k-s-o-n. I'm here on behalf of the Attorney General to testify in support of LB742. To provide some historical context, back to the Paul Douglas administration of the '70s, the Attorney General's office has always taken the position that a settlement agreement is a public record. If you review 84-712.01, it specifically provides that this statute is to "be liberally construed whenever any state, county, or political subdivision fiscal records,

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audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved." We as an office, particularly under Attorney General Bruning, have taken a very broad reading of the public records statutes for the reason that, again, we believe it is appropriate public policy that government be transparent, especially when government spends taxpayer dollars. That said, we also have an obligation to uphold the exemptions to the public records law, which you were getting at in your question, Chairman Avery. There are 16 exemptions in 84-712.05, and then there are numerous other places in our statutes where certain records are protected. For instance, in the revenue statutes, individual income tax records are protected; in Health and Human Services, there's a variety of HIPAA and other provisions that protect personal information. And so as we worked with Senator McCoy and Senator Avery on this bill, in Section (3) we provided that, again, confidentiality or nondisclosure agreements with regard to settlement agreements or claims are "void"--"against public policy." However, there's nothing that requires the disclosure of material that would otherwise be exempt, and we put it "as otherwise provided by law." That's consistent with the language in the public records statute exemptions, which allows, again, those 16 items that are identified in the other places in statute to exempt that information. It has always been our practice under Attorney General Bruning that when asked for a confidentiality agreement by an opposing party in a settlement agreement, we decline. We believe under the current law we're prohibited from doing that. However, certainly the situation in Papillion highlighted that perhaps not everyone is following the law as we believe it should be followed. We believe this is an important clarification of those provisions. I'd like to also explain the reason in subsection (2) that the state is exempt. In addition to the state tort claims process, there's the state contract claims process and the state miscellaneous claims process. All of those go through a lengthy public process: The State Claims Board meets regularly; it's a public meeting; it's noticed; all of the claims are on the agenda. However, there are certain levels of claims where they never make it to the Claims Board, because either the Risk Manager or some agency head has authority to resolve those claims. However, they don't meet as a public body; they don't have meetings with agendas. We, as an agency, do not have public meetings nor meet as--with an agenda, because it's inconsistent with our constitutional and statutory duties as lawyers to provide confidential legal advice to the state or to resolve claims on behalf of the state. However, once we enter into that agreement, we treat it as a public record. And again, all of the settlements that we do--almost all of them--get blessed by a court and/or have already been before the tort claims board, which--actually, it's a misnomer to call it the tort claims board, because they also do contract claims and miscellaneous claims. So the state is exempt from that provision for two practical reasons: one, as Senator McCoy pointed out, there's multiple levels of transparency involved with the Claims Board; and for those that don't go to the Claims Board, there's no public body that meets that would be able to satisfy those requirements. I think you may hear today some opposition to certain parts of the bill, particularly from political subdivisions about that part. And I think they do have some legitimate, practical concerns. And I know, in

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speaking with Senator McCoy and Auditor Foley, we stand ready to work with those groups if we can make this a better bill. But we think this is--Attorney General Bruning expressly believes this is an important public policy and needed to address this situation and clarify that when the state pays out money for a claim, it's a public record and the public has a right to know. [LB742]

SENATOR AVERY: Let me ask you, where would this--would this apply to the University of Nebraska, or in what way? [LB742]

DAVID COOKSON: Yes. We've always taken the position that the public records law applies to the university, and so if you're subject to 84-712, you would be subject to LB742. Basically, it's any public body as defined in the statutes. And that includes the University of Nebraska, University of Nebraska at Kearney--the public university systems. [LB742]

SENATOR AVERY: Have you ever had any reason to challenge the university's actions in this regard? [LB742]

DAVID COOKSON: Not to my knowledge. We've defended their actions a few times. I know ESPN was a little cross with them a year or so ago when they would not provide records regarding to some wrestlers who had been dismissed, and we opined to ESPN that the university was correct in their interpretation of the public records act. [LB742]

SENATOR AVERY: Okay. Thank you. Any other questions from the committee? Seeing none, thank you, Mr. Cookson. Any other proponent testimony? [LB742]

JACK GOULD: (Exhibit 1) Senator Avery, members of the committee, my name is Jack Gould--that's G-o-u-l-d--and I represent Common Cause Nebraska. I'm testifying in support of LB742. Public entities are created by the people and for the people. They're supported by hard-earned tax dollars, which should guarantee full public access. Public meetings are held to keep the public informed and to encourage the discussion of relevant issues. When some sensitive issues arise, executive session is available, but only for restricted subjects. Issues requiring a vote of the board must be done in public. Settlement agreements, however, don't follow the rules. Boards may be briefed in executive session, and agreements can be made without public scrutiny. Tax dollars can be promised and spent in secret. Deals can be made to hide situations that may be embarrassing but may not be in the best public interest. LB742 calls for the full disclosure of settlement agreements and gives the parties involved the right to comment. Common Cause supports LB742 because we believe in the public's right to know. There should be no secrets when it comes to public policy and tax dollars. The public should not be left in the dark, only to guess what kind of a deal has been made. [LB742]

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SENATOR AVERY: Thank you. Any questions from the committee? Senator Giese. [LB742]

SENATOR GIESE: Thank you, Chairman Avery. Mr. Gould, your second paragraph, the first line there: "Settlement agreements, however, don't follow the rules." And, actually, two sentences: "Boards may be briefed in executive session, and agreements can be made without public scrutiny." Are you aware of any other situations where this has happened? [LB742]

JACK GOULD: I have lots of concerns about executive session and what goes on there in many different bodies, including school boards. But, you know, I can't give you a concrete example of a settlement agreement that followed the pattern that was followed in Papillion. But that doesn't mean it won't happen again. I mean, if we don't take steps to make sure that settlement agreements are handled properly, then what happened in Papillion could happen in a lot of places. [LB742]

SENATOR GIESE: And the reason why I asked that--just from my personal involvement in city government, I mean, any executive session that I was ever involved in I've just never seen that, and maybe that's a good thing. [LB742]

JACK GOULD: No, it's a good thing. [LB742]

SENATOR GIESE: But not even discussed remotely. So I just find it hard to believe that... [LB742]

JACK GOULD: That went on. [LB742]

SENATOR GIESE: ...that could be done in executive session and... [LB742]

JACK GOULD: Well, I'm--I wasn't party to all this--but I'm relatively sure that there were serious briefings that took place in executive session. And it seems relevant that the--it seems like the agreement itself was never...all the details were not made public. And it may well be an unusual situation. But the danger of that kind of thing going on or setting a precedent that other groups could do the same kind of thing is a serious issue. [LB742]

SENATOR GIESE: I guess this particular issue would fall under that "possible litigation" part of executive session, in which you can talk about anything. [LB742]

JACK GOULD: Well, I'm not a lawyer, but I, you know, I have strong feelings about how executive session is used. And so much of the time no one knows what goes on in executive session. And it depends on how honorable the board is in executive session. [LB742]

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SENATOR GIESE: Well, they have to...there's three specific things that they can only address in executive session... [LB742]

JACK GOULD: That's correct. [LB742]

SENATOR GIESE: ...and possible litigation is one of them. [LB742]

JACK GOULD: Right. [LB742]

SENATOR GIESE: So maybe that... [LB742]

JACK GOULD: Personnel issues. [LB742]

SENATOR GIESE: Personnel issues. [LB742]

JACK GOULD: Yeah. [LB742]

SENATOR GIESE: Thank you. [LB742]

JACK GOULD: Okay. [LB742]

SENATOR AVERY: Mr. Gould, you pay attention to the University of Nebraska from time to time? [LB742]

JACK GOULD: Once in a while. [LB742]

SENATOR AVERY: And I was wondering if you were aware that the university does not consider its settlement agreements as public record? [LB742]

JACK GOULD: I wasn't aware of that. But I know that the University of Nebraska has exempted itself from many, many other rules that apply to public entities. So I'm not terribly surprised. [LB742]

SENATOR AVERY: They are anticipating considerable additional cost. And I wish Mr. Cookson were still here. But if they don't consider themselves subject to this current law and the Attorney General's office does, it seems to me there's a pretty big disconnect there. [LB742]

JACK GOULD: Well, it would appear to me that we ought to go to court and find out. [LB742]

SENATOR AVERY: You mentioned that you think that in the Papillion case there might

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have been information withheld. Do you know of anything in particular that the public needed to know that we didn't find out about? [LB742]

JACK GOULD: I think that's the problem. We don't know. I don't know. Perhaps the Auditor knows, but he's not allowed to tell us. So I think it's, you know, that's the big flaw in the whole system, is that if promises were made that are not clearly defined to the public, then none of us know what went on exactly and what deals were made. That's why this is important. [LB742]

SENATOR AVERY: Any other questions from the committee? Seeing none, thank you for your testimony. [LB742]

JACK GOULD: Thank you. [LB742]

SENATOR AVERY: Additional proponent testimony? Mr. Peterson, welcome. [LB742]

