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Transcriber's Office

Executive Board Committee  
February 01, 2016

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[LB686 LB1016]

The Executive Board of the Legislative Council met at 12:00 p.m. on Monday, February 1, 2016, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB686 and LB1016. Senators present: Bob Krist, Chairperson; Dan Watermeier, Vice Chairperson; Kathy Campbell; Ernie Chambers; Colby Coash; Galen Hadley; Dan Hughes; Tyson Larson; Heath Mello; and John Murante. Senators absent: None.

SENATOR KRIST: Welcome to the Executive Board committee hearing for February 1, 2016. We're going to start right away. We do have a quorum. Today we're going to hear LB686 by Senator Chambers to provide the publication and distribution of the Constitution of Nebraska. And the second bill we'll hear today is LB1016, Senator Watermeier, redefine agencies under the Legislative Performance Audit Act. Before we start, I'd like to start with introductions around the room and I'll start my far right with Senator Mello.

SENATOR MELLO: Heath Mello, District 5, south Omaha.

SENATOR HADLEY: Galen Hadley, District 37, Kearney.

SENATOR KRIST: Senator Chambers is down there.

SENATOR WATERMEIER: Senator Dan Watermeier, Syracuse, District 1.

JANICE SATRA: Janice Satra, legal counsel.

SENATOR KRIST: Brandon is our page today. I'm Bob Krist from District 10 in Omaha.

BETH DINNEEN: Beth Dinneen, committee clerk.

SENATOR CAMPBELL: Kathy Campbell, District 25.

SENATOR MURANTE: John Murante, District 49, Gretna and northwest Sarpy County.

SENATOR COASH: Colby Coash, District 27, Lincoln.

SENATOR HUGHES: Dan Hughes, District 44, ten counties in southwest Nebraska.

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SENATOR KRIST: Thank you, Senators. We're not going to use any lights so there won't be any limits, but I ask you to be respectful of time because we try to get this in and we'll have an Exec Session following this before we are able to do anything else during lunch hour. If you're going to testify, please fill out a sheet. They're right outside the door and hand them to the page when you come in. If you have any handouts for us, let the page do that for you as well. When you come to the mike, please spell your name, both first and last. That's for the transcribers, not us, to make a clear record. And be warned--we have a new speaker system all over the Capitol so the speakers are extremely sensitive. So if you don't want to be heard with a private conversation in the back, I'd ask you to just take it out of the room. With that, Senator Chambers, LB686.

SENATOR CHAMBERS: Thank you, Mr. Chairman, members of the Exec Board. I'm going to do a little differently from the way I usually do with most of the bills I offer. This pertains to the constitution. It's a technical bill that's very detailed. And rather than put all of that information in my statement of intent, it kind of sketches out. Then because the bill is not that long, I'm going to read the text of the bill. The reason I'll do it, if somebody wants to look at the transcript, they're not going to have the bill itself but the text of it will be there. And as you'll see, it's very important. Legislative Bill 686 establishes a process for the development and publication of a certified version of the Nebraska Constitution with annotations of cases affecting its operation. Such version shall constitute the official version of the Nebraska Constitution and may be cited as prima facie evidence of the law in all courts of this state. The Secretary of State and the Attorney General participated in the formulation of this bill. Duties of the Secretary of State, the Attorney General, the Revisor of Statutes, and the Clerk of the Legislature are enumerated. The certified version will be published on the Legislature's Web site; in the Session Laws; and made available for distribution to the public upon request. The version in the Revised Statutes may be different, due to the inclusion of additional annotations concerning interpretations, etcetera, by the Nebraska Supreme Court. The wording, or text, of the Constitution itself will not be changed. Updating will be published each year, as needed. And this is the text of the bill: "Except as provided in subsection (6)" and that subsection lays out in detail when it is not necessary to do all of this recertifying and I'll read that, but anyway, "(1) Except as provided in subsection (6) of this section, following each regular session of the Legislature, the Revisor of Statutes shall compile an updated copy of the Constitution of Nebraska, showing all sections as they exist at that time and including notes after the end of each section as follows: (a) For each section, the Revisor of Statutes shall provide a note referencing the source of such section and any amendments thereto; (b) If a section is declared unconstitutional or inoperative, in whole or in part, by the final judgment of a federal court or the Nebraska Supreme Court, the Revisor of Statutes shall provide a note to that effect. The Attorney General shall assist the Revisor of Statutes in complying with this subdivision by promptly notifying the Revisor of Statutes when any section is declared unconstitutional or inoperative; and (c) For any section, the Revisor of Statutes may provide additional notes at his or her discretion. (2) The Revisor of Statutes shall, within two days after the Legislature has adjourned sine die, transmit the updated copy of the

