

ARKANSAS ETHICS COMMISSION

2020 WEST THIRD, SUITE 300
LITTLE ROCK, AR 72205
(501) 324-9600
FAX: (501) 324-9603

JACK R. KEARNEY
Director
MARY LYNN REESE
Commission Chairman

Commissioners:
KERRY F. PENNINGTON, M.D.
RONALD A. MAY
JEROME GREEN
NORTON WILSON



CERTIFICATE OF ADOPTION OF RULES
BY THE ARKANSAS ETHICS COMMISSION

As keeper of the records for the Arkansas Ethics Commission, I certify that the attached Rules and Regulations of the Arkansas Ethics Commission is a true and correct copy of the rules officially adopted by the Arkansas Ethics Commission, in compliance with ACA § 25-15-201, et seq, and in particular ACA § 25-15-204.

This is to further certify that, in compliance with statutory requirements:

- (1) Notice was given of a public hearing on the adoption of Rules and Regulations, published on February 28, 1992.
- (2) Public hearings were conducted on March 18, 1992, and March 26, 1992.
- (3) The Rules and Regulations were officially adopted by vote of the Arkansas Ethics Commission on March 26, 1992.

In witness whereof, I hereunto set my hand on this 18th day of June, 1993.

Jack R. Kearney

Jack R. Kearney
Director
Arkansas Ethics Commission

State of Arkansas
County of Pulaski

Subscribed and sworn before me this 1st day of June, 19 93.

David Watson

Notary Public

JUN - 1 PM 12:07
NOTARY DIV.

My commission expires: February 24, 2002.

FILED
REGISTER DIV.
19 JUN -1 PM 12:11

THE DAILY RECORD

TUESDAY, MARCH 3, 1992

CLERK OF THE COURT
SECRETARY OF STATE
LITTLE ROCK, ARKANSAS

NOTICE OF PUBLIC HEARING

Notice is given that a public hearing will be held at 10:00 a.m. on March 18, 1992, in room 138 of the Arkansas State Capitol Building, State Capitol Grounds, to allow interested parties to comment on proposed Arkansas Ethics Commission Rules and Regulations.

Copies of the proposed Rules and Regulations are available for public inspection and may be obtained at the office of the Arkansas Ethics Commission, 2020 West Third Street, Suite 300, Little Rock, AR 72205.

Interested parties may submit written comments to Jack R. Kearney, Executive Director, Arkansas Ethics Commission 2020 West Third Street, Suite 300, Little Rock, AR 72205, no later than March 18, 1992.

DR-5T-2/28,2/29,3/3,3/4,3/5'92-jf

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NORTON WILSON

I, Mary Lynn Reese, accept on behalf of the Secretary of State the attached Certificate of Adoption of Rules and documents attached thereto. This 1st day of June 1993.

STATE OF ARKANSAS
OFFICE OF THE SECRETARY OF STATE
LITTLE ROCK, ARKANSAS

JUN -1 PM 12:08

REGISTER DIV.
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MINUTES OF ETHICS COMMISSION MEETING

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March 26, 1992

23 JUN -1 PM 12:11

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OFFICE OF THE
COMMISSIONER OF
STATE

The Arkansas Ethics Commission held a meeting on March 26, 1992, at 11:00 a.m. and conducted the following business:

Members present were: Mack Koonce, Mary Lynn Reese, Ronald May, Kerry Pennington, and Jerome Green.

Visitors present were: Rachael O'Neal of the Democrat-Gazette and Richard Behra from the Arkansas Department of Human Services.

The meeting was called to order and the Commission conducted the following business:

I. A motion was made by Ronald May and seconded by Kerry Pennington that the minutes of the January 28, 1992, meeting be approved. It carried unanimously.

II. After a discussion of the Commission's policy of enforcing errors and violations in new filings, Commissioner May suggested the Commission wait until there is a "spot check" of candidate filings before it decides what it should do in response to omissions and errors in filing.

III. Commissioner Koonce suggested that, because of the political season being eminent, the staff focus its efforts on reviewing candidate filings and getting information to potential candidates.

IV. Commissioner Green suggested that a press conference be held to announce the Commission's new emphasis on enforcement.

Commissioner Green moved to hold a press conference. Commissioner Reese seconded the motion, and it carried unanimously.

V. Mr. Kearney discussed the costs and required state procedure for the printing process of "A Practical Guide to the Arkansas Ethics and Disclosure Laws". He explained the bidding and contract award process.

Commissioner May suggested that we get as many copies as a \$5,000 budget limit would allow, rather than setting a number of 2500 copies at the low bid of \$4347.00. Commissioner May moved that the staff spend up to \$5,000 to publish the guidelines and Commissioner Pennington seconded the motion. The motion carried unanimously.

VI. The Commission discussed the possibility of a state-wide seminar with Senator David Pryor as the featured speaker. Richard Behra, Arkansas Department of Human Services, Office of Chief Council Audit Section, addressed his effort in helping plan for the

seminar. Commissioner Koonce and Commissioner Reese suggested that the staff also consider conducting regional meetings either before or after the state-wide seminar.

VII. In addition to the grammatical and syntax corrections suggested for the guidelines the following additions will be made:

(a) Allow limited, discretionary subpoena power to the director for the benefit of the accused. The decision of the director to deny a subpoena to the accused would be upon consultation with the chairman of the Commission.

(b) Provide that the entire investigation file be open to the accused, with some discretion left with the Commission to withhold certain information if the revelation of the material would jeopardize the investigation or subject the source of the information to a denial of fundamental rights. The decision by the director to withhold any evidence from the accused would be upon consultation with the chairman.

(c) That a hearing master be used on a discretionary basis in cases where the issues, volume of evidence, or number of witnesses require it, and that the master would make proposed findings and recommendations of disposition. The findings of fact and recommendations of the master would not be official until and unless the Commission acted upon them.

VIII. The Rules and Regulations were adopted unanimously.

IX. The following opinions were considered and voted on:

(1) #92-EC-001 - A request from Ms. Catherine L. Hughes, Attorney at Law, to clarify former ethics opinions as to when private business persons who may attempt to influence public servants must register as lobbyists.

Decision: That the law only mandates registration as a lobbyist when the business person actually engages in activity described in the statute as "lobbying".

After discussion, Mary Lynn Reese moved that the Commission approve the opinion. Ronald May seconded the motion, and it was unanimously approved.