ALAN PETERSON: Thank you, Chairman. Good afternoon. I am Alan Peterson; I'm a lawyer and lobbyist for the news media in this state on matters that involve open government, First Amendment freedom of speech and freedom of the press, and all the issues that pertain to that. [LB742]

SENATOR AVERY: Would you spell your name for the record, please. [LB742]

ALAN PETERSON: And I spell my name P-e-t-e-r-s-o-n. [LB742]

SENATOR AVERY: Thank you. [LB742]

ALAN PETERSON: First name is A-l-a-n. Thank you. I don't want to repeat. The news media that I represent--which hopes it supports open government and tries hard to do so--supports this bill. There are some things about it that I don't like and I'll call to your attention, but I think it has far more strengths than weaknesses and far more value than disvalue. What I don't really like about it is it picks out one particular kind of document and says: This is on the laundry list of what shall forever and ever now be considered public record. And when the public records law was written back in 1978 and '79, the effort was very strong not to start a laundry list of what is a public record but rather to say: Everything the government holds as a document in any form is a public record unless it fits under one of the statutory exceptions. So instead of trying to throw a few apples in the basket, we said all that stuff in the basket is a public record unless this Legislature has exempted it. LB742 goes the opposite way a little bit and says: Okay, well, from here on, settlement agreements are public record. But because of what has happened in Papillion--and I know of a few other situations--the effort seems to have been to take advantage of rather vague loopholes and get around making that settlement up there public information. And the public records law, which I dearly love

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as a law, nevertheless has these loopholes. One of them is the public records law doesn't force any public body to make a public record or to create it or to have it. And if it says to itself: Well, we want to do some business, but don't put it in writing, don't put it down, don't make a recording; then there's no public record, and the public record law doesn't get violated. Here, I think that was kind of accomplished by apparently delegating away complete authority to settle claims to the municipal insurance pool for such claims so that the Papillion council and officers were saying: Well, we didn't settle this claim; don't ask us about it; it was all done by our insurers; and, no, we have no written record. At least that was their first response. And so there was a kind of a stonewall feeling under the loophole, that, well, it doesn't violate the public records law: We don't got any--to put it in the vernacular. Secondly, there was some suggestion that: Oh, well, even if we had information about this settlement, it involves employees, and therefore it's exempt under the personnel records exception to the public records law. And so that was played with a little bit, it appeared to me from reading--I gathered the press clippings. And finally, just the idea that a public body does not have to approve a settlement of a couple hundred thousand dollars because it's delegated away the authority to do that by contract doesn't smell very good. We're talking about the resignation of the chief officer of the city under silent circumstances, \$200,000 paid out to a former employee or perhaps still employee at that point, and the whole city was stonewalling the thing to at least the media. This bill would do a nice job, I think, of keeping that particular situation from happening again. There may be details of this bill that are legitimately criticized, and I would hope that the general concept of it passes, whether it be amended to fix some of the problems that you'll probably hear about in a few moments. The media is probably not going to be a major player in those negotiations. But the main point seems to me to be where the people's employees--like you folks and like the mayors and the city officers--where they have made enough of a mistake that a huge amount of money is required to cover it over, the public deserves to know that. I don't need to argue that; that would almost seem to be pretty obvious. I want to answer one last issue or mention one last thing. Lots of people will point at the media and say: Oh, well, you guys just want to get the salacious details; you want to know the nitty-gritty: How much sex was there? Were kids involved? Who were they? Who got...? You know, all that stuff. And this bill does not reduce substantially that degree of privacy that can be preserved. In the very first section, all it says is that what's required to be put up for approval is a brief statement of the claim. I've been writing settlement agreements for defendants for decades. And I don't want to put in the details, whether they're public or not. You don't put those in. You have a generic description that covers the wrong that is alleged to have been done; you have, usually, a denial of any guilt on both sides; and you have some boilerplate language that says: We both want to avoid the further costs and time of litigation, blah, blah, and therefore we've agreed to resolve. And everybody goes their separate way. And now, apparently, there's being an effort to stick in also a confidentiality agreement between the parties. That's like a municipality saying: Well, we're going to contract away the public records law. They can't do that. And this bill makes it clear that they cannot, as part of a public claim

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settlement, do that. But it doesn't mean...nothing in this bill would open up for the press or the public or anybody else the details of what amounts to a pretty ordinary domestic sexual harassment claim; it doesn't do that. So I wouldn't want to hear any exaggeration about how this opens up the details of people's personal lives unnecessarily. It doesn't. It's a good bill, and we support it. Thank you very much. [LB742]

SENATOR AVERY: Thank you. Questions from the committee? Seeing none, thank you for your testimony. [LB742]

ALAN PETERSON: Thank you, Senator Avery. [LB742]

SENATOR AVERY: Additional proponents? Okay, we'll move now to opponents. Anyone wishing to testify in opposition to LB742? [LB742]

BILL HARDING: (Exhibits 2 and 3) Senator Avery, members of the committee, my name is Bill Harding, and I spell that H-a-r-d-i-n-g. I'm a Lincoln lawyer; I'm here today at the behest of the League of Nebraska Municipalities to state our opposition to LB742. And the first reason is there's no need. I'm having distributed to you as we speak an Attorney General's opinion. If you'll look on page 4 of 6, you'll see that claims are a public record which is not exempt from disclosure. And if you'll look at page 6 of 6, you'll see that a settlement agreement is a public record which is not exempt from disclosure. That is the current state of the law in Nebraska. The second document which is being distributed is a court case. The court case is one which involves a county housing authority, and there was a confidentiality agreement in the settlement document. And if you will look at page 11 out of 14, you'll see that the court concluded that placing a confidentiality agreement in a settlement document did not change that public record from being disclosed. And to the best of my knowledge, that approach has been followed by Nebraska political subdivisions. I have represented both public and private employers for decades. Now it's true that Mr. Peterson and I graduated from law school about the same time, but he's much older than I. (Laughter) And in that period of time, I have not encountered political subdivisions which have sought to play games with the public records act. They follow what the Attorney General has said. The claim is the one bookend; the settlement agreement, the expenditure of funds is the other bookend. There may well be numerous documents generated in between those bookends which are covered by the Nebraska statutes as public documents which are exempt; that may well be. But at least as to those items which are covered by LB742, it's no change in the law; that is the current state of the law. There are some other problems with LB742, and I want to mention just a couple. Other speakers who will follow me will talk about the problems, the administrative problems, of dealing with the requirements of the agenda issues for LB742. It's possible that that is going to be an expenditure of funds that you do not want to countenance. There's also the potential that there will be more litigation encouraged. Like, Mr. Peterson and I have entered into many settlement agreements for parties, but it does not always have to be, in the words of Mr. Peterson, a

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"mistake"--the word he used--that leads to a claim. Sometimes--I know you'll find this hard to believe--sometimes plaintiffs file or threaten to file claims which have no merit. In my years I've seen many of those meritless claims, but many times you decide to settle rather than to litigate. I recall a judge in an adjoining state one time talking to counsel in chambers, saying: Remember this--it's better to have a bad settlement than a good lawsuit, because nobody wins. And it is true that sometimes even a meritless claim is one which is subject to settlement. And I think that that is something that should not be lost in this discussion on LB742. There is also the possibility that a claim under this bill is too broad, too broad to be practical; there are other speakers who will talk about that. And I urge you not to consider (sic) the possibility that some claims involve individuals I would describe as a vulnerable plaintiff, a vulnerable claimant. They may not be fully attentive to the way in which, as Mr. Cookson described, certain of their confidential information can be maintained on a confidential basis; they may not be represented by counsel. This is a bill which has the potential, I believe, to have that rule of unintended consequences apply. And I urge you to be cautious. There's one final thing that I'll mention before I leave--because I heard what Senator Avery said about the lights, and I recall specifically discussions with a former member of this body when he instituted the procedure of lights. If you would take a look at the housing authority case, which I mentioned, if you would look at pages 8 and 9 of that case, you'll see a dialogue about whether a private insurance carrier should be treated different than a municipal risk management pool like LARM. And the court there said: No, if the public funds paid the premiums, then any of the public records which the insurance carrier has--even the private carrier--those are still public records. And the Nebraska Supreme Court said as much in the city of Kimball case earlier this year. This bill does not make that clear. So in the event there are changes that go forward on this bill and an agreement is reached, I urge you to not let this bill attempt to undo the transparency that the housing authority case I mentioned and the city of Kimball case earlier this year mentioned when they said: It does not matter whether the record is in the possession of the public entity; if they paid for their coverage with public dollars, that is a public record. So I urge you to consider that as well. And if you have any questions, I'd be happy to answer them. [LB742]

SENATOR AVERY: Thank you for your testimony. Senator Krist. [LB742]

SENATOR KRIST: Mr. Harding, thank you for your testimony. Did you go to Senator McCoy and talk about your proposed opposition to this bill? [LB742]

BILL HARDING: I've never met Senator McCoy. [LB742]