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Constitution of Nebraska as compiled under subsection (1) of this section to the Secretary of State for his or her review to determine whether the updated copy accurately reflects the" and here's where the amendment will go "accurately reflects the text of the" that's the amendment, "Constitution of Nebraska as it exists at that time. If the Secretary of State determines that any changes are necessary, he or she shall, within five days after receipt of the updated copy, notify the Revisor of Statutes of the changes. The Revisor of Statutes shall make such changes and then promptly return the updated copy to the Secretary of State for further review. If the Secretary of State determines that no changes are necessary or that all necessary changes have been made by the Revisor of Statutes, the Secretary of State shall certify the updated copy as an accurate reflection of the" then reinsert the amendment these three words "text of the" continuing, "Constitution of Nebraska as it exists at that time. The Secretary of State shall then transmit the certified copy to the Clerk of the Legislature for distribution no later than ten days after the Legislature has adjourned sine die. (3) After receiving the certified copy of the Constitution of Nebraska from the Secretary of State pursuant to subsection (2) of this section, the Clerk of the Legislature shall: (a) Make the certified copy available in electronic form on the Legislature's web site; (b) Include the certified copy in the session laws compiled and published pursuant to section 49-501.01; and (c) Print pamphlets of the certified copy for distribution to the public upon request. (4) The certified copies printed by the Clerk of the Legislature pursuant to subdivisions (3)(b) and (3)(c) of this section shall constitute the official version of the Constitution of Nebraska and may be cited as prima facie evidence of the law in all courts of this state. (5) The Secretary of State shall maintain in his or her office a copy of every edition of the Constitution of Nebraska certified pursuant to this section. (6) Following any regular session of the Legislature, if the Revisor of Statutes determines that there have been no changes to the" and then again the amendment, "text of the" continuing, "Constitution of Nebraska and no changes to the notes required by subsection (1) of this section, the Revisor of Statutes may decide not to compile an updated copy of the Constitution of Nebraska for that year. If the Revisor of Statutes decides not to compile an updated copy for the year, he or she shall notify the Secretary of State and the Clerk of the Legislature of such fact and the Clerk of the Legislature shall continue to use the most recent year's certified copy for purposes of subsection (3) of this section." Then when you turn the page, there is this amendatory language beginning on page 4 in line 5: "The session laws shall also contain a certified copy of the Constitution of Nebraska as required by section 1 of this act." And the session laws are those little paperbacks that will show what has been done by the Legislature before a new hardbound volume of the statutes is put into play. And the reason I read it, I could read it a lot faster than if I just recited it to show how good my memory at 78 years old is. If you have any questions, I'll be glad to answer them. [LB686]

SENATOR KRIST: Senator Coash. [LB686]

SENATOR COASH: Thank you, Senator Krist. Senator Chambers, within this bill there are three entities directed to do something under three different deadlines. [LB686]

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SENATOR CHAMBERS: Um-hum. [LB686]

SENATOR COASH: The Revisor has two days, the Secretary of State has five, and the Clerk has ten to do what each of those entities is mandated to do under this bill. I am wondering if this is enough time and I'm asking this to you. Maybe the testifiers behind you will say if what you purported within this bill is reasonable... [LB686]