(2) #92-EC-003 - A request from Merlyn R. Haubein, Attorney at Law, inquiring whether Arkansas law allows out-of-state political action committees to contribute to state political action committees, and if so, what monetary limit is placed on such contributions.

Decision: Arkansas law allows any "person", which encompasses corporations and organizations, to contribute to approved political action committees. The monetary limit for such contributions is two hundred dollars (\$200) per year.

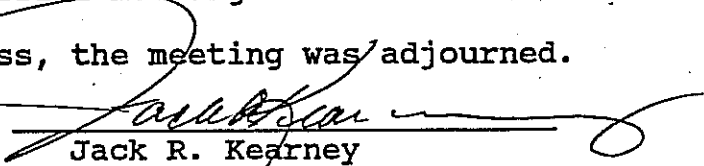
After discussion, Commissioner Pennintgon moved that the Commission approve the opinion. Mary Lynn Reese seconded the motion, and it was approved unanimously.

X. The Commission decided to pay the bills for copying documents from the Secretary of State's office but plans to investigate purchasing its own copier to make copies.

Commissioner Koonce is going to try to get something reconciled prior to the next commission meeting.

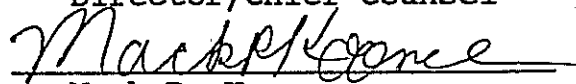
There being no further business, the meeting was adjourned.

Submitted by:



Jack R. Kearney
Director/Chief Counsel

Approved by:



Mack R. Koonce
Chairman

ARKANSAS ETHICS COMMISSION

REGISTER DIV.

TRANSCRIPT OF PUBLIC HEARING CONDUCTED 1 PM 12:11

MARCH 18, 1992

STATE OF ARKANSAS
OFFICE OF THE REGISTER
LITTLE ROCK, ARKANSAS

Mack Koonce: "If anyone has a statement they would like to make, we would be looking for your input. The purpose of today is to discuss the rules and regulations that we're suppose to adopt under the ethics law, that is was be Act 1 of 1990.

Let me introduce myself. I'm Mack Koonce, chairman of the Ethics Commission, and on my left is Jerome Green and Ron May a couple of my fellow commissioners. Sitting on my immediate right is Jack Kearney. He is our legal counsel and director of the Ethics Commission. Judy Smithson is over here and is our investigator and Anne Tatom is our secretary over at the Commission.

We hope that it will be a very informal meeting. If you have any questions whatsoever or statement, we'd like that you would like to make, if you would we would ask you to if you want to make a statement would you come to the microphone, because we are recording this for minutes for future purposes. But come to the microphone and state your name and organization that you represent. And we will try to have it as quickly as possible. If anybody's got any question we will be glad to try to answer it.

Does anybody wish to speak at this time in regards to the proposed rules and regulations? Thank you, come right on up."

Mike Rainwater: "My name is Mike Rainwater. I'm an attorney. I serve as chairman of the Government Law Committee of the Arkansas Law Bar Association, and it is in that capacity that I was asked to review these rules. I'm not here really as a representative of the Bar Association, but I will say that that's the capacity in which I came to view this. And I talked to members of the bar leadership, and I think I can say that the six or seven lawyers that I've talked to, in certain leadership roles of the bar, and this only happened yesterday afternoon, will generally agree with the comments or have so far with my comments.

I also spoke with Mr. Kearney, and I sort of just raised a few points. Maybe we can talk about them a little bit. First of all to give you a little more background, I do represent local governmental entities and in that capacity have drafted numerous sets of policies for hearing procedures primarily for personnel issues. And in that context I've done a fair amount of work in dealing with the fourteenth amendment, and I guess I come to view things from a fourteenth amendment point of view. And that is really the thrust or basis for my comments.

The way I understand the rules, when a complaint is filed it's investigated by the staff and the director. All information is gathered through that investigation. The accused is allowed to submit any information that he or she desires to submit in mitigation or rebuttal of the allegation. Once that process is concluded the staff and the director make a decision. Basically a finding of, I'll say, guilt or innocence or violation or no violation, and determine what discipline they think is appropriate. At that point they reduce their findings to writing, put it together with the investigative file, and direct that investigative file to the Commission. The Commission then reviews that entire written record that has been filed along with the recommendation of the staff and the director. And then the Commission makes a decision. A decision, again basically of guilt or innocence or violation or no violation. And makes a decision of what discipline of what they think is appropriate based upon that finding. It's only at that time that the accused is allowed to have a hearing. And I should qualify that, is allowed to request an in-person hearing as opposed to a hearing on the record. I recognize that there is a difference, and both constitute a hearing within the meaning of the fourteenth amendment terms. But the way this is designed, the accused is actually the convicted by the time he has an opportunity to appear in person and have an in-person hearing before the Commission.

I talked to Mr. Kearney about this a little bit yesterday, and let me say a little bit further, that generally the fourteenth amendment requires that before the government deprives somebody of something, life, liberty, or property, they are to give them a predeprivation hearing. The idea is that if you're entitled to a hearing, and it's not an emergency, then you should have a predeprivation hearing. That generally applies in the context of a property deprivation, and we're not dealing with a property deprivation here. It is . . . also a "hearing" does not necessarily mean an in-person hearing, okay and I recognize that. But the general rule is that before the government acts, you are suppose to hear both sides of the story. In this case, both sides of the story would be only the written record, and I'll direct that in just a minute.

As far as the in-person hearing happens after the fact, it puts the accused, convicted, in a position of having to, in effect, talk the commission into changing its mind. And professionals will tell you it's like ten times as hard to convince somebody to change their mind than it is to get them convinced on the front end before they've made up their mind. And as a trial lawyer one of the objectives is always to get the jury or the judge, whoever the trier-of-fact, to withhold making a decision until they've heard all the facts on both sides. Then they have both sides of the story in their mind. They have the whole story in their mind. They have a better opportunity to make a correct decision, and that's what we're looking for, a correct decision. In a case such as *Loudermill vs. The Board of Education*, a Supreme Court Case, will say that the purpose of a predeprivation hearing is to prevent

the possibility of mistake. And I would suggest that the proposed rules be changed so that after the Commission and director make their decision and recommendation, but before it goes to the Commission, so the Commission has to make up its mind and enter a finding along with discipline, the accused be afforded the opportunity at that point to request a hearing before the Commission, so he's got a fair opportunity to have his side of the story heard and have the persuasive value that goes along with being there, building that relationship, albeit a quickly built relationship in person, and I think will have a more meaningful opportunity to be heard. And I would suggest that you change the rule.