SENATOR KRIST: How long have you been aware that we were going to hear this in the committee? [LB742]

BILL HARDING: About a week. [LB742]

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SENATOR KRIST: And the bill writer's name is on the bill. [LB742]

BILL HARDING: Oh, it is indeed. [LB742]

SENATOR KRIST: And you chose not to talk to the person who was writing the bill in terms of offering any counsel to the senator? [LB742]

BILL HARDING: Well, with respect, Senator, I wasn't asked to talk to Senator McCoy. But, in addition--if I may--my understanding is that there was some dialogue with Senator McCoy and Senator Avery and others about some of the potential problems that others had. I don't...you know, I'm always happy to talk to Senator McCoy or others. If my comments are redundant, I don't know how necessary it is. But I believe that some of those discussions have taken place. [LB742]

SENATOR KRIST: Well, you're the third person today that's told me that they did not talk to the bill writer or anybody about opposition, yet you're talking to the committee now. And I think it should be noted for the record that the way this system is supposed to work--you had a week to look at it; the bill writer was, I'm sure, willing to talk about any modifications to the bill. If you told me today that you did go to Senator McCoy, I'd say: Rah, rah, let's move on. I would encourage people who have issues with a bill writer to go to the bill writer and try to work out some issues or at least become part of the process. That's all I have. [LB742]

BILL HARDING: Well, I agree, Senator. With respect, I've always understood this process--the hearing process--to be the time that all the citizens come forward with their comments. And certainly of late we have been hearing a lot in the media about the challenges of discussions in back rooms; now, granted, that was at the federal level not the state level. But I agree with you that better communication is always important; I stand ready to do that. [LB742]

SENATOR KRIST: Well, I thank you for your concurrence. And my point is that when it gets to this point, we're hoping to see the best product possible. And if the citizen or the lobbyist or anybody finds an issue with a bill that's written by me, I would hope that any of you would come to me before it gets to this point. But thank you for your testimony. [LB742]

BILL HARDING: It seems very sensible. [LB742]

SENATOR KRIST: That's all I have, Chairman. Thank you. [LB742]

SENATOR AVERY: Any other questions from the committee? Thank you, Mr. Harding. [LB742]

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BILL HARDING: Thank you. [LB742]

SENATOR AVERY: Any more opponents? [LB742]

SCOTT NORBY: Mr. Chairman, members of the committee, my name is Scott Norby, N-o-r-b-y. I'm an attorney, and I represent the Nebraska State Education Association. I've been legal counsel for the NSEA for the better part of 30 years now, and in that capacity I've had an opportunity to represent many, many Nebraska teachers in issues associated typically with the severance of their employment with Nebraska school districts, political subdivisions. And in doing so I've been involved in lots and lots of settlement agreements with these public bodies. And in doing that, I guess, I want to first offer the committee some assurance that whatever happened in Papillion is not consistent with my experience in terms of how settlement agreements are handled by Nebraska's political subdivisions typically. First of all, when a settlement agreement is entered into between a public board and an individual or an entity, the public meetings law has to be followed. I mean, that means that there has to be an agenda item that specifically describes--with sufficient specificity so the public is aware of what is going on--what the board is going to consider. And number two, if the board elects to bind itself to the terms of that agreement, that it do so in open session: that a motion be made and there be a public vote, that there not be something private or, you know, a secret vote. And candidly, I think that's pretty consistent in terms of how most view the obligations of a public body under the open meetings law. And candidly, for me, as somebody who finds himself as legal counsel for the employee in that situation, it's important to me on behalf of my client that it be done that way, because in order for that agreement to be enforceable, it has to be done consistent with those open meeting law requirements. And if it's not done consistent with those open meeting law requirements, that agreement is arguably unenforceable, and that doesn't work for my client. The second issue I'd like to address is the issue of public records. It has always been my position, and of the many attorneys with whom I have dealt who have represented political bodies, that the settlement agreements are matters of public record. I make it very clear to my clients that they are. And if somebody in the public wants to see that document and makes an appropriate request to the public body, the public body should and will provide it. That's typically how these arrangements work. My only reservation about this bill is not the, of course, the evil sought to be remedied by this, which is to make sure our public bodies act in a transparent and open way, but that the confidentiality provision may have unintended consequences. I think it's important public policy that where parties want to settle their dispute, that they be encouraged to do so and there not be an unintended potential disincentive for them doing so. And one of the most significant items of consideration for a public employee, teacher, whomever, in severing their employment relationship with the employer is the assurance that when that employment ends, for whatever reason, that they can leave that employment knowing that matters that are appropriately confidential personnel matters stay that way.

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And consequently I often put in these agreements a provision that effectively states that the agreement or the circumstances leading to it shall be kept confidential, to the extent allowed by Nebraska law. And, really, the purpose of that, of course, is that matters like personnel file information--Senator Avery identified Social Security numbers and so forth, but I'm thinking more in terms of performance evaluations, you know, other things that a educator or other employee may have in the file that is appropriately kept a confidential employment matter--be treated that way by the public body after the employment ends as well. Because if they can't be assured that the public body will continue to treat it as confidential, then there's often little consideration for them to compromise. Because often when you're severing an employment relationship and there's a dispute or a claim and it goes public in the form of some type of hearing or, worst-case scenario, litigation, that obviously doesn't work for the public employee in terms of their future professional career or getting another job. So a big piece of this consideration is keeping what is appropriately confidential, confidential after the fact. Now, I listened very carefully and was encouraged, candidly, by Dave Cookson's testimony, you know, that the intent of the bill is to not limit public bodies from, you know, confirming that. But as Mr. Harding indicated, you know, and I will tell you, in my experience, a bill like this can be read by some and can chill and intimidate some public bodies, I fear--from reading that confidentiality that: no, we can't agree to that; the Legislature has now said that that's not appropriate. Maybe that can be addressed in the context of an amendment--make it clear so there aren't those unintended consequences. And, I guess, I first--I also want to speak to Senator Krist: I, candidly, understood before I came in here today that there was going to be a dialogue in that regard with Senator McCoy. And that did not happen, and I'm sorry about that. I honestly thought that that had occurred, and we hope to have that dialogue. I hope to have that dialogue with Dave Cookson and the appropriate people talk to the senator. The goal of this bill, the evil sought to be remedied, is a legitimate goal, you know. My concern as a practitioner in this area is to not create something that chills and intimidates our political subdivision from settling disputes--whether they be employment disputes or otherwise--that could otherwise possibly be settled, because of a perception about what is appropriately confidential and what is not. And it's for that reason that I offer reservations to the bill as presently structured. [LB742]

SENATOR AVERY: Thank you. Let me ask you, you seem--you're testifying in opposition, but you seem to actually support a lot of what's in the bill. [LB742]

SCOTT NORBY: Indeed. We support that settlements be public, that public bodies act transparently, and that they be public records. It has been our position--my position as a lawyer and NSEA's position organizationally--that that is true. And to that extent, I certainly agree with Mr. Harding. I don't think those portions of this bill change existing law. So I'm not against, we're not against transparency in government as it relates to settlement agreements. When money--certainly when money changes hands between a public body, the public has a right to know. [LB742]

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SENATOR AVERY: Are you worried that this bill would in any way threaten employee confidentiality--performance evaluations and things of that sort? That's one of your concerns. [LB742]

SCOTT NORBY: Yeah, I'm on the boots-on-the-ground level, Senator, you know, somebody who actually is in there negotiating for public employees and knowing how the process works. I have a fear that the bill may be perceived by some as limiting their ability to agree to keep matters that ought to be kept confidential, confidential. And, you know, where do you draw that line? Because, again, I...for a public employee to settle their employment dispute, they almost invariably are going to want and expect that matters that ought to be kept confidential associated with that former employment arrangement be kept confidential after. Because if it's not, if they don't have that assurance, they're not motivated to settle. If it's all going to go public, if they can't have some guarantees that, you know, whatever performance evaluation or whatever led to their dismissal is going to be kept confidential by that employer, they might as well go to a public hearing and let the chips fall where they may, because...you know, that's where they weigh. And I will tell you that right now--and I think this is a good thing--at least with regard to our public educators in Nebraska, you know, dismissal cases--very few of them end up in a dispute. I want to say well over 95 percent of them, you know, are resolved by agreement with the parties. I don't want to undermine that; I think that's good policy. I mean, I think it's good that the process is working, in the sense that we're not generating tons of litigation or tons of hearings, because, again, as Mr. Harding suggested, that process is enormously expensive, and nobody wins. And I don't want to disincentive either political subdivisions or my clients from settling, when that's what they want to do. And, again, as I understand, I don't think this bill is designed to do that; that's not the evil it seeks to remedy--you know, it's the Papillion case. And the Papillion case is--what little I know about it--that was a bad deal. You know, on the other hand, it's those unintended consequences and, in my experience, how I know certain folks may view legislation like this and say: No, we can't do that. And then: Okay, let's go to a hearing, or let's go to court or whatever the case may be--when they otherwise would probably resolve it. [LB742]

