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State Government

Q-3 Kansas Open Records Act

Purpose

The Kansas Open Records Act (KORA)—KSA 45-215 *et seq.*—is one of two main laws that guarantee the business of government be conducted in the “sunshine.” The other “sunshine” law is the Kansas Open Meetings Act, which is the subject of a separate briefing paper.

The open records law declares it is the public policy of Kansas that “public records shall be open for inspection by any person unless otherwise provided” (KSA 45-216). The burden of proving an exemption from disclosure is on the agency not disclosing the information (*SRS v. Public Employee Relations Board*, 249 Kan. 163 (1991)).

Who Is Covered by the Act?

Coverage under KORA is keyed to the definition of “public agency.” Included in this definition are:

- The state;
- Any political or taxing subdivision of the state or any office, officer, agency, or instrumentality thereof; and
- Any other entity receiving or expending and supported in whole or in part by public funds that are appropriated by the state or its political and taxing subdivisions.

The definition covers all state agencies, cities, counties, townships, school districts, and other special district governments as well as any agencies or instrumentalities of these entities and any officers of the above public entities.

In addition, although not included in the KORA itself, KSA 45-240 requires non-profit entities, except health care providers, that receive public funds of at least \$350 per year to adhere to certain open records requirements. The 2005 Legislature added this provision to require such non-profit entities to document the receipt and expenditure of public funds and make this information available to the public. Non-profit entities may charge a reasonable fee to provide this information.

Exclusions from Open Records Requirement

Certain entities and individuals that are excluded from the definition of “public agency” include:

- Any entity solely by reason of payment from public funds for property, goods, or services of the entity. This exemption is designed to exempt vendors who merely sell goods or services to the government, but the records of the public agencies making the purchases must be open to the public. (See *Frederickson*, 33 Kan. L. Rev. 216-7);
- Any municipal or state judge; and
- Any officer or employee of the state or local political or taxing subdivision, if the office they are provided is not open to the public at least 35 hours a week.

Further, judges of the district court are excluded from the definition of public agency, and judges’ telephone records do not become public records merely because the telephone system is maintained by a county (Op. Atty Gen. 77 (1996)).

What Is a Public Record?

“Public record” is defined under KORA to mean “any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency . . .” (KSA 45-217(g)(1)).

Excluded from the definition of public record are:

- Records owned by a private person or entity that are not related to functions, activities, programs, or operations funded by public funds;
- Records kept by individual legislators or members of governing bodies of political and taxing subdivisions; or
- Employers’ records related to certain individually identifiable employee records. (KSA 45-217(g)(2) and (3)).

The above definition is quite broad. The comment has been made that the Act is meant to encompass “all recorded information—be it recorded on paper, video film, audiotape, photographs, mylar overlays

for projectors, slides, computer disks or tape, or etched upon stone tablets.”

Right of Public to Inspect and Make or Obtain Copies of Records

Members of the public have the right to inspect public records during regular office hours and any established additional hours. If the agency does not have regular office hours, it must establish reasonable hours when persons may inspect records. An agency without regular office hours may require a 24-hour notice of desire to inspect. Notice may be required to be in writing. All records are open for inspection unless closed pursuant to specific legal authority (KSA 45-218 (a) and (b)).

Any person may make abstracts or obtain copies of a public record. If copies cannot be made in the place where the records are kept, the records custodian must allow the use of other copying facilities (KSA 45-219(b)). Members of the public cannot remove a record without written permission of the custodian (KSA 45-218(a)).

Computerized information can meet the definition of a public record and must be provided in the form requested if the public agency has the capability of producing it in that form. The agency is not required to acquire or design a special program to produce information in a desired form, but it has discretion to allow an individual who requests such information to design or provide a computer program to obtain the information in the desired form. (Op. Atty Gen. 152 (1988) [voter registration lists]; Op. Atty Gen. 106 (1989); and Op. Atty Gen. 137 (1987).)

However, KORA explicitly states a public agency is not required to electronically make copies of public records by allowing a person to obtain the copies by attaching a personal device to the agency’s computer equipment (KSA 45-219 (g)).

A public agency is not required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, or illustrations unless the items were shown or played at a public meeting. Regardless, the agency is not required to

provide items copyrighted by someone other than the public agency (KSA 45-219(a)).

Duties of Public Agencies

Public agencies are required to:

- Appoint a freedom of information officer to assist the public with open records requests and disputes. That officer is to provide information on the open records law, including a brochure stating the public's basic rights under the law (KSA 45-226 and KSA 45-227);
- Adopt procedures to be followed (KSA 45-220(a)); and
- Provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records (KSA 45-220(f)).