Mr. Kearney said that for the way it is drafted it is intentionally drafted, because it is his understanding that the applicable state law provision that we're all trying to comply with says that the accused is entitled to a hearing after a Commission makes a finding. And I may be misstating that. That's the way I understood what he was saying. And that these procedures were drafted to dovetail with that statute that governs the activity here.

Now, first of all I have not read the statute. I believe, however, just based on my general view, my general work with Arkansas statutes, there is surely a way to construe that statute where it would permit the accused an opportunity to have a hearing while he is still the accused, before he is the convicted. And I think that will more nearly square with the fourteenth amendment way of doing things. Now let's analyze this from a fourteenth amendment point of view. We're not taking a man's property. So we would not fall squarely within the, 'you must have a predeprivation hearing' ruling of cases such as the Loudermill case, but we are certainly dealing with a man's liberty, his life because life includes the right to enjoy his life through happiness and those things associated therewith. So if he is not entitled to a predeprivation hearing, let's say, and he is only entitled to a post deprivation hearing or post-decision hearing in this case, then I think you run into another prong in the fourteenth amendment which is within the procedural due process clause, which says if you're gonna have a hearing it should be a meaningful hearing. The elements of a meaningful hearing are notice of what's going to be talked about, a meaningful opportunity to present your side of the story, and the third element is impartial tribunal.

These rules deal with the the impartial tribunal aspect of procedural due process, and in fact say on page 10 under procedure, point number 1 retaining commission impartiality. So it appears to me that the desire to obtain Commission impartiality is high on the list in these rules, but at the same time the way the procedure is set up, it appears to me that by the time the accused has the opportunity to be heard, he's the convicted. The Commission has made the decision, they're now defending their decision along with trying to make the right decision as to what is correct after applying the laws of the fact. We're just talking human nature

here. And if you look at decisions being with impartial tribunal that's the substance of what we're talking about; is that the impartial tribunal remain objective. Once you make a decision, you're now subjectively involved, and you lose at least some of your objectivity because you're dealing with an 'objective' question and a 'subjective question' that is protecting my own ruling, vindicating my own decision. So let's back up just a little bit. But we say, 'well the predeprivation hearing is okay, because it is; not a property deprivation, and since we gave him a predeprivation opportunity to be heard we made our decision after hearing both sides of the story: and, therefore, our decision is an impartial decision and what we're talking about is the opportunity for an appeal.' I think that would be an acceptable procedure under the fourteenth amendment. But, the way this is set up if I can find it here, on page 11 under paragraph under procedure paragraph B 5. Let's start out at the top of that on the bottom of page 10."

Mack Koonce: "I'm sorry what did you say?"

Mike Rainwater: "Okay, it's on the bottom of page 10. Go to the bottom of page 10."

Mack Koonce: "Okay."

Mike Rainwater: "Item B5."

Mack Koonce: "Okay."

Mike Rainwater: "The executive director, are you all with me?"

Mack Koonce: "Okay."

Mike Rainwater: " 'The executive director shall notify the person accused that he or she is under investigation and the nature of the investigation. If during the process of the investigation evidence of other violations or allegations of other violations arise against the accused, the executive director shall notify the accused of the same', in other words the nature of the allegations if an investigation of the new evidence or alleged violations is pursued. At this point it goes on to say, 'the director shall insure that he or she shall obtain from the accused all evidence the accused may have which rebuts or mitigates the allegation.' Now stop right there. It's difficult as an accused, and I can tell you from the aspect of a lawyer who represents those who are accused and also the other side, it is difficult to submit evidence which may rebut or mitigate allegations when you don't know what the allegations are except for the nature of the investigation. The way I read this, what you're told is a complaint has been filed alleging this violation. That's the nature of our investigation. On the other hand, the director shall insure that he or she shall obtain from the accused all evidence the accused may have which rebuts or mitigates the allegation. It's hard to effectively rebut or mitigate the allegations unless you have all the allegations

against you which would include all of the statements obtained during the course of the investigation, so you have a fair opportunity to know the substantive nature of the factual allegations dealing with the nature of the investigation. See what I'm saying?"

Mack Koonce: "Agree."

Mike Rainwater: "So, here's what I suggest. I would suggest that at that point you would insert a phrase to say something like this: 'The accused shall have the right to request and receive a copy of any and all evidence in the investigative file, and the director shall insure that he or she shall obtain from the accused all evidence the accused may have which rebuts or mitigates the allegations.' There is a slight difference there. Instead of saying we want all the evidence that rebuts or mitigates the allegations we're adding, here's the investigative file so you can figure out what the factual nature of the allegations is and then have corresponding duties to accept from the accused all evidence which the accused may have which rebuts or mitigates the allegations. I would recommend that change."

Now, one other point, and that is the next subparagraph which is B6 on page 11. 'The executive director or legal counsel of the Arkansas Ethics Commission may issue subpoenas for documents, persons, books, or other records relevant to its complaint investigation.' I would add to that, 'the accused shall have the right to request a subpoena be issued in her behalf to obtain evidence to rebut or mitigate the allegation.' That way, the accused would have a meaningful opportunity to obtain the evidence that the director has a duty to insure that the accused have an opportunity to present, and that is the evidence which rebuts or mitigates the allegation.

So to sum it all up, recommendation number one, I would recommend a precommission decision hearing opportunity. That's number one. Point number two, I would recommend that the accused be given the opportunity to have the complete investigative file, so that the accused has a meaningful opportunity to rebut or mitigate the allegation. And I recommend that whether or not you change the hearing request opportunity to before the Commission decision. And the third recommendation would be to enlarge the subpoena power to give the accused the opportunity to make subpoena requests to the director on his behalf. I have not reviewed other procedures such as the disciplinary procedures for disciplining attorney and things like that, but it's my understanding those provisions, my understanding from talking to I believe, Jim McKenzie, president of the Arkansas Bar Association, that those recommendations would be consistent with the procedures that are permitted in that disciplinary procedure. I don't know personally because I have not reviewed that. Those are my comments, just my thoughts from reading over it."

Mack Koonce: "Mike, thank you very much. We may have a couple of

questions. Let me tell you we spent several hours on this, and as you might imagine, quite some discussion and with three attorneys sitting around you can imagine the arguments we got into. Let me, Jack, would you like to comment or Jerome or Ron either one. Frankly I'm not sure that I feel adequate to respond at this time, but Jerome."