SENATOR AVERY: Let me ask you this: How can we have a development like we had in Papillion when you have at least agreement between you and Mr. Harding and, at the time, Attorney General Stenberg in 1991 that the law already requires that this be public record? How can that happen? [LB742]

SCOTT NORBY: You know, I--I'm... [LB742]

SENATOR AVERY: Ignorance of the law? Willful disregard? [LB742]

SCOTT NORBY: No. You know, I think--my sense is that these people were not

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ignorant; they just didn't want to comply. And so they tried to find, like Mr. Harding said, loopholes in the law and rationalized and justified their behavior based on these loopholes. Again, I, you know...that was a bad deal; that's not what the law permits. And, I mean, on the other side of it, it seems to me the law worked, because we all know about it. [LB742]

SENATOR AVERY: I would tell you that I think this committee wants to close any loopholes that may exist. And if you have any ideas on how we can do that, I invite you to share that with the committee. If you have any suggestions on how LB742 can be improved, we'd like to hear that as well. [LB742]

SCOTT NORBY: Well, I commit to you this, Senator, I intend to visit with Mr. Cookson, an individual whom I've known for a long time, and we're going to address this, because, again, what happened in Papillion is indefensible. I'm here not because of the goals sought to be achieved by the bill; I'm here because I'm concerned about unintended consequences in chilling and intimidating parties who otherwise want to settle from doing so because of an anomalous case. And if there's a way to make sure that Papillion never happens again, we're all for it. [LB742]

SENATOR AVERY: All right. I've got three people here; I'm...Senator Sullivan. [LB742]

SENATOR SULLIVAN: Thank you. Mine, hopefully, will be quick. Thank you, Senator Avery. Just so I'm getting this clarified in my own mind...so--and I hate to really be referring--continuing to refer back to the Papillion case, but that seems to be the focus. Does it appear that they disregarded the current law and that might happen again, even if we had this statute in place? [LB742]

SCOTT NORBY: You know, I think you can pass all the laws you want; if you have people motivated to break the law, they're going to do it. [LB742]

SENATOR SULLIVAN: Okay. [LB742]

SENATOR AVERY: Unless the sanctions are stiff enough to discourage them. [LB742]

SCOTT NORBY: Even then, you know. There's some...(laugh). It's hard to say. But my...you know, again, there's a point at which... [LB742]

SENATOR AVERY: But isn't the law supposed to provide a deterrent? [LB742]

SCOTT NORBY: Pardon me? [LB742]

SENATOR AVERY: Isn't the law designed to provide deterrents? [LB742]

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SCOTT NORBY: And I think it...on the most part, Senator, it does a pretty good job of that. But as we all know, it doesn't always do that. [LB742]

SENATOR AVERY: Senator Price, you had a question. [LB742]

SENATOR PRICE: Yes, thank you, Mr. Chairman. Mr. Norby, I apologize for walking in midway, but I did want to catch something here. In trying to follow this--you mentioned something about 95 percent of the situations that arise are not an issue; it comes to a resolution. [LB742]

SCOTT NORBY: I think that's accurate. [LB742]

SENATOR PRICE: Okay, whatever the number was is not material. I was thinking about it from the flip side. Is there a chance that an employee would just roll over and take it because they didn't want and they knew they couldn't go to bargain, and they didn't want to go to court, you know? So, in other words, if there's a performance issue--a performance appraisal issue--you can't argue it because you can't get it settled, and you don't really want to go to an open trial with this, so you just roll over. So then it would kind of seem to put an unfair advantage against them, because you could just allege anything. It would never go to court; you'd never have arbitration; it would just be anytime you wanted to. I mean, I think it would open the door--it could open the door, and that's...we don't want to do that. We don't want to make that to where they're even less inclined to try to clear their names. [LB742]

SCOTT NORBY: Okay. [LB742]

SENATOR PRICE: Okay, good. Thank you. [LB742]

SENATOR AVERY: Senator Krist. [LB742]

SENATOR KRIST: Thank you for agreeing to go back and look at this with the professionals. And, oftentimes, if you do that before you come to the hearings, things go smoother. And we've had a prior conversation, and I appreciate you acknowledging that. I'm going to ask you a stupid-pilot question. Okay. The people you deal with all the time and the settlements that you come to--you may have a teacher...and I'm giving you a hypothetical. You may have a teacher that for one reason or another doesn't need to be in that school district anymore, and it's a mutually agreed-upon settlement, which is reasonable in terms of settlements. It might be six months' worth of health benefits; it might be a month's worth of pay. But it certainly isn't what I would call the Papillion situation--extortion. So how do we get to a point where we enable you, in Senator McCoy's bill--how do we get to a point where we enable you to do what you're doing and keep as many of these things out of the court system as possible and prevent the extortion from happening on the other side? And I guess part of that's a question, but

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part of that is a comment in the fact that if you can do that with Mr. Cookson--ducked out again--or anybody else in amending this bill, I believe sincerely that that's where we need to go. And I'll leave you to respond, I'm sorry. [LB742]

SCOTT NORBY: I don't disagree. Again, I mean, you know, whether it's \$10 or \$10,000, I think that the public has a right to know that when political bodies enter into transactions, that they're transparent, you know. And so I have somewhat of a...this is my instinctive response to your question. I have...I'm a little concerned about putting dollar limits on it, because that might suggest that, you know, certain transactions up to X dollars are kind of okay to do in one fashion, and transactions in excess of that amount need to be more transparent. I'm not sure that's where we need to go with that. My sense of this is that we need to make sure that public bodies continue to do business in a way that is public. You know? [LB742]

SENATOR KRIST: But... [LB742]

SCOTT NORBY: And the other side...but don't tie their hands in a way that disincentives them from settling disputes with others, with whom they have disputes, where there's a mutual desire to settle it. And, you know, how you work that out I'm not entirely sure, but it seems to me that that's--the devil is in the detail, and that needs to be addressed. [LB742]

SENATOR KRIST: In every one of the situations, though, you're talking about public disclosure. [LB742]

SCOTT NORBY: Um-hum. [LB742]

SENATOR KRIST: So if the teacher and the administration did decide, in your particular profession... [LB742]

SCOTT NORBY: Um-hum. [LB742]

SENATOR KRIST: ...that this was equitable... [LB742]

SCOTT NORBY: Um-hum. [LB742]

SENATOR KRIST: ...it's public knowledge. [LB742]

SCOTT NORBY: Yeah, I mean, let me give you a... [LB742]

SENATOR KRIST: The money part of it. [LB742]

SCOTT NORBY: Yeah, let me give you a common example. Let's say you've got two

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very excellent teachers in a community. You know? And it's a school district that's suffering declining student enrollment; their state aid isn't what it used to be. You know, it's the classic situation we've all heard of. No one wants to get rid of either one of those teachers; they're both great teachers; they both have invested their lives in that community and that school district. But it's obvious to everybody that somebody needs to go. And reasonable minds can differ as to which one it ought to be. Okay? I represent one of those teachers that's indicated a willingness to sever their employment, you know, provided they can get some moving expenses and, you know, that there's confidentiality associated with their personnel file and evaluation information. And, candidly, Senator, these transactions don't involve the exchange of big dollars; we're not talking tens of thousands of dollars here. I mean, that's just not--that's not the scenario we're talking about here. I mean, that's the typical arrangement that takes place for a public schoolteacher. I mean, those are the situations. But in that agreement, that teacher almost invariably wants to know that--and so does the school district--that there's a mutual release, you know, that the school district knows that this severance means that neither party is going to throw rocks at the other one when it's all over. And if there is a couple of thousand dollars changing hands to help this teacher move down the road and apply for a different job or whatever, that's certainly substantially less money than that school district is going to spend to get lawyered up to try to do a contested dismissal case or something associated with...I mean, that's the classic situation that I don't want us to chill. [LB742]

SENATOR KRIST: Thank you. [LB742]

SENATOR AVERY: Anyone else? Senator Sullivan. [LB742]

SENATOR SULLIVAN: In that scenario, the parties might still agree to disclose that information publicly. Right? [LB742]

SCOTT NORBY: If that's what they agree to. [LB742]

SENATOR SULLIVAN: Okay. [LB742]

SCOTT NORBY: If that's what they agree to, sure. [LB742]

SENATOR AVERY: Thank you for your testimony, Mr. Norby. Additional opponents? [LB742]

PAUL KRATZ: My name is Paul Kratz; it's spelled K-r-a-t-z. I'm the city attorney for Omaha. A couple things I want to say. First of all, we believe that settlement agreements are public records, and we will disclose those if requested to. It's never been an issue. We do have some plaintiffs, occasionally, that will ask if we'd put a confidentiality clause in there. We inform them that we do not think we can enforce a