SENATOR CHAMBERS: Yes. [LB686]

SENATOR COASH: ...because we have three different deadlines with three different parts of the Legislature and the executive branch. And I want to make sure that it's done well and not done quickly and there's enough time within this bill to get it done. [LB686]

SENATOR CHAMBERS: There won't be a lot of research any one of them has to do. And they're familiar with the text of this bill. As I said, the Attorney General and Secretary of State played a part; the Revisor of Statutes is aware of it. And in fact, they naturally wrote the bill so I'm sure that adequate time is there. And if it had not been, those provisions would not be in this bill. And none of us wants to have any substantial lag time between the time the session ends and when this certified copy is made available. [LB686]

SENATOR COASH: Thanks. [LB686]

SENATOR CHAMBERS: But those behind me can elaborate on that. [LB686]

SENATOR COASH: Thank you. [LB686]

SENATOR KRIST: Senator Murante. [LB686]

SENATOR MURANTE: Thank you, Senator Chambers. Thank you, Senator Krist. Senator Chambers, I'm wondering why you chose the start of the time period in which these deadlines begin at the end of the legislative session. Could you explain? [LB686]

SENATOR CHAMBERS: Well, those...somebody who comes after me can tell exactly why. But you have always a point from which things happen. So the end of the session would make it clear nothing further is going to be done that would have any impact on what is to be done in this process that we have now. Let's say that you would do it before the end of the session. Maybe at the end of the session a bill would be passed with an emergency clause. It might have something

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to do with something or other. But anyway, by the end of the session anything that could be of significance would have been done. And if not, then the next time around, for example, if the court made a determination after all of this is done, then that would be in the next year's update. [LB686]

SENATOR MURANTE: So my question is following up on that, the Legislature can't really amend the constitution... [LB686]

SENATOR CHAMBERS: No. [LB686]

SENATOR MURANTE: We can submit ballot initiatives. So it seems like the most common occurrence of the constitution changing will be general election followed by probably a less likely common occurrence of a primary election, maybe a special election or court case. So I'm wondering why we aren't doing this after the Secretary of State certifies the election because that's when the constitution is actually being amended. After the session, we're not...we don't have anything to amend. We're not amending anything after the session. So I'm wondering if that deadline doesn't make a little more sense. [LB686]

SENATOR CHAMBERS: If former senator...oh, he is here, Senator Wickersham, I didn't want to tell on him if he hadn't shown up. But he can tell you why they decided on that. [LB686]

SENATOR MURANTE: Okay, thank you. [LB686]

SENATOR KRIST: Senator Chambers, just for the record, I want to make sure I understand. These things are new tasks for these offices to comply with. Is that correct? [LB686]

SENATOR CHAMBERS: Um-hum. Yes. [LB686]

SENATOR KRIST: And yet there is no fiscal note. [LB686]

SENATOR CHAMBERS: There's no what? [LB686]

SENATOR KRIST: Fiscal note. [LB686]

SENATOR CHAMBERS: No, because it wouldn't take any time or any effort. All they'd have to do is read it also, just like I've done. [LB686]

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SENATOR KRIST: I'm going to use that excuse next time somebody gives me a fiscal note.  
(Laughter) [LB686]

SENATOR CHAMBERS: I didn't understand you. [LB686]

SENATOR KRIST: I'm going to use that excuse sometime when somebody gives me a fiscal note--because I said it's your job to do that and they say, oh, no, two men, two years, \$2 million.  
[LB686]

SENATOR CHAMBERS: Well, I think when you look at the people who are involved in it...  
[LB686]

SENATOR KRIST: I got it. [LB686]

SENATOR CHAMBERS: ...putting together this and presenting it, there will be no chicanery by anybody. [LB686]

SENATOR KRIST: Thank you. [LB686]

SENATOR CHAMBERS: Thank you. [LB686]