Rights of Public Agencies

The public agency may:

- Require the request to be written, but not on a specific form (KSA 45-220(b));
- Require written certification that the requestor will not use names and addresses obtained from the records from solicit sales to those persons whose names are contained in the list (KSA 45-220(c));
- Deny access if the request places an unreasonable burden in producing the record or is intended to disrupt the agency (KSA 45-218(e)); and
- Require payment of allowed fees in advance. Fees may include costs of any computer services and staff time (KSA 45-218(f) and KSA 45-219(c)).

Prohibited Uses of Lists of Names and Addresses

A list of names and addresses shall not be obtained from public records for the purpose of selling or offering for sale any property or service to the persons listed (KSA 45-220(c)(2) and KSA 45-230). This provision does not prohibit commercial

use generally; it just applies to use of the names to sell or offer to sell property or a service. This provision does not prohibit the use of lists of names obtained from public records to solicit the purchase of property from the persons listed (water meters; promissory note underlying contract for deed).

Any person, including the records custodian, who violates this provision of the law and gives or receives records for this purpose can be penalized with a civil fine not to exceed \$500 in an action brought by the Attorney General or a county or district attorney (KSA 45-230).

Records That Must Be Closed

Some public records are closed mandatorily by federal law, state statute, or Supreme Court rule. These types of public records must be closed and generally are referenced in KSA 45-221(a)(1). Approximately 260 different statutes require closure of certain public records. A few examples include:

- Child in need of care records and reports, including certain juvenile intake and assessment reports (KSA 38-2209);
- Unexecuted search or arrest warrants (KSA 21-5906);
- Grand jury proceedings records (KSA 22-3012); and
- Peer review records (KSA 65-4915(b)).

Records That May Be Closed

KSA 45-221(a)(1) to (55) lists other types of public records that are not required to be disclosed. The public agency has discretion and may decide whether to make these types of records available. However, the burden of showing that a record fits within an exception rests with the party intending to prevent disclosure. Some of the different types of records that may be closed discretionarily include:

- Records of a public agency with legislative powers, when the records pertain to proposed legislation or amendments. This exemption does not apply when such records are:

- Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
- Distributed to a majority of a quorum of any body with the authority to take action or make recommendations to the public agency with regard to the matters to which these records pertain (KSA 45-221(a)(21)).
- Records of a public legislative agency, when the records pertain to research prepared for one or more members of the agency. Again, this exemption does not apply (*i.e.*, the records would be open) when such records are:
 - Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
 - Distributed to a majority of a quorum of any body that has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain (KSA 45-221(a)(22));
- Records that are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure (KSA 45-221(a)(2));
- Medical, psychiatric, psychological, and alcohol or drug treatment records that pertain to identifiable individuals (KSA 45-221(a)(3));
- Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies (KSA 45-221(a)(4));
- Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual (KSA 45-221(a)(6));
- Information that would reveal the identity of any undercover agent or any informant reporting a specific violation of law (KSA 45-221(a)(5));
- Criminal investigation records (KSA 45-221(a)(10));
- Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications, or related information for any building or facility used for purposes requiring security measures in or around the building or facility, or for the generation or transmission of power, water, fuels, or communications, if disclosure would jeopardize security of the public agency, building, or facility (KSA 45-221(a)(12));
- Attorney work product (KSA 45-221(a)(25)); and
- Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy (KSA 45-221(a)(30)).

Sunset of Exemptions

A sunset provision for all exemptions was added in 2000. The provision required a review of exemptions within five years, or they would expire. It also required any exemptions continued after legislative review to be reviewed again five years later (KSA 45-229). The Legislature began its review during the 2003 Interim and continued during the 2004 Session and the 2004 Interim. The review was completed during the 2005 Session and extended the life of more than 240 exemptions, which had been scheduled to expire on July 1, 2005. The extension, based on the legislation that resulted from this review, would have expired on July 1, 2011. The exceptions again were reviewed during the 2009 Interim. Recommendations from that review resulted in the extension of approximately the same number of exceptions by the 2010 Legislature. Twenty-eight exceptions were reviewed during the 2010 Interim and subsequently were approved in the 2011 Session. During the 2012 Session, exceptions reviewed and extended involved six subject areas and eight statutes (2012 HB 2569).

In 2013, the Legislature reviewed and extended exemptions in 15 statutes. Additionally, the Legislature modified the review requirement so that exceptions will no longer be subject to review and expiration if the Legislature has twice reviewed and continued the exception or reviews and continues the exception during the 2013 Session or thereafter (2013 HB 2012). In

2014, the Legislature conducted a final review of 36 exemptions. Two were