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confidentiality clause, and that usually takes care of the situation. There's one--some conflict in this particular language of the legislation. In the first part, in the first paragraph, the language talks about claims made against a public subdivision; the last part of it talks--defines settlement agreements as any settlement agreement, which I interpret to be broader. Now that's not a big issue in most cases, but a few years ago the city of Omaha actually filed suit as a plaintiff--which is unusual for us--on a professional negligence case, and we got a substantial settlement out of it. And we had a confidentiality clause in that. It was worded in such a way that if somebody requested the settlement, that the defendant would have to come in and defend it and keep it confidential if they so wanted. But the point I'm trying to get at is we would not have had that settlement but for that confidentiality clause. It was a large settlement, and it impacted their reputation. So in that case, it was beneficial. And besides that, we looked at it as money was coming into the city, as opposed to going out. What I do want to mention is more of a practical issue that we have up in Omaha. As a home rule charter city, the council has given the law department the authority to settle claims and litigation under \$35,000. Last year, for example, we settled about 170 claims before they even got to litigation; we also settled anywhere from 15 to 20 pieces of litigation--again, all under the \$35,000 mark. To take one of those through the city council each time would take, obviously, a little bit more work from our standpoint, take more time from the city council's standpoint, and just make it less efficient, at least up in Omaha. So I would suggest or would hope that that process can be worked out so that maybe there's a reference or you allow the city council to delegate some of the settlement authority so we can at least move through claims on a rather efficient basis. I'll take any questions if you desire. [LB742]

SENATOR AVERY: Thank you, Mr. Kratz. Any questions? Senator Price. [LB742]

SENATOR PRICE: Senator, thank you. Sir, my ear perked up when you said, as a plaintiff when money came in it wasn't an issue. [LB742]

PAUL KRATZ: The way I looked at it at the time...I understand the transparency concept, and we believe totally in that, and, hopefully, we are. But when the city is a plaintiff, we're not spending city funds; we're not spending taxpayer funds. We are collecting additional funds for the taxpayer. And then I think under that logic, I guess, under my logic, there's less of a need for that transparency than is there the other way, when the city is spending money, which--we normally are spending money. [LB742]

SENATOR PRICE: All right. Thank you. [LB742]

SENATOR AVERY: Senator Janssen. [LB742]

SENATOR JANSSEN: Thank you. When I was on the city council of Fremont, we dealt with--several times that we would refer it to the city attorney to deal with situations of...

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[LB742]

PAUL KRATZ: Um-hum. [LB742]

SENATOR JANSSEN: ...oh, maybe it's a sidewalk slip, or most commonly in Fremont with all the old trees we had is limbs falling down on either cars or roofs or whatnot. [LB742]

PAUL KRATZ: Um-hum. [LB742]

SENATOR JANSSEN: I know, I believe--and tell me if this bill would change that or whatnot--but the city attorney would handle that. Generally it would be a new roof, or we would pay for the front quarter-panel of a 1972 Impala or whatever the deal would be. [LB742]

PAUL KRATZ: Sure. [LB742]

SENATOR JANSSEN: But it's my understanding still, we knew what that settlement was. It just wasn't as public as far as, I guess...my understanding was the public could find out; they could come in and ask about it, but we didn't necessarily advertise it, because all of a sudden we would have 200 limbs falling on houses, if there's new roofs being handed out by the city or whatnot, if there was some type of false idea. Would you see that as being maybe an unintended consequence of this legislation? [LB742]

PAUL KRATZ: I think it is, and that's what I was talking about with respect to the process and that we would have to take everything to the council. Certainly every settlement we have is a public record. And the press sometimes asks for those, and we provide it. That is not the issue. But it does make government--at least it makes our government more efficient if we can settle those types of claims. Anyway, a lot of them were small--some trip-and-falls, tree limbs, snowplow claims, a lot of that type of stuff. [LB742]

SENATOR JANSSEN: Yeah, I was just...that would be my concern as a councilman or as a citizen. I felt that I could go into the city attorney's office and get that information. Just never chose to. [LB742]

PAUL KRATZ: Newspaper periodically--in fact, they've asked recently how many snowplow claims do we have... [LB742]

SENATOR JANSSEN: Right, yeah. [LB742]

PAUL KRATZ: ...what the cost is, and we're in the process of compiling that. [LB742]

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SENATOR JANSSEN: Okay. [LB742]

PAUL KRATZ: So that information is available. [LB742]

SENATOR JANSSEN: Thank you. [LB742]

SENATOR AVERY: Anyone else? Thank you for your testimony, Mr. Kratz. [LB742]

PAUL KRATZ: Okay. Thank you. [LB742]

SENATOR AVERY: All right, how many other people wish to testify either in opposition or neutral? Two? More? Okay. We've now been at this for about an hour, so I'm going to try to end this by 3 o'clock; that's about 17 more minutes. So John, you guys--Doug, too--keep it short. All right. Let's go. [LB742]

JOHN McCLURE: Thank you, Chairman Avery, members of the committee. My name is John McClure; I'm general counsel for Nebraska Public Power District, and I'm here today on behalf of the Nebraska Power Association in opposition to LB742. It's interesting, as you sit through one of these, you start changing your testimony based on what you've heard. And so in the interest of time and some of the comments, let me begin by saying generally I agree with everything the proponents have said. Our concern is that this bill, as drafted, I think, has a number of unintended consequences. And we have met with Senator McCoy's staff briefly to talk about our concerns and also with Mr. Cookson. It is a very broadly drafted requirement. It says that any settlement--any party to a settlement regarding any claim or potential claim must execute this settlement agreement. Most of the focus today has been on people-related issues, but I can tell you that, you know, we may have incidents where \$25 of damage is done to someone's property, and we settle that. We don't think that is the type of claim that would have to go to our board and be the subject of a discussion, but if you look at this very broad language, it would require that. There are a number of things that--we think this is much broader than is probably in the interest of the proponents, and we've had some brief conversations with them; I think there's some opportunities to narrow this much more. I also heard Mr. Peterson, who I have great respect for, refer to loopholes. I would argue that the exceptions that are in the public records statute should not be characterized as loopholes. They are very legitimate exceptions. And I think, as I understand the law from talking--or the proposed bill--from talking to Mr. Cookson, there could still be aspects of a settlement agreement that could be redacted from the public, and I think everybody should be clear about that. That's where it says, "except as otherwise provided by law." And there are some very specific exceptions and legitimate reasons for excluding certain things from public disclosure. Certainly I think this topic is a very legitimate issue. I agree that the current public records statutes do not allow you to take a settlement agreement and say: We can't disclose this. However, there may be aspects under the present law--and even if this bill passes, there will still be aspects of

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those that could be confidential, as I understand the law. And with that, I'd be happy to answer any questions. [LB742]

SENATOR AVERY: Would you be willing to give me an example of some exceptions that...just following up on your last comment. [LB742]

JOHN McCLURE: Yes. I was involved in--we had major litigation in the 1980s with General Electric Company. A part of the settlement that we structured with them had to do with the pricing of certain goods and services that they were going to provide to us as consideration for the settlement. They did not want other customers of theirs or other suppliers to know the pricing that was negotiated in that settlement. So we held that the majority of the settlement was a public record and a public document. But there were portions of it that we said are legitimately confidential under exceptions in the public records that say: Proprietary business information can be dealt with and excluded from a public records disclosure. [LB742]

SENATOR AVERY: You had no pushback on that at all? [LB742]

JOHN McCLURE: No. [LB742]

SENATOR AVERY: Okay. Any questions from the committee? Senator Sullivan. [LB742]

SENATOR SULLIVAN: So just to clarify again, you're saying that even if this legislation were passed, that there are aspects of the public meetings law that would still allow for confidentiality agreements? [LB742]

JOHN McCLURE: Parts of the public records law, as I understand it--and I urge you to follow up with your counsel and Mr. Cookson and others--that would allow a party to redact a portion of an agreement or to deem it to be confidential, as the example I just gave where we had a commercial settlement involving a commercial contract. [LB742]

SENATOR SULLIVAN: Okay. Thank you. [LB742]

SENATOR AVERY: Any other questions? Sorry for that side conversation. Seeing none, thank you very much, Mr. McClure... [LB742]

JOHN McCLURE: Thank you. [LB742]

SENATOR AVERY: ...for your testimony. Other opponents? [LB742]

JOHN BONAIUTO: Senator Avery, members of the committee--John Bonaiuto, B-o-n-a-i-u-t-o, and it's J-o-h-n--executive director of Nebraska Association of School