Jack Kearney: "Well I, like Mr. Rainwater said, we had a discussion yesterday. And he generally gave you what I told him my impression was of what the statute says. I don't believe that we would be in a position today to argue back and forth. We will certainly take his comments under consideration and discuss them further. Mr. Rainwater, the points you bring up are ones that have been discussed before and there have been differing opinions among the commissioners. But we will take this under consideration again I'm sure, and we thank you for this."

Mike Rainwater: "May I say there are a couple of more things, this is just an observation on page 6. Item A5."

Mack Koonce: "Okay."

Mike Rainwater: "Any citizen or government official may be entitled to an advisory opinion issued by the Commission. It just struck me that the word entitled there leaves the commission with no discretion. It goes on to talk about that it must qualify as a valid request. I don't really see anything objective that defines what a valid request is versus an invalid request. It's just something that occurred to me as I was reading it. And then compare that to paragraph B1 on page 7."

Mack Koonce: "Which one?"

Mike Rainwater: "Paragraph B1 on page 7."

Mack Koonce: "Okay."

Mike Rainwater: "Which says 'the Ethics Commission shall accommodate to the extent practicable requests for advice and guidelines to constitutional offices, state executive agencies, county agencies, and municipal agencies.' It seemed to me that both should be on the same footing. That if in paragraph A5 it says any citizen or government official shall be entitled to an advisory opinion issued by the Commission, but on point B1 on page 7 county agencies, municipal agencies, constitutional offices, executive agencies, they're only entitled to advice or guidelines to the extent practicable. It sounds like a double standard."

Jack Kearney: "Let me tell you the basis for that. The statute gives every citizen, and that of course includes government officials, the right to have an opinion. To request one and to have it. That's why it is written into the rules and regulations. The second paragraph that you were addressing is our attempt to help offices, the governor's office, DF&A to have internal

guidelines for their employees. So that's what that's speaking about."

Mike Rainwater: "I see. I see what you're saying. In other words, under A5 on page 6 they can formerly requests an advisory opinion and be entitled to it as a citizen or government official."

Jack Kearney: "Exactly. But if they want guidelines to cover their whole offices, that's a whole different matter."

Mike Rainwater: "I'm with you. Those are my comments. Thank you for hearing them."

Ronald May: "I would like to comment on Mr. Rainwater's presentation. It was very effective and articulate one, and we really appreciate the effort that went into it. And as Mr. Kearney says we will very much consider these suggestions. I'd point out a couple of things to you though. In the first place, keep in mind that the majority of these investigations will be involving relatively, I wouldn't say trivial matters, but they're matters of crossing i's and . . . "

Mike Rainwater: "Right compliance oriented issues."

Ronald May: "Right, for that reason you know, we may have been a little restrictive in allowing hearings at an early stage because we didn't want to be engulfed with hearings over whether somebody should have written down something like that. The other thing is, in the long run the authority of this commission is fairly limited as you will note. We have power to give cautions and warnings but if anything that has teeth in it, has to be a recommendation to a law enforcement agency. And so, at that point, of course, as you point out the constitutional mechanisms will crank in there very strongly. But we are very sensitive and I particularly think these points that you made about the accused having the right to have subpoenas issued and access to the file at least in part are very good. We will consider those before we adopt these final rules."

Mike Rainwater: "Let me say that I recognize there are valid reasons for writing the rules such that the 'hearing', putting that word in quotes, is not an in-person hearing like you normally think of in the context of a trial. The word hearing simply means hearing both sides of the story before making a decision. And other state agencies, for example, proceedings before University officials, they do not permit attorneys to participate in them. There are lots of degrees of formality that you can permit in a hearing. And the degrees of formality depend upon the severity of the nature of the hearing, which would boil down to the result and so I understand exactly what you are saying. The only other comment I would make is anytime you deal with the word 'ethics' and let's put that word in quotes, the mere fact that a decision is made of an ethical nature raises it to higher level, and the law recognizes that. For example, there are different standards for a stigmatizing charge that is published by governmental officials."

The law recognizes it in that context. If a governmental official, let's say a county official, publicly makes a stigmatizing charge--that's one that goes to moral character and that's what ethics is--then the government must provide that employee, if requested, an opportunity to have what's called a 'name-clearing hearing', a name clearing hearing. And the other rationale is when the government says it, it must be so. And there is so much weight attached to that mere comment, that if it goes to ethics, moral character or moral character stigmatizing charge, we get to another zone of required governmental activity. And one other comment, and that is, there is a fundamental difference between a state and a city or a county. Primarily because a state has separate and distinct sovereign. Whereas cities and counties are treated for constitutional purposes generally as persons. As municipal corporations and legal persons in that sense. So there is a fundamental difference there. But when you get back to what we're talking about which is you come back to square one which is the fourteenth amendment. Hear both sides of the story before making a decision. That's just fundamental fairness and that's what due process is. The other is, of course, that whatever decision you make, whatever decision you follow be uniformly applied to all persons similarly situated. We don't have a problem with that prong of the fourteenth amendment. But I do think that because we're dealing with ethics, the mere finding, even though it may be only a caution or reprimand, it doesn't appear that way."

Ronald May: "I think you are exactly right. And I hope this Commission will always be sensitive to that."

Mack Koonce: "Mr. Green"

Jerome Green: "Let me just say to the chairman of this Commission, that Mr. Rainwater is known and respected in the legal community as a constitutional scholar and trial lawyer and that's how I've come to see him today. And Mr. Rainwater we appreciate you coming here. And I thank him very much. Added to what Commissioner May has said, one of the reason that the regulations were drafted as they are is to try to eliminate layers of bureaucracy and make the work of the Commission manageable and 'do-able'. As you might imagine we had many and long discussions concerning the precise issues that have been discussed by you this morning concerning the due process clause and the right of a person to be heard and to confront his accusers. Let me ask you something on that plane, let me ask you a question. Would your comments concerning the prehearing requirement request be different if the appeal process was de novo?"

Mike Rainwater: "Well, from a practical point of view you're still dealing with human beings who have made up their mind. And I'm just of the school that once somebody makes up their mind, it's ten times as hard to get them to change it as it is if you try to persuade them in the first incidence. Let me make, though, a side comment on that. I notice there are provisions to have a hearing master."

Jerome Green: "Yes."