SENATOR KRIST: Any other questions? [LB686]

SENATOR CHAMBERS: And I know people who offer bills sit out in the audience, but I have a chair and I have 38 years' seniority. [LB686]

SENATOR KRIST: You're welcome to sit in your own chair. [LB686]

SENATOR CHAMBERS: It's 41 now. [LB686]

SENATOR KRIST: You're welcome to sit in your own chair. I just respect and all of you are aware at the beginning of the hearing session if you're presenting in here, I just ask you not to ask any questions of the people who are coming in opposition with you. Senator, welcome.  
[LB686]

BOB WICKERSHAM: Support? [LB686]

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SENATOR KRIST: Absolutely. [LB686]

BOB WICKERSHAM: All right, Senator. Senator Krist, members of the Exec Board, for the record, my name is Bob Wickersham, B-o-b W-i-c-k-e-r-s-h-a-m. I'm here to appear in support of LB686, and I'm very pleased to work with Senator Chambers on this bill. Senator Chambers remembers it, some of you may not, the last time we worked together on something we caused an explosion in the basement. I can explain that if you want later. It's a fact. But this bill is not explosive. In fact, this bill is a follow-up to a constitutional amendment that was adopted in 1998. Prior to 1998 there was a section of the constitution that said that the Secretary of State was to maintain a copy of the constitution in his or her office. We had a Constitutional Revision Commission that met. The Chair of that commission went over to the Secretary of State's Office and said, I'd like to see the constitution. It wasn't there. Now it wasn't lost really, it was just down in the Historical Society where it is now. And what I'm specifically referring to is a copy of the 1875 Constitution. There have been subsequent amendments and, of course, there was a recompilation in 1923. But anyway, the Secretary of State was not maintaining a copy of the constitution. No one thought that it was necessary to be in the constitution so it was repealed. But there was no follow-up legislation so there was nothing that required anyone to maintain a copy of the constitution. Now if you want to see a copy of the constitution, you can. It's published by the Legislature in cooperation with the Secretary of State. And that is in part why there is no fiscal note. They're already doing most of what the bill requires, most of what the bill requires. If you look, however, at this copy of the constitution, you'll see that it doesn't contain any notations for federal cases. Nor if you looked in the statute books and found the annotated copy of the constitution would you find any annotations for federal decisions. And, of course, those are the ones that are likely to affect operation of the constitution. Can you actually do something that the constitution requires such as Initiative 300? Declared unconstitutional by a federal court. The provision for term limits on federal representatives declared unconstitutional by a federal court. But it's in the constitution. If you read the constitution, you'd think those things were operative. They're not. And there are other examples, but I think those are the two clearest ones. So if you read this, published by the Clerk of the Legislature, published by the Secretary of State, you'd think that represented the law of Nebraska. It does not. So the effort is to have something like this be a better representation of what the law in Nebraska is and to do a couple of other things. One is to make sure that you have something, if you want to prove the contents of the constitution, you can show a judge and say this is an authoritative version of the constitution. That's what it says. That's the language we need to interpret. There's nothing in the statutes now that would allow you to do that. Now I don't think it's been a problem in the courts; but, in fact, there's nothing that allows you to do that. So it fixes a couple of...I think the bill fixes a couple problems and provides greater notice to the citizenry about what the constitution as operative in Nebraska may be. Now the version of the constitution that's called for in the bill, there are several places where it is published: one of them is this pamphlet, the other is the session laws. Senator Murante, I think your questions relate to the session laws. The session laws

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are published as quickly as possible after the Legislature adjourns. And so the time lines in the bill are designed to make a copy of the constitution available for publication with the session laws. Now you're correct that there might not have been an election and amendment to the constitution, but there may have been a federal decision that affected operation of the constitution. So you'd want that in the most recent and most authoritative version. And to couple that with publication of the session laws seemed reasonable to the people who reviewed the bill. And it was reviewed by the Secretary of State's Office, by the Attorney General's Office, and of course drafted by the Revisor's Office and reviewed by the Clerk's Office, all of whom, I might add, at various times had suggestions for amendments. Largely, those have been incorporated. So it's...that's the rationale for the rather rapid publication and the annual review, not just in case of an election with an amendment. So, Senator Krist, I hope that is helpful, but I would respond to questions if there are any. [LB686]