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Boards. I will shorten up the testimony because much of what we were going to talk about has been said by the other opponents. I know that when Mr. Peterson was up here--and we worked with Mr. Peterson on other occasions--he made reference to the "brief description" that is called for under Section 1 of this bill, and I don't know what that "brief description" necessarily means. We look at that, and that's just what it says: It shall be "a brief description." And that can cover a lot of ground. And so that is of concern. And as I look at school boards, putting items that would be part of a settlement on an agenda--and you could have a lot of different settlements for a lot of varying amounts for varying reasons, and some of these could be sensitive. And in our case, we deal with families and kids in the school districts, and so there could be some settlements that involve children. But to list these on the agenda, publicize that you're having a settlement, a brief description, talk a little bit about that, and then the amount you're settling for, I think that what we're looking at is creating almost an agenda that would have settlement amounts, so that when we have similar claims of this nature that we're advertising, that all the claims, you know, that these claims now will be at this level, because now we're advertising how much we're going to be paying. Whether it's public record or not, if someone wants to go see it, they can, but we try not to advertise it. And I think that's what we're looking at here is...and then having it on the agenda--it's unclear if the board needs to take action on this. School boards do not normally act or have an action on this type of a settlement that is being done on behalf of their insurer for them. And so other than having it on the agenda, should it be discussed? Should there be some type of action? With that, I would say that I think that there is a potential that this legislation, if enacted, would cause insurers--whether it's insurance companies or pools--to possibly take a look at whether or not there would be more litigation, whether people would be more apt to take the action to the fullest extent of the law rather than to settle and have it made public in an advertised board setting. And I think, then, rates could go up. So with that, I would conclude my testimony. [LB742]

SENATOR AVERY: Thank you. Pardon my bluntness... [LB742]

JOHN BONAIUTO: Um-hum. [LB742]

SENATOR AVERY: ...but it sounds like you're for public disclosure light. (Laughter) [LB742]

JOHN BONAIUTO: We--I think that boards--school boards--are in a fishbowl, and they do public disclosure and work with the open meetings law. This is an area that seems to be going a little above and beyond what would normally be expected. [LB742]

SENATOR AVERY: Any questions from the committee? Thank you. [LB742]

JOHN BONAIUTO: Thank you, Senator. [LB742]

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SENATOR AVERY: Mr. Clark. [LB742]

DOUG CLARK: Chairman Avery and members of the committee, my name is Doug Clark, C-l-a-r-k. I'm with the Metropolitan Utilities District; we provide utilities services to over 200,000 gas customers and to over 200,000 water customers. In my conversations with the general counsel to the district, this bill appears to be overly broad. His interpretation of the public records law is expansive, that most everything we do is a public record and that we really don't have a lot of excuses for not disclosing--if we have that record--when it's requested. So when you start adding new language to the statute, you start confusing lawyers who've been operating under certain assumptions over the years of what can be held back and what cannot be. In our case, we don't believe there's very much at all, if anything, that is not a part of the public records. And as far as a claim goes, when you're providing service to the number of people we're providing service to, if we have a water main break in a block in Omaha, we can wipe out about 15 basements in no time at all. And in that process, we now have potential claims. We start writing checks to those people so we can get the mold and the mildew and the carpet out and all the things that they have to do to make their life better. If we have to wait until a board member (sic) to get those expenditures approved, we're putting those customers, I think, at an extreme disadvantage. While we believe in public disclosure and support public disclosure, we believe this bill is overly broad, and we believe it creates more concerns than it answers questions. And as far as the Papillion case goes, legal remedies were available in the event that that information wasn't forthcoming. And I think at that point, if it did go to court, and there was a court ruling in the negative, that this committee would have a clear vision of what the courts decided needed to be done. So that information could be made public, and it would be clear for all public institutions of what our responsibilities are. So I'm not sure that the bill addresses any real problem at this time. I understand the perception problem that the bill is attempting to address. And we, being a public body, don't like having the perception that we would withhold information or would inadvertently utilize clauses to avoid our responsibility as a public body. With that, I'd be happy to answer any questions. [LB742]

SENATOR AVERY: Thank you for your testimony. Questions from the committee? Seeing none, thank you. [LB742]

DOUG CLARK: Thank you very much. [LB742]

SENATOR AVERY: Any other opponents? Anybody wish to testify in a neutral position? Seeing none, that closes the hearing on LB742. Thank you for your attendance. Oh, I'm sorry. I'm sorry. Senator McCoy, I was worn out by the testimony, and I forgot. [LB742]

SENATOR McCOY: Well, thank you, Chairman Avery and members of the committee. I will be brief in my closing remarks. We've had a interesting discussion this afternoon in

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regard to LB742, and I appreciate the questions that you asked, both proponents and opponents of the bill. I stand ready, as I always do with any piece of legislation, to hear from both parties on the issues at hand and any unintended or unforeseen consequences that may come up, to sort of clear the air. Only one of the opponents that testified today approached me or my staff before today's hearing. So I would be happy to discuss any opinions and thoughts about this bill with any and all folks with regard to it. I think a few things that may be important to note is that, as Deputy Attorney General Cookson stated, there are--as it's clearly in statute--16 exemptions to this. And we're not in any way, or I should say, I'm not in any way attempting to delve into those 16 exemptions as far as what would be discussed. And very clearly there were concerns noted in regard to children and families and...in fact, number 7 of those 16 exemptions are personal information in records regarding personnel in public bodies--other than salaries and routine directory information--cannot be discussed. And that's just 1 of those 16 exemptions. So I feel like some of that may have been redundant, in that there are clearly a long list in there of those things that already can't be discussed. And I'm in no way attempting to open that up; that's not what this is about; this is not to get into the nuts and bolts of the settlement or claims process. This is to make available to folks what exactly is out there. How can the public, how can Nebraskans request information about something if they don't know that it exists? And that's merely what this is trying to accomplish. And with that, I would close my remarks. Thank you, Mr. Chairman.
[LB742]

SENATOR AVERY: Thank you, Senator McCoy. I'm sorry I overlooked your closing.
[LB742]

SENATOR McCOY: No, you're fine. [LB742]

SENATOR AVERY: Any more questions? Thank you very much. [LB742]

SENATOR McCOY: Thank you. [LB742]

SENATOR AVERY: Now we will officially close the hearing on LB742 and will move to the second item on the agenda, LB737. []

SENATOR PRICE: All right, ladies and gentlemen, we'll go ahead and go ahead with LB737. Senator Karpisek, please open. [LB737]

SENATOR KARPISEK: Thank you, Chairman (sic) Price and members of the Government Committee. My name, for the record, is Russ Karpisek, spelled R-u-s-s K-a-r-p-i-s-e-k, and I represent the 32nd Legislative District. I'm here today to introduce LB737, which deals with the addition of nursing director to the list of nonclassified positions for the Department of Health and Human Services and the Department of Corrections. I believe the director of nursing positions are very instrumental in the

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quality of care and level of competency of any healthcare institution. It is my understanding that the departments have been having a hard time filling some of these positions because of salary limitations. I feel that our citizens and our institutions should have the same level of care as in the private sector, and if the best candidates are not available to us because of the pay scale, we're doing them an injustice. This basically would just take the directors of nursing out of the union contracts so we could--the department could negotiate a different pay scale for them. We did it last year or a couple years ago with psychiatrists, some other positions that we were maybe having a hard time filling. It's exactly what we're doing here. So with that, I would try to answer any questions. We've got people behind me that will be better to answer them. [LB737]

SENATOR PRICE: Any questions? Seeing none, thank you. I take it you'll stay here for closing. [LB737]

SENATOR KARPISEK: I suppose. [LB737]

SENATOR PRICE: All right. Can we have proponents, please? Any proponents? [LB737]

KERRY WINTERER: (Exhibit 1) Good afternoon, Senators, members of the Government, Military and Veterans Affairs Committee. I am Kerry Winterer; that's K-e-r-r-y W-i-n-t-e-r-e-r. I am chief executive officer of the Department of Health and Human Services. I'd like to thank Senator Karpisek for introducing LB737 on behalf of DHHS and the Department of Correctional Services, and I'm here to testify in support. This legislative bill would amend state statute 81-1316, section 15, by adding the position of nursing director to the allowed list of nonclassified positions. DHHS and the Department of Correctional Services are the only state agencies that use this title. The nursing director is an integral management position responsible for directing nursing care and treatment services and implementation of nursing policy and practice in a 24-hour facility. It's important for these positions to be filled as quickly as possible because of their critical role in providing and maintaining nursing care in accordance with accreditation, certification, and licensing standards. The nursing directors with DHHS report directly to the facility administrators or facility operating officers. Whenever these positions vacate, extensive recruitment efforts are undertaken. Making the position of nursing director a nonclassified position will allow us the flexibility to better fill vacancies in a timely manner and compete with the private sector in this highly competitive market. Thank you; I will be happy to answer any questions. [LB737]

SENATOR PRICE: Yes, Senator Janssen. [LB737]

SENATOR JANSSEN: Thank you, Chairman (sic) Price. Mr. Winterer, what is the pay scale right now that you're paying nurses? [LB737]

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KERRY WINTERER: I couldn't really tell you that. It's on the classified scale, so it would be subject to that classification across the state. But I can provide that information if you'd like. [LB737]

SENATOR JANSSEN: Yeah, I'd be curious to know where that's at... [LB737]

KERRY WINTERER: All right. [LB737]

SENATOR JANSSEN: ...to see if it's a truly competitive wage or not. It's an area of expertise I certainly have, so it'd make me better informed on... [LB737]

KERRY WINTERER: Sure. [LB737]

SENATOR JANSSEN: ...whether or not this is necessary, or not. [LB737]

KERRY WINTERER: Um-hum. Sure. [LB737]