Mike Rainwater: "Utilize the master proceedings, I wouldn't have a problem with that. See the difference?"

Jerome Green: "That would be a written?"

Mike Rainwater: "Well, I wouldn't have a problem with the predecision hearing aspect of it. I would still suggest that the accused have access to the entire investigative file so he can meaningfully rebut the allegation and to that he have the same opportunity the Commission has to garner that information and that is to have that subpoena power available to him."

Jerome Green: "Specifically to the first . . . "

Mike Rainwater: "Strictly to the hearing. If you had a master involved it would be a different matter because there you have another decision maker who has not been involved in the decision. See what I'm saying? He's the finder of fact, and that finder of fact can hear both sides of the story in that instance. And the Commission would serve basically as the prosecutor and the accused would serve basically as the defendant."

Jerome Green: "How do you analogize that scenario to a municipal judge, to a magistrate, reviewing information in terms of probable cause or issuance of an indictment or something different?"

Mike Rainwater: "It's a different decision. The same person can make different decisions in the context of the same procedure. The same judge can make the decision--probable cause to detain, that's one decision. Probable cause to go forward with prosecution, that's another decision. Whether or not to exclude certain evidence as tainted, that's a third decision. Finally, the decision whether or not the facts applied to a law renders a verdict of guilty or not guilty. No problem with that, but that's not what we're talking about here. We're talking about a Commission who has not only made up its mind, but formally reduced that to writing and communicated that and it becomes public at that point, as I understand it. Now the whole world knows they've made up their mind. Now the accused has to come in and get you to, in effect say 'whole world we made a mistake, this is the decision we ought to make.' And I'm not saying that you would be, that you would intentionally or deliberate or anything else not make the right decision. I'm not saying that for a moment, but I am saying we're human beings, we deal with human nature, and there's something about human nature that says once you make up your mind and you communicate that to the world, now you're personally involved. Now you have something else at stake, which is whether you're a good decision maker."

Jerome Green: "So it would be your opinion that even with the appeal, with de novo, that that would not be satisfactory or

preferable, in the context that you've considered it, to a predeprivation, to a prehearing?"

Mike Rainwater: "No, it should be because I just feel like it goes back to the impartial tribunal aspect of procedure of due process. The bottom line is you're entitled to a hearing, entitled to a meaningful hearing. Meaningful hearing includes impartial tribunal. If you interject a master, then you can clear these problems. I like masters personally. I think masters make very good hearing officers. I think in terms of proceedings when you have distinctly two different stories, this side is championing this position and this side over here is championing the other position. The master makes the decision. The only thing that I would interject on that is, whether or not you want to delegate to a master the decision of the Commission. You see the master isn't the one that was chosen according to this procedure that has been established for picking these five representatives of all of us to make this decision. I think you have to be careful to make sure that the master would serve as a fact-finder and that the Commission would serve as the final decision maker. For example, you could have your director or staff go in before the master and present the case. The master serves as a fact finder. The accused comes in and presents his side of the story. The master in that case serves the same role as the United States Magistrate Judge serves. He would reduce his decision to recommend his findings and conclusions. Those would come before the Commission. The Commission could then make a decision. I think that would be a great procedure."

Ronald May: "Mike, I think that this goes back to what I was saying earlier. This is an evolutionary problem. We anticipated for the first few years or maybe the first couple of years a lot of what we're going to be doing is on these trivialities right now. I think some were under the presumption that if we had a serious ethical question, we would appoint a master and follow that. You know if we could have an elaborate procedure for every one of these we did, we would be working eight hours a day fifty weeks a year and none of us is prepared to devote that kind of time to it. Maybe as an evolutionary process and in a few years when people are accustomed to the filing requirements and to the trivialities have kind of dropped out, maybe at that point we might wish to have a formal procedure for the court hearing. But I certainly agree with everything you've said about that."

Mike Rainwater: "Let me say that I agree with everything you can do to streamline this proceeding so that you can get all the facts before you so that you can make a meaningful and correct decision. And I will agree that given the opportunity for an in-person hearing, something that is evidenced against you can be turned into a very time-consuming process. I'm normally on the side of representing governmental entities, and I'm very conscious of those decisions. And I think that, within the context of procedural due process we're talking about, you can accomplish that objective. And I would refer you to the procedures used by the University of

Arkansas. I can tell you, I've represented the accused in some of those proceedings, and as a lawyer who wants an opportunity to have an in-person hearing directly participate in proceedings, it is very frustrating and difficult because you can't do it. You can't do it. And you can't do it because 'hearing' doesn't mean what we normally think of seeing on tv, lawyer showing up and the judge is present. It's not that kind of hearing. It simply means hearing both sides of the story. It can certainly be done in summary fashion in writing, I have no problem with that. I just feel like you ought to be able to get all the allegations against you, meaningfully rebut those, do it in writing, that's fine. Then I think you need to structure the decision making process where, see if you did all that, you'd be ready to make a decision. That would basically satisfy the hearing problem. That's the reason I digressed a minute ago and said if you did these other things then these mechanics over the hearing itself and whether you have a predecision and postdecision hearing. Those would be moot. You would have a predecision. The predecision hearing would be hearing both sides of the story in writing based on submissions with subpoena power after seeing everything in that investigative file. You have a meaningful opportunity to rebut. So I think there's plenty of latitude there to accomplish your managerial objectives, let's say. And at the same time accommodate these fundamental notions of due process and fairness. And after all, if we're dealing with ethics, fairness of all kinds goes together."

Mack Koonce: "Does anybody else have any comment?"

Jack Kearney: "I don't, I agree with his comments about a referee possibly solving most of the problems, but I'll tell you what concerns we had with that was whether or not we could or the Commission could, indeed, turn over its authority to a referee. We discussed that, and I'm sure we will discuss it at some length further. But that is a concern."

Mike Rainwater: "I think the way to structure that is just like a U. S. district judges do, they will assign questions to Magistrate Judges, and can assign those questions for preliminary issues like discovery and things like that. But when it comes to making the decision the parties must consent to the magistrate making the decision in lieu of the one that our law says makes the decision, that's the district court. But I think what you can do following that analogy is simply make the magistrate, the referee, a finder-of-fact. He hears both sides of the story, he submits it to you, you make a decision. Now for differentiating between those that are, let's say, I don't want to use the wrong word here, but less important than other charges, I don't think there's any problem with that. I think you can do that, but I think that you should decide on the front end how you're going to categorize it. What's the objective standard for determining what is and what isn't an important charge."