SENATOR KRIST: Absolutely. Thank you. Any questions? Senator Hadley. [LB686]

SENATOR HADLEY: Yes. Senator Wickersham, just so I'm kind of clear, did you say that there are things in there that courts have ruled as unconstitutional and they're still in our constitution? [LB686]

BOB WICKERSHAM: Yes, sir. We can't remove the language from the constitution. Only the voters can do that. [LB686]

SENATOR HADLEY: Okay. How does this...in my spare time the other day I was watching a hearing in the Judiciary Committee that dealt with a Supreme Court ruling on marriage. [LB686]

BOB WICKERSHAM: Yes, sir. [LB686]

SENATOR HADLEY: And the bill was to remove that from our constitution. How would that...does that play into this at all? [LB686]

BOB WICKERSHAM: Well, that is...I mentioned two other...I can mention two other provisions. I mentioned two that were unconstitutional. That's a third one that's been declared unconstitutional by the Eighth Circuit, not directly by the U.S. Supreme Court but by the Eighth Circuit. So the process in the bill is that under that section of the constitution there would be an annotation by the Revisor, prepared by the Revisor's Office citing the case, indicating that the court had declared that provision to be unconstitutional or unenforceable under the federal constitution. [LB686]

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SENATOR HADLEY: It would still be in our constitution. [LB686]

BOB WICKERSHAM: Yes, sir. The language is there, but there's a notation at the bottom that if you continue reading would tell you that even though the language is there it's not operative. It can't be enforced. [LB686]

SENATOR HADLEY: Does this mean that someone has to go through the...to make sure they are aware of federal court decisions that impact our Nebraska Constitution... [LB686]

BOB WICKERSHAM: Yes, sir. [LB686]

SENATOR HADLEY: ...to have that and who would do that? [LB686]

BOB WICKERSHAM: The Attorney General. [LB686]

SENATOR HADLEY: The Attorney General would. [LB686]

BOB WICKERSHAM: The Attorney General is made a party to all actions that would involve constitutionality so they have notice of them. And, of course, there's a little bit of an effort to bring this up to date. But once it's up to date, then it's just an ongoing annual process. And if there is any decision, then it would be noted. [LB686]

SENATOR HADLEY: I have now exhausted my legal knowledge of everything. [LB686]

SENATOR KRIST: Civics 101. [LB686]

BOB WICKERSHAM: There is one other section and I do not know whether the Revisor...that I'm aware of and I don't know if the Revisor will prepare a note. A couple of years ago the Legislature advanced a resolution to repeal a section of the constitution requiring that only English be used in the schools, not in the public schools, in the schools. That provision is at least constitutionally suspect. I don't know what the Revisor will do with that section. There was a case, a Supreme Court case in the 1920s that declared a statute implementing that section unconstitutional. Now if the statute implementing is unconstitutional, then almost certainly the provision in the constitution is unconstitutional. But the effort to remove that language made by the Legislature failed but is not enforceable. [LB686]

SENATOR KRIST: Any other questions for Senator? Thank you, Senator Wickersham. [LB686]

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BOB WICKERSHAM: Now you've almost exhausted my knowledge of the constitution. Thank you. [LB686]

SENATOR KRIST: Thank you. Any other proponents of LB686? Okay. I need to read into the record...are you a proponent? [LB686]

BUB WINDLE: Yes. [LB686]

SENATOR KRIST: Okay. Please come up. Go ahead. [LB686]