SENATOR JANSSEN: Thank you. [LB737]

SENATOR AVERY: Any other questions from the committee? Seeing none... [LB737]

KERRY WINTERER: Thank you. [LB737]

SENATOR AVERY: ...thank you, sir. Any more proponents? [LB737]

BOB HOUSTON: (Exhibit 2) Good afternoon, Senator Avery and members of the Government, Military and Veterans Affairs Committee. My name is Bob Houston, H-o-u-s-t-o-n; I'm the director of Corrections, Nebraska Department of Correctional Services. I would also like to thank Senator Karpisek for introducing this bill on behalf of the Department of Corrections and also Health and Human Services. The legislative bill would amend 81-1316, Section (1)(w), by adding the position of nursing director to the list of nonclassified positions for the Department of Corrections. The change would provide greater flexibility in hiring and retention. The position of nursing director is an integral management component within the Department of Corrections, Health Services, and supervises numerous critical positions that provide direct care in 24-hour facilities. This position reports directly to our chief operating officer for health services, who is also in an at-will position. Making the nursing director a nonclassified position helps ensure that the community standard of care--the level of medical care we are statutorily required to provide--is met and allows greater opportunity to recruit, hire, and supervise critical personnel without restrictions from selection procedures, compensation rules, career protections, and grievance privileges. I'll answer any questions that you would have. [LB737]

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SENATOR AVERY: Thank you, sir, for your testimony. Questions from the committee? Senator Janssen. [LB737]

SENATOR JANSSEN: Thank you, Chairman Avery. Could you possibly answer the question that I asked previously of what--do you know what the current pay grade or pay scale is for director of nursing? [LB737]

BOB HOUSTON: I would only be guessing at it, and I wouldn't know what the comparison would be to that in the community. And so I, like Mr. Winterer, will get you that information. [LB737]

SENATOR JANSSEN: Okay. [LB737]

BOB HOUSTON: Good. Thank you. [LB737]

SENATOR JANSSEN: Thank you. [LB737]

SENATOR AVERY: Any other? Senator Sullivan. [LB737]

SENATOR SULLIVAN: Thank you. Could you just explain to me the difference between a classified and nonclassified employee? [LB737]

BOB HOUSTON: A classified employee retains...is a...generally under rules and regulations, there could be a contract-covered employee. And they have grievance rights, due process rights. The at-will positions are appointed. And what that does is, is that they sit at the will of the director. And we can--we have some latitude in compensation, so we can match up with what the community pays. Also, they're in a key position, and so if that person needs to be removed for some reason, you don't have the due process procedures you have to follow. [LB737]

SENATOR SULLIVAN: At-will, meaning nonclassified. [LB737]

BOB HOUSTON: Right. Exactly. Yes. There is nonclassified and at-will. They're different, but they're very similar in their effect. [LB737]

SENATOR SULLIVAN: Thank you. [LB737]

SENATOR AVERY: I see no more questions. Thank you, Mr. Houston. [LB737]

BOB HOUSTON: Thank you. [LB737]

SENATOR AVERY: Any more proponent testimony? Any opposition testimony? Neutral? Senator Karpisek, do you wish to close? Senator Karpisek waives closing.

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That ends the hearing on LB737. And we will now move to LB714. [LB737]

SENATOR PRICE: Thank you. We're going to--like he said, we'll move on to LB714. Senator Avery, you are free to open on LB714. [LB714]

SENATOR AVERY: No more cracks about turning on the lights, huh? [LB714]

SENATOR PRICE: Well, you'll control the lights from there, sir. [LB714]

SENATOR AVERY: (Laugh) My name is Bill Avery, spelled A-v-e-r-y; I represent District 28. I am here to introduce LB714. You may recall that in the '09 session we had a discussion on the floor about independent expenditures. And that discussion revealed a lot of discontent among sitting senators about their experiences in campaigning for office and about the role that independent committees played in those campaigns. And it led this committee to look at this issue in an interim study. And we did, in fact, examine all of the issues within the jurisdiction of the Nebraska Accountability and Disclosure Commission, including independent expenditures. There was...in the course of that interim study, we had to grapple with the issue of the First Amendment, which we all recognized makes it very difficult to regulate these independent expenditures and independent committee activities. We did, however, in the course of those discussions, come to realize that perhaps what we could do here in Nebraska was to perhaps require additional disclaimers from the independent committees making independent expenditures in campaigns. So we agreed to two things: one, that we would propose to the Legislature and this committee that independent committees making an independent expenditure would have to include the name of the committee treasurer on that piece of literature, or it would have to be noted in a TV ad or in any communication that the independent committee was engaged in. So first would be the disclosing the name of the campaign treasurer. Second, if the independent expenditure related to a candidate, then the disclaimer would include language on the printed matter or advertisement that the expenditure was not authorized by the candidate or the candidate's committee. This provision is intended to clarify that expenditures by independent committees are done independently of candidates. These were concerns expressed by some of the state senators in our discussions on the floor. It was...there were strong feelings, as you recall, about some of the negative mailings that had taken place and that it was not clear whether candidates were involved in those. So this disclaimer is intended to clarify that these mailings are not authorized by a candidate. The committee counsel and I had a discussion before we came in here about the enforcement of such a law. And, already in statute, punishment for violating laws under this particular section of statute involve a Class IV misdemeanor, which has a maximum fine of \$500 or a minimum fine of \$100 and no prison time. I'm sure that this does not resolve the issue of independent expenditures. It's probably as far as we can go and stay within the constitutional protection of free speech; I wish we could do more. I'm not seeking to undermine the First Amendment, but having gone through a pretty bad

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campaign myself a few years ago and been subject to a lot of these independent expenditures, I have interest in this, and many of you do, too. And I've always wanted to find out where the line was so that we can fairly get a better handle on who's doing what to whom without running afoul of the First Amendment. This, I believe, will take us part of the way there. And I think it would certainly be within the constraints of the First Amendment. So with that, I would urge you to advance this to General File. And I will take questions. [LB714]

SENATOR PRICE: Thank you, Senator Avery. Are there any questions? Yes, Senator Giese. [LB714]

SENATOR GIESE: Senator Avery, so on a--you're talking about a flier or a mailer, and it will say: This is paid for--or: Bill... [LB714]

SENATOR AVERY: It could be a TV advertisement. [LB714]

SENATOR GIESE: ...and listing Bill Avery as treasurer of... [LB714]

SENATOR AVERY: Yeah. Bill Avery, treasurer. I would see it: This is not paid for by any political candidate or candidate committee; Bill Avery, treasurer. And if you wanted to contact me, as the person whose name is on that, then you would be able to do that. You'd be able to connect the mailing with a person. Now you could do that now by going to Accountability and Disclosure and looking through the filings. This simply puts it in the public domain right at the point where the mailing or the advertisement is aired. [LB714]

SENATOR GIESE: And you think, in itself, that will...it won't solve the problem, will it? [LB714]

SENATOR AVERY: No. It won't stop negative advertising, but at least you'll have a little bit more accountability. [LB714]

SENATOR GIESE: Thank you. [LB714]

SENATOR PRICE: Senator Karpisek. [LB714]

SENATOR KARPISEK: Thank you, Senator Price. Senator Avery, so you're saying it wouldn't say: Paid for by People for the Rights to Breathe; Bill Avery, treasurer. [LB714]

SENATOR AVERY: It can. It can read: Paid for by Nebraskans for Good Government; Bill Avery, treasurer; not paid for by any political candidate or candidate committee. It's an additional disclaimer. [LB714]

SENATOR KARPISEK: Okay. Thank you. [LB714]

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SENATOR PRICE: Senator Sullivan. [LB714]

SENATOR SULLIVAN: Thank you. Again, a clarification on that, where you say the second disclaimer would be--something about containing...if a...well, anyway, I guess if it's a negative piece about a candidate, the disclaimer then gives the name of the treasurer, but--and then it says, not paid for by the opposing candidate. Is that what you're saying or...? [LB714]

SENATOR AVERY: The concern expressed last year, you may remember, was that there was deep suspicion that a lot of the negative communications by independent committees... [LB714]

SENATOR SULLIVAN: Um-hum. [LB714]

SENATOR AVERY: ...was actually being sponsored by candidates. [LB714]

SENATOR SULLIVAN: Right. [LB714]

SENATOR AVERY: And to require a note on the communication: Not paid for by a candidate... [LB714]

SENATOR SULLIVAN: Wouldn't that necessarily have to name the candidate? Or would it have...? [LB714]

SENATOR AVERY: No, it wouldn't. But if you're falsifying it, then that's a violation of law. If it, in fact, is paid for by a candidate and you say it is not... [LB714]

SENATOR SULLIVAN: Okay. [LB714]

SENATOR AVERY: ...that's a violation. [LB714]

SENATOR PRICE: Great. Then I'd like to follow up then, real quick, to tie up the loose knot there, to me. You have--you've...I've almost heard three different declarations. We have one to say who the treasurer is, then one that says: Paid for by... [LB714]