Ronald May: "We don't know."

Mike Rainwater: "I know that. And I'm just saying that I think maybe you ought to go into that if you're going to have a procedure where some cases you go this way and some cases you go that way. Then that introduces this whole requirement of objectivity."

Ronald May: "Over a period of time I think we will be able to discover some perimeters of what you're talking about."

Mike Rainwater: "I'll tell you what I predict. Somebody, you're going to spend a bunch of time on the front end fighting over whether your procedures are adequate. I'm just saying if I were you, I'd want to eliminate as many of those questions as I could. Because that's going to take a bunch of time too. And that's going to derail the proceeding and it's going to turn what is intended to be a very positive thing into, now, a very controversial and so forth. And we don't want that either. So those are just my comments. Whatever I can do to help, I'll be glad to."

Mack Koonce: "Mike, we thank you very much. You might imagine and I'm sure you have read the initiated act of 1990."

Mike Rainwater: "I've not read that."

Mack Koonce: "Well, I think if you get a chance to look at it you'll see there are very very little guidelines given to us as to what our responsibilities are. We have discussed this and I do recall very vividly we decided that we could not constitutionally delegate our authority, as I recall, to somebody else to make this decision. So, we do appreciate your comments, and you're absolutely correct. We would like to get these rules and regulations where it's clear to everyone. I can assure it's been our primary desire all along. We do appreciate you having an input very much."

Mike Rainwater: "I will say the Government Law Committee of the Arkansas Bar Association, if we can help or answer questions, or something along that line, or maybe find other procedures you can take a look at, we would be glad to consider them."

Ronald May: "We need somebody to volunteer for the master."

Mike Rainwater: "Yea, everything costs money doesn't it. Thank you a lot."

Mack Koonce: "Thank you very much. Does anybody else wish to give a statement or comment or address the Commission? Yes sir."

David Morris: "I would like to say coming up to the speaker stand, I feel a little bit inadequate, like you do Mr. Koonce, after following Mr. Rainwater. I feel very much like a seminary student following Billy Graham in quoting some part of the Bible. Mr. Rainwater left before he heard that. For the record, I'm David Morris with the Association of Arkansas Counties. We are the official voice, recognized statutorily, to speak for the seventy-

five county governments of Arkansas, of course. We would like to just echo some of the sentiments Mr. Rainwater made. And certainly not going in and taking time because he does such an adequate job in those. Mr. Kearney, of course, has come and has met with our Board of Directors, made a very good presentation to them in regard to the work of the Commission. We thank him for his efforts of coming over to our Board meeting, and we do appreciate him coming and kind of share some of the idea and forethought of what you all were in the process of doing. We, of course, representing county elected officials of Arkansas have some of the same feelings and comments Mr. Rainwater made. And he was a little, I believe, not adequate in making his representation for his involvement in county government known. He is the attorney for our risk management fund with the Association of Arkansas Counties and very involved with the very policy, personnel policy guidelines and procedures and has written many of the recommendations for the county governments of Arkansas that they have taken back to the seventy-five counties back home and have adopted. We would like to echo his sentiments in the prehearing recommendations, and not to go into that because he did such an adequate job and you all dialogued back and forth with him. Also the fact, the open file, giving the accused, so to speak, access to the file and enlarging that subpoena power as he spoke of. A comment that was made that a lot of times these are very trivial, they maybe very trivial. But back in the rural counties of Arkansas where politics are certainly a heated and especially at this time of year with it being filing time approaching the preferential primary, very very serious to that particular elected official, that may be accused of something as of this, maybe so to speak, quote 'dotting of an i or crossing the t.' But when you take it back home and the fact that there is a Commission in Little Rock investigating an elected officials doings or something like this, politically at home it does begin to create some type of a problem. And many we're hired to represent, of course, make their sole livelihood from serving as a public servant in a county elected position. It is their livelihood and once labeled, as Mr. Rainwater stated a minute ago, a lot of times that implication although they may clear it by the Commission or whatever, that implication will haunt him politically back home in trying to maintain their office and their livelihood. For those reasons, we would like just to echo Mr. Rainwater's sentiment and just go on record publicly as the county governments of Arkansas would like you to consider those recommendations that he made."

Mack Koonce: "Thank you very much. We appreciate your input Mr. Morris. Anyone else have a question, or wish to address the Commission? Yes sir."

Jack Kearney: "Let me make a comment before the next person comes up. Mr. Morris, we agree with you. Anytime that we undertake an investigation or we issue a ruling, it is going to be serious. It is going to be serious as to that person who is the accused. And as for the staff and the Commission, we approach every accusation with that in mind. So we're going to take every one of them

seriously and understand what impact it might have on these people in taking action."

Mack Koonce: "Thank you."

Richard Hutchinson: "Thank you. My name is Richard Hutchinson. I'm director of government relations for the Arkansas Education Association. I don't have a statement. I just have a question or really I'm looking for some clarification. I draw your attention to page 17 of section E item 7 and 8. Item 8 reads, if I'm reading this correctly, is that an individual cannot make a promise to contribute to a campaign of a state constitutional officer or general assembly candidate"

Mack Koonce: "I'm sorry, what paragraph are you on again?"

Richard Hutchinson: "Page 27, item 8."

Mack Koonce: "Eight, okay. Go right ahead."

Richard Hutchinson: "If the promise was made during a period extending from 30 days before any regular or special session to 30 days following, and I'm wondering how we would know if we were in a period of 30 days necessarily prior to a special session?"

Jack Kearney: "I can answer that by saying that the inclusion of 'special session' in that paragraph is a mistake."

(Tape malfunction, some undetermined amount of testimony not included)

Linda Polk: "...to clarify a couple of points. The one question that I hope that you will clarify, has to do with the meeting and holding them over the telephone and how that fits in with FOI."

Mack Koonce: "Jack, would you like to. Are you asking the question in regard to what our position is?"

Linda Polk: "Right. How will those meetings be held, and I believe it's on page 5 paragraph 7."

Mack Koonce: "Under FOI."

Jack Kearney: "We will give notice if it is being held by electronic/telephonic means. We will give notice to the public and the press of such a meeting. And this paragraph that you're speaking about is what's called an emergency meeting, if that becomes necessary. Then we will give notice as soon as we can. That's why 'as soon as practical' is used."