BUB WINDLE: Chairman and members of the committee, my name is Bub Windle, that's B-u-b W-i-n-d-l-e, and I'm here on behalf of the Nebraska State Bar Association in support of the bill. The association support is straightforward. We believe that it adds clarity and definitiveness to what is the law in Nebraska and therefore support the bill. [LB686]

SENATOR KRIST: Thank you. Any questions? [LB686]

BUB WINDLE: Thank you. [LB686]

SENATOR KRIST: (Exhibits 1 and 2) Thanks, Bub. Okay, I'd like to read in two letters of support: one from the Secretary of State's Office signed by John Gale, the other from the ACLU signed by Spike Eickholt. Are there any opponents to the bill? Any neutral testimony for the bill? Okay, that closes...would you like to close, sir? Then that closes the hearing in LB686. We are now going to address LB1016, Senator Watermeier. [LB686]

SENATOR WATERMEIER: Thank you, Chairman Krist. Members of the committee, for the record, I am Senator Dan Watermeier, D-a-n, Watermeier, W-a-t-e-r-m-e-i-r, introducing LB1016, would amend the definition of "agency" in the Legislative Performance Audit Act, adding the Office of Probation Administration and the Office of Public Guardian to a list of governmental units that can be subject to a performance audit. This would begin January 1, 2018. This would only allow for audits of these two judicial branches of office. It would not mandate that they must be audited. The Performance Audit Committee would still have to select one of these offices to be subject to Performance Audit Office. Additionally, the legislation does not change the language in the agency definition that states that any court is not an agency under the act, so the Legislative Audit Office would still not be able to do individual...audit individual courts. Similar to the discussion regarding LB954, this bill would allow for additional legislative oversight of these programs, and there are other state audit agencies nationwide that have access to similar judicial branch programs. Thank you for your time on this bill. I'll just give you a little

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history. The bill is very simple and very straightforward. After discussions I have had with Administrator Steel and even Mike Heavican, the judges in my district, and we were going to...I had the Performance Audit Office actually get a long, complicated process and we decided at that point in time...I wanted to pull that all back and make it very simple, 30,000-foot view. And this will give us a chance that we're on record that we're going to be able to look at this in the future but I can't tell you exactly what that's going to look like, but I know we'll be working pretty hard to get to that point. So thank you, Mr. Chairman. [LB1016]

SENATOR KRIST: Thank you, Senator Watermeier. Senator Coash. [LB1016]

SENATOR COASH: Thank you, Senator Krist. Senator Watermeier, you're Chair of the Legislative Audit Committee? [LB1016]

SENATOR WATERMEIER: Performance Audit, yes. [LB1016]

SENATOR COASH: Performance Audit Committee, so you're familiar with the Performance Audit Act, I assume. So my questions are mainly about the Performance Audit Act. In order for the Legislature through that committee to do what it's charged to do, you need information from the agencies that you're auditing, correct? [LB1016]

SENATOR WATERMEIER: Um-hum, yes. [LB1016]

SENATOR COASH: And cooperation from that agency to get that information? [LB1016]

SENATOR WATERMEIER: Assuming so, yes. [LB1016]

SENATOR COASH: Does the Legislative Performance Audit Act give you any teeth to get that information or to force that cooperation? [LB1016]

SENATOR WATERMEIER: Well, I see Senator Mello nodding his head over here, too, and I'm not sure it's going to do exactly what we want. But I'll tell you that I think it's on...it's important to be where we are today, to put this on record that we're going to have the ability to do it. Do we have everything we need today? I don't know, to be honest with you. I could bring up Auditor Carter and she can maybe address it a little bit closer than I could, so. [LB1016]

SENATOR COASH: Well, I think...I want to be clear that if this is to move forward that it's going to do what we want it to do, which is the ability for this committee to audit particular

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agencies which you are now increasing through this bill. And I'm wanting to know what kind of force of law the Performance Audit Committee has in obtaining that information and getting that cooperation. [LB1016]