SENATOR AVERY: Um-hum. [LB714]

SENATOR PRICE: Because you've got: Paid for by the committee and the treasurer... [LB714]

SENATOR AVERY: I think that's the current law. [LB714]

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SENATOR PRICE: You've got two. Okay. And the treasurer. And then you'd have--then you said: Not endorsed by any candidate committee. And then you have: Not paid for by the candidate committee. Those are kind of different--you know, I just want to make sure... [LB714]

SENATOR AVERY: I don't remember... [LB714]

SENATOR PRICE: ...which one you wanted there. [LB714]

SENATOR AVERY: I don't remember saying anything about: endorsed by. [LB714]

SENATOR PRICE: All right. Well, we'll work through that as it...thank you. Any further questions? Seeing none... [LB714]

SENATOR AVERY: Not authorized, I think, was the word I used. [LB714]

SENATOR PRICE: Okay. [LB714]

SENATOR AVERY: Not authorized by. [LB714]

SENATOR PRICE: Thank you. Seeing no further questions, we'll move on to proponents. [LB714]

JACK GOULD: (Exhibit 1) Senator Price, members of the committee, my name is Jack Gould--that's G-o-u-l-d--and I represent Common Cause Nebraska. I wanted to...I brought to you what accumulated in my mailbox during the last campaign, in 2008. I live on a farm; I get my mail in town, and our mailbox is both my wife, myself, and my brother. We all live on the same farm. So you might look at the names on here and be a little--wondering why there are three different names. But in most cases I got these things in triplicate, so my mailbox was always full. And it's...I think when you--if you get a chance to go through this, and you based your voting on the kind of slander that appears in here, you probably may decide: I'm not even going to vote--because the character assassination is such that you really don't know who you're voting for or what the candidate is like, because it's so distorted. So I wanted to begin my testimony by just passing this around. You folks can look at it, and you can imagine...most of this came in the last three weeks of the campaign, so my mailbox was jammed all the time. I'll just read a statement that I prepared. And then if there are any questions, I'd be very pleased to address them. I've got to use my glasses. (Laugh) Independent committees have become an embarrassment to our electoral process. These committees are often responsible for personal attack ads during the last two weeks of a campaign. Based on lies and half-truths, such ads divert attention from real issues and discourage good people from running for office. It's even more discouraging to see both the Democratic and Republican Parties responding to these ads with their own character assassination

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rather than focusing on the issues and supporting informative discussion. The First Amendment protects free speech, but the Nebraska Unicameral needs to enact LB714 to require independent committees to make it crystal clear to the public who actually is speaking. Those who choose to hide behind patriotic names while throwing mud should be easy to identify. The Accountability and Disclosure Commission Web site tracks the names of the independent committees, who contributed to their finances, and who the major organizers are. This information is vital, but it requires some research; and in the final days of a campaign, voters don't always take the time to examine every ad. LB714 clearly separates the voices of the candidates from the independent committees. It also requires that committee treasurers be identified on each piece of advertising. This is not interfering with free speech. It simply gives the public a better chance to know who is really speaking. I think that's really the key to the entire situation, is that I don't think that the candidates set out to assassinate one another. They set out with the idea that they're going to talk about issues. But as it goes on, and when we have independent committees, particularly, starting to throw mud, the other side feels that they have to do it, and then it just gets exaggerated. And a lot of the things that are said are totally uncalled for and have nothing to do with the campaign. So by following through...and we can't change the First Amendment--I don't know that any of us want to--but we can make it clear who speaks. And I think what you'll notice on here--the first disclaimer that's already required just says this was paid for by some organization. But, you know--Citizens for a Better America--you get that. Who are these people? You don't know who they are. Sounds good, but you don't know who they are. So the next disclaimer would be to separate it from the candidates, that this is not being sent out by either of the candidates. That needs to be there. And then the third thing is putting a name on there, like the treasurer, because if people, you know, if people are going to throw mud, then we ought to know who they are, and there needs to be a name. And if somebody wants to step up and they want to call somebody "Mr. Moneybags" or accuse someone of not paying their income tax or saying that they run a awful business of some sort, then there should be somebody held accountable for that. The public wants to know. And I know when I got these things in the mail, I looked at them, and I thought, you know, I'd just like to know who it is. I'd like to call the guy up and say: Knock it off; you know, this isn't right. So that is why I think Senator Avery has put those two extra steps. It's not just who paid for this ad; it's the fact that the candidate didn't pay for the ad. And then it's--here's a guy who did, and he ought to be held accountable. [LB714]

SENATOR PRICE: Thank you, Mr. Gould. Are there any questions from the committee? Seeing none... [LB714]

JACK GOULD: Okay. [LB714]

SENATOR PRICE: ...thank you [LB714]

JACK GOULD: Thank you. [LB714]

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SENATOR PRICE: Any further proponents? [LB714]

FRANK DALEY: Good afternoon, Vice Chairman Price and members of the Government, Military and Veterans Affairs Committee. My name is Frank Daley, D-a-l-e-y. I serve as the executive director of the Nebraska Accountability and Disclosure Commission, and I appear today to express the commission's support of LB714. Let me just clarify, I think, what the current state of the law is and how this would change. Under the current state of the law, if there were political materials sent out by an independent committee, you would have a disclaimer which would say something like this: Paid for by Citizens for Good Government Committee, 1111 North 11th Street, Lincoln, Nebraska 68508. That meets the current disclaimer requirement. Under LB714, the disclaimer would be something such as: Paid for by Citizens for Good Government, 1111 North 11th Street, Lincoln, Nebraska 68508; John Smith, treasurer; not authorized by any candidate or any candidate committee. And I think what the purpose here is that, obviously, as everyone said, there's been some discussion and some unhappiness with the way certain independent committees have been functioning over the past few elections. And most of this unhappiness is directed to the types of literature which are sent out. And, unfortunately, what happens is when literature goes out which trashes a candidate, that literature is often attributed to the opposing candidate; people believe that, somehow, the opposing candidate has sent that out. And it's kind of an interesting thing. Once this starts rolling, you've got candidates on both side that are being trashed and are being blamed for the trash on the other side. LB714 doesn't attempt to limit what independent committees can say. And LB714 does not attempt to limit how much independent committees can spend. What it does is it--what it primarily does is makes clear in the disclaimer that whatever this material is, it hasn't been authorized by a candidate; it hasn't been authorized by a candidate committee. And maybe, in some small way, that gives the members of the public reading it the opportunity to understand the precise nature of what it is that's been set before them. Thanks for the opportunity to testify today. [LB714]

SENATOR PRICE: Thank you, Mr. Daley. Are there any questions? Yes, Senator Sullivan. [LB714]

SENATOR SULLIVAN: Just a quick question. Do you think there's any question of constitutionality in this? [LB714]

FRANK DALEY: No. [LB714]

SENATOR SULLIVAN: Okay. [LB714]

FRANK DALEY: I don't. [LB714]

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SENATOR SULLIVAN: Thank you. [LB714]

FRANK DALEY: If we're attempting to limit what they could say or what they could spend, yes. But even on the federal level now, you will probably see...with federal candidates, there's a tag line that says: My name is John Smith, and I authorized this campaign ad. For independent committees which are putting out campaign commercials or ads, there's usually a tag line that says: Not authorized by any candidate. [LB714]

SENATOR KRIST: So this is consistent with what they're--what the federal law does... [LB714]

FRANK DALEY: Yes. [LB714]

SENATOR KRIST: ...now? [LB714]

FRANK DALEY: Well, generally. I mean, it...one side of it. Currently Nebraska law does not require candidates for Nebraska state and local office to say in their ads: Authorized by the candidate. But this law would at least do part of what federal law does and require independent committees to say: This is not authorized by a candidate. [LB714]

SENATOR KRIST: You're familiar with federal law as well? [LB714]

FRANK DALEY: I'm familiar with it; I'm not an expert in it. [LB714]

SENATOR KRIST: Are we not going far enough, if federal law goes further? Or does that even...? [LB714]

FRANK DALEY: Could be. But I don't think that there seems to be an issue on the candidate side with their own materials right now. [LB714]

SENATOR KRIST: Okay. [LB714]

FRANK DALEY: This is intended to address a particular situation. [LB714]

SENATOR KRIST: Thank you, sir. [LB714]

SENATOR PRICE: Seeing no further questions, thank you, Mr. Daley. [LB714]

FRANK DALEY: Thank you very much. [LB714]

SENATOR PRICE: Are there any further proponents? Opponents? Neutral? Seeing none, Senator Avery--free to close. [LB714]

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SENATOR AVERY: Very quickly. Thank you, Senator Price. We all agree there's a problem. We know that there's a limit to what we can do. This might be it. Thank you. [LB714]

SENATOR PRICE: Thank you, Senator Avery. Seeing that that's the end of this hearing, it closes LB714 and closes the day. Thank you all for attending your Nebraska Legislature. [LB714]

SENATOR AVERY: We will convene tomorrow for hearings and a brief executive session. We'll exec on bills today and yesterday. []