Linda Polk: "Do you think it will be a common occurrence to have other meetings by telephone?"

Jack Kearney: "I don't think it will be common. But there are times because our Commissioners are from all over the state."

Linda Polk: "I, I . . ."

Jack Kearney: ". . . that there maybe only one item on the agenda to be considered. Then it is possible that rather than bring all of those Commissioners in for a meeting, that it will be held by a telephonic, it will be a telephone meeting. We have had one of those and we invited the press and the press did indeed show up and reported on it."

Linda Polk: "You do that by speaker phone then."

Jack Kearney: "By speaker phone."

Linda Polk: "That's the one question that I have. Let me see if Bobbie Hill who served on the group who helped to write the Initiated Act might have any comments."

Mack Koonce: "I'm sorry, would you state your name for the record please."

Bobbie Hill: "My name is Bobbie Hill, immediate past president of League of Women Voters of Arkansas, chairman Campaign Ethics Committee. I would like to reassure the people that we worked long and hard for one year to bring the ethics legislation to the people and, that we tried to make it as fair as possible for everybody. Those who had some problems with their filling out for election their papers afterwards, that nobody, let me say this that when they came when they might be accused of something that those people who are duly accused could not just do that blatantly. That they would be, if that happened to them, it would be a problem. So we wanted to make that quite sure that nobody would be accused and if they were that that person would then have a . . ."

Mack Koonce: "We appreciate very much your comment, Mrs. Hill."

Bobbie Hill: "Thank you."

Mack Koonce: "Thank you, Mrs. Polk."

(Tape malfunction, undetermined amount of testimony lost)

Mack Koonce: "I'm sorry, would you state your name again for the?"

Noel Oman: "My name is Noel Oman. I'm a reporter for the Arkansas Democrat-Gazette."

Mack Koonce: "Noel, glad to have you."

Noel Oman: "I'm covering this meeting, but she raised an interesting question. I neglected to follow up when it was pointed out to me. What I wanted to know, first off from you, what was

that meeting that you held by telephone conference and that you notified the press."

Mack Koonce: "Your newspaper covered it, and I can't recall, do you recall the reporter's name? And there was an article in the paper in regards to the meeting. He was there in the meeting. And what was it? We discussed the rules and regulations."

Jack Kearney: "It was last month's meeting."

Noel Oman: "Was it the one during the special session?"

Mack Koonce: "No."

Noel Oman: "Okay, I was made aware of that meeting."

Jack Kearney: "We didn't have a meeting during the special session."

Noel Oman: "Well it was right around then about the . . . "

Mack Koonce: "Yes, about the contribution, was what the call was about?"

Noel Oman: "Right, that was during the special session."

Jack Kearney: "Well, that was not a meeting."

Noel Oman: "Well, you guys got together by telephone conference and issued an advisory opinion."

Jack Kearney: "There was a telephone poll and the only question asked was whether or not an opinion could be approved. And we reported the results of that poll and the question, so that was not a meeting."

Mack Koonce: "We had a vote, though."

Noel Oman: "The only point I would like to make is when I saw that, I thought a decision, if an opinion was issued I considered an opinion or a decision of a governmental entity and that the media should have been notified that it was going to take place."

Mack Koonce: "You had a reporter there."

Noel Oman: "At that one."

Mack Koonce: "At that meeting. He sat in the office right next to me on my immediate left."

Noel Oman: "Now, when the poll was conducted?"

Mack Koonce: "Yea."

Jack Kearney: "No, no, no those are two different situations. The telephonic meeting was covered by your newspaper."

Mack Koonce: "Yea, that's the one I was referring to."

Jack Kearney: "The poll itself, was not a meeting. It was not a meeting. We poll our members frequently about many things, and about whether or not to do lots of things. This was not a meeting. There was one question that was asked of each Commissioner, and the question was revealed to the public."

Noel Oman: "Okay, I just wanted to get . . . "

Mack Koonce: "I'm sorry and I recall I was one of them you couldn't get a hold of."

Noel Oman: "I was just of the mind that a decision had been rendered by your body and that"

Mack Koonce: "It was not an official opinion at all."

Noel Oman: "Okay."

Ronald May: "It's on the same level as being asked about a date for a meeting. Frequently we will have a meeting scheduled and it will be changed, at which time our director will call us to see if the new date is satisfactory."

Mack Koonce: "Thank you very much. Does anybody else have any discussion or question whatsoever? Assuming not, let me thank you again very much for all of each of the speaker's input. As you can imagine it's been a very difficult job, but I can assure you this Commission's intent is to be fair to everybody concerned, and as someone stated a minute ago, no complaint is taken frivolous by any of us and it will be a serious matter. Yes sir, Mr. Hutchinson."

Richard Hutchinson: "Will you continue to accept written responses?"

Mack Koonce: "Certainly, we would ask you to submit them. Now, could I ask you this please. We would, if you would like written a comment we would like it as soon as possible, please. We would like to get these rules in the hands of everybody quickly. We're getting a lot of requests for, because of the filing period and obviously as you can understand, you can certainly understand that. So we would encourage you. Yes we'd like written, but would like to do it as soon as possible. Is there any other question?"

Ronald May: "We are having a meeting on the 26th."

Jack Kearney: "We are indeed having a meeting the 26th in which we will consider the comments from today's public hearing as well as the written comments that we will receive."

Mack Koonce: "For Noel and for everybody else, that meeting is going to be held at 11:00 on the 26th over at the office which is, in what building?"

Jack Kearney: "The Executive Building."

Mack Koonce: "The Executive Building, over on third street. Is there any other question? Sir? March 26th, correct. Yes, yes, yes, please."

And we will be obviously discussing all the changes we are talking about today. Yes ma'am."

Candy Stevens: "I'm sorry, I was running a little bit late and I'm sorry if I'm holding you over, I just now had a chance to review this. My name is Candy Stevens and I'm the Ethics Director for the Secretary of State's office. On page 17, item number eight, I believed a gentleman referred to this earlier, it was corrected in 7 but there is still an error in 8 as far as receiving contributions 30 days prior to a special."

Mack Koonce: "Yes"

Jack Kearney: "Yes, both of those were mistakes and are corrected."

Candy Stevens: "Seven was correct, but eight was still incorrect. I have a question on number nine."

Mack Koonce: "Did you, let me. You're saying that 7, let me read it. Okay. I see what you're saying. Yes, Candy that has been corrected."