SENATOR WATERMEIER: Well, I am going to let Auditor Carter, Martha, answer some of those questions. But I will just tell you that everything we do in our Audit Committee is in fluid motion. We've learned this through Revenue audits; we've learned this in HHS audits. We've learned this every step of the way that there are times we have to stop and review how we can get that information, and then we have to change and go back. And we have another bill in the session this year that we have to go back and talk about some agency issues about coming in and getting information we need. [LB1016]

SENATOR COASH: Okay. Well, let's get the legislative intent clear... [LB1016]

SENATOR WATERMEIER: Okay. [LB1016]

SENATOR COASH: Is it your intent through this bill that the Legislative Performance Audit Committee can audit the Office of Probation Administration and the Office of Public Guardian? [LB1016]

SENATOR WATERMEIER: Yes. [LB1016]

SENATOR COASH: Okay. [LB1016]

SENATOR WATERMEIER: I'm not sure it's clear in that intent, but that's the intent. [LB1016]

SENATOR COASH: Okay, thank you, Senator Watermeier. [LB1016]

SENATOR KRIST: Senator Campbell. [LB1016]

SENATOR CAMPBELL: My question is for Janice. Could not the Chair of the Performance Audit Committee come to the Exec Board and ask for subpoena power... [LB1016]

JANICE SATRA: Yes. [LB1016]

SENATOR CAMPBELL: ...to get the information and compel it to be done? [LB1016]

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JANICE SATRA: Yes. And I think it may be in the act anyway, in their act. [LB1016]

SENATOR CAMPBELL: Martha is nodding. I think that's important to answer your question. [LB1016]

SENATOR KRIST: When Ms. Carter comes up, I think there will be definition. Any other questions for Senator Watermeier right now? Okay, any proponents for the bill? Yes, please. You can fill out a green sheet afterward. And having served on Performance Audit for several years, I can say I really appreciate what you do and the fact that you take those questions to all the agencies that I've been a part of listening and performing audits. And your staff does a great job. And there is a point at which almost with every audit there is pushback, so please tell us how that goes. [LB1016]

MARTHA CARTER: Thank you, Senator Krist and members of the committee. For the record, I'm Martha Carter, M-a-r-t-h-a C-a-r-t-e-r, and I'm the Legislative Auditor. To first answer Senator Coash's question, the committee does have subpoena power and to date we have never had to use it. But we do generally have to remind agencies that the committee has it; not generally, I shouldn't say that, but Senator Krist is right. There is often, as in any audit situation, a certain amount of hesitancy or resistance to our initial arrival on the scene, although with agencies that we visit frequently, like Health and Human Services, we actually sometimes get better response because we've gone through all of the initial sort of laying of the groundwork and saying, you have a statutory responsibility to provide us with information, the statute is very clear, it says that the Audit Office shall have access to agency information, confidential or otherwise, in any form that it may exist. And so once you get that out on the table and get some dialogue, generally, people are, if not cooperative, they do provide the information at least. [LB1016]

SENATOR KRIST: Senator. [LB1016]

SENATOR COASH: Thank you, Senator Krist. Thank you, Ms. Carter, for helping us understand this. So you've never had to use the power of subpoena to get the information? [LB1016]

MARTHA CARTER: That's correct. [LB1016]

SENATOR COASH: If you did, how would that work? You would petition the court? You'd make a motion to the court to issue a subpoena for particular information, compelling an agency to give you information? How would it work if you had to do it? [LB1016]

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MARTHA CARTER: I believe so. And legal counsel to this committee might be able to help me out. It's this...it would be the same process that other, for example, the Corrections Committee, has used. So I have never done it but, yeah, it would be...we would come back, I mean, and we have a range of actions that we go through within the agency. And so we would go through all those and those would involve, if we really just weren't getting cooperation and there wasn't, for example, a specific statute that was at issue, if we just really thought somebody was refusing us information that we had authority to view, we would come to our Audit Committee and discuss that and there would likely be a discussion between the Chairman or some members of the committee and the agency director. And then if we had exhausted all of those and couldn't move any further, then we would come and ask the committee to file the appropriate paperwork and... [LB1016]