Candy Stevens: "And it has been corrected?"

Mack Koonce: "In both 7 and 8. We should have corrected before we . . ."

Candy Stevens: "You're telling me that this copy is not correct but you have corrected that?"

Jack Kearney: "Well, if we haven't made it . . ."

Mack Koonce: " . . . It will be corrected, yes."

Candy Stevens: "Okay."

Mack Koonce: "We've discussed that and it will be corrected in 7 and 8."

Candy Stevens: "I have a question on number 9. 'A candidate for public office at anytime prior to the period set out by law, convert funds to personal use.' There are two sections in the code. One section deals with before you have a filed opponent to

your nomination or to your election. Basically you should be using your funds for personal use prior to that time, and then also after 30 days after the election. That would be post-time. The wording on this, 'at any time prior to the period set out by law'. I believe that's incorrect."

Jack Kearney: "Candy, I think what you, I don't think the Commission has issued an opinion on your interpretation of the law, the one that says that you can start using the money when you don't have an opponent."

Candy Stevens: "I didn't realize that needed an interpretation. It's pretty black and white."

Jack Kearney: "Well, tell me. Point to the law that you're speaking of."

It's our interpretation, at least unofficially, that you cannot use money at any time prior to that until after the election, and if there is some section of the law that contradicts that, we'd like to hear about it."

Candy Stevens: "Section 7-6-203"

Jack Kearney: " Okay."

Candy Stevens: "And section (h) and also section (i)"

Jack Kearney: "Okay."

Candy Stevens: "If a candidate has no filed opponent to his or her nomination and election, then after the deadline to file as a candidate, the unopposed candidate shall not take any campaign funds as personal use from self or family. So basically, if you're in a just, and underneath that also have no opponent for your nomination and then you have no opponent for your election. So if we're referring to a general election, up until the time that an individual has an opportunity to file, you have no way of knowing if you're going to have an opponent or not. And the law prohibits you from using that as personal income after the time you've had a filed opponent and not prior to that time."

Jack Kearney: "What are you saying, that the deadline, that the law allows you to take. . . "

Candy Stevens: "It prohibits you from taking it after that. It does not discuss prior to that."

Jack Kearney: "Well, I certainly think that probably will take an interpretation from the Commission. An opinion from the Commission as to whether or not your present interpretation is correct. And I'm not saying that you're wrong about it, but it certainly is not clear from these statutes that says that 'you can't do that'. And

I assume that the paragraph you've pointed to in our rules and regulations has an underlying assumption that you cannot, but it's not been interpreted by the Commission. So, I don't want to say which way we'll go on it."

Candy Stevens: "Okay. You might want to look into that. Also number 11 on page 18. That a political action committee or exploratory committee failed to provide all the names, addresses and information regarding its contributors. That's no required by Arkansas law. A political action committee has to disclose who they contribute to but not the individuals who contribute to the PAC. And there has been an AG's interpretation on that."

Jack Kearney: "An AG's interpretation on that? Well, the first thing is this. Our Commission has taken the stance that all laws that interpret these statutes is under the authority of the Commission, so that they have to issue an opinion on it."

Candy Stevens: "Okay."

Jack Kearney: "So, we will take another look at this and see if it's right."

Candy Stevens: "That's one of the sections that the law did not require it, but when we created our forms, the Ethics Commission requested that information be included and then when an opinion was requested, the AG said some of those things they felt like could be included and some of those things they felt like the Commission should not ask for. And that was some of the things that they said that you probably should not ask for. But those are some areas I would like for you to look at."

Jack Kearney: "We will indeed."

Mack Koonce: "Thank you very much. Appreciate your comments. Yes sir."

Noel Oman: "Back under the FOI, paragraph 7."

Mack Koonce: "I'm sorry."

Noel Oman: "On page 5."

Mack Koonce: "Okay."

Noel Oman: "Paragraph 7, I take that to mean that you guys might have an unscheduled meeting and the press not be notified."

Mack Koonce: "No."

Noel Oman: "The last sentence says the last phrase in that paragraph says and shall be notified if practicable thereafter if circumstances prevent prior notice of such meetings."

Mack Koonce: "I can't conceive of us ever having or ever have a reason why we will ever have a meeting without the press being notified and obviously they can attend if they so desire. Jack, would you like to comment. I can't remember"

Jack Kearney: "I cannot envision us having a meeting, but this is talking about an 'emergency' situation and if we could envision it it wouldn't be an 'emergency'. But, there is a possibility of something coming up so immediately that the Commissioners have to be placed on the telephone to discuss a situation. I cannot imagine what that would be. They would discuss it and we would get information to the press as soon as we could after. That's what that says. I don't know what that situation would be."

Noel Oman: "Would that not be a violation of the Freedom of Information Act if you guys did hold a meeting and not notify the press of an emergency meeting? Would that be violation, I mean?"

Jack Kearney: "I don't think it would be, if it were indeed an emergency situation. But it is certainly something we would not do. I can't imagine what situation that would come up under. And we would not ever want to have a meeting without first having notified the press."

Mack Koonce: "And may I say, we have not had one without first notification."

Linda Polk: "May I make an additional comment, or do you want me to go over here?"

Mack Koonce: "That's fine. You may from there."

Linda Polk: "I think it might be a good idea to clarify it. It would seem to me that I had read that there needs to be a two hour notification. There would seldom be an occasion when you would need to meet by telephone when you couldn't give two hours. Because what I'm concerned about is not that I think this Commission would ever have a problem with that, but its the perception the public might have of things the Commission is doing. And it is the Ethics Commission. And so always we want you to not only to do things ethically, which I know you are going to do, but also that the appearance to the public would be that it is done very carefully and there would be no compromise."

Mack Koonce: "Mrs. Polk, may I say to you that this Commission has been very aware of that. That and has been very concerned about the press and everybody else having complete notification of our meetings. I absolutely cannot visualize when we could ever have a meeting without the press having sufficient notice. You know, normally it's a week, normally a month in advance. I'm saying, yes we will be glad to look at this again."

Linda Polk: "I wish you would think on it, because I think it's really a very short time. I believe it's a two hour notification."

And that's really not a long length of time. That is required under FOI, and I really would request that you check into that."

Mack Koonce: "I can assure you we will. Thank you very much. Any other questions or comments? Again, let me thank you very much for your time and appreciate it, and at any time you would like to make comments to the Ethics Commission, please do so. Thank you very much."