SENATOR COASH: But ultimately, if it ever got to the point of a subpoena, it would be a judge who would be saying to the court,... [LB1016]

MARTHA CARTER: Yes. [LB1016]

SENATOR COASH: ...you're out of compliance and now I want you...doesn't that seem like one branch of government or the boss telling his employees what to do? [LB1016]

MARTHA CARTER: In the case of the bill that's in front of us now? [LB1016]

SENATOR COASH: Yes. [LB1016]

MARTHA CARTER: Yes. [LB1016]

SENATOR KRIST: Let's get some clarification. We're talking about different sections, so, Legal Counsel, do you want to walk us through? [LB1016]

JANICE SATRA: (Inaudible.) [LB1016]

SENATOR KRIST: Oh, okay. So the subpoena power then...well, you can help me with the explanation. The subpoena power that was granted to the special committee, LR424, was very clear. We could not get what we wanted so we went back to a judge, filed a petition for the subpoena power. I don't know of a case--and I worked with Senator Lathrop and his staff, we did, going through this process--I don't know of a case where that subpoena has been denied once we have asked for a subpoena, no matter what the subject matter. And here we're talking about...in that case we were talking about a subpoena with the executive branch. I understand your

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concern. I just want to be clear, once we convey subpoena power, and with Performance Audit or any committee, that it has to go before a judge. [LB1016]

SENATOR COASH: A judge is under no obligation, however, to issue that subpoena. The best...in other words, the best that the Legislative Performance Audit Committee can do is request a subpoena, but it is within the judge's discretion whether or not to issue that subpoena and mandate any agency, including the two that are being added under LB1016, to issue that information. Okay. [LB1016]

SENATOR KRIST: There is no question. But I would remind all of us that it's been very clear that the judge doesn't work for the Chief Justice and the Chief Justice has these agencies. So I don't know what more we can do than maybe exercise that if it comes to that. Senator Campbell. [LB1016]

SENATOR CAMPBELL: Senator Chambers, would you mind answering a question for us? [LB1016]

SENATOR CHAMBERS: If I have the answer. [LB1016]

SENATOR CAMPBELL: I think you probably would. If a judge denied a request of a subpoena, is that appealable? [LB1016]

SENATOR CHAMBERS: If it's considered a final order, probably it could be... [LB1016]

SENATOR CAMPBELL: Okay. [LB1016]

SENATOR CHAMBERS: ...because any final order of a court can be appealed. [LB1016]

SENATOR CAMPBELL: Okay. So at this point, if it got to all the courts, it would seem to me that was the answer we were given this summer is that we'd have to have a special...if it got all the way to the Supreme Court and it dealt with the Supreme Court, there would have to be a special panel of judges brought in to deal with the issue? [LB1016]

SENATOR CHAMBERS: What...like if you, you go to the district court, then where we appeal from, you might appeal to the appellate court; you might go up to the Supreme Court, then they would give it to the appellate court. But that would be something that whatever agency is seeking the subpoena would be able to figure out. [LB1016]

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SENATOR CAMPBELL: Okay. [LB1016]

SENATOR CHAMBERS: I'm just speaking in general terms. [LB1016]

SENATOR CAMPBELL: No, and that was my question. Thank you. [LB1016]

SENATOR CHAMBERS: Okay. [LB1016]

SENATOR KRIST: Anything else for Ms. Carter? Thank you for coming up. [LB1016]

MARTHA CARTER: Thank you. [LB1016]

SENATOR KRIST: And please don't forget to fill out a sheet for us. Any other proponents? Any opponents? Anyone in a neutral capacity? Okay, that concludes our hearings for the day. And if you'd leave, please, we're going to start with an Executive Session as soon as you clear out. Thank you. [LB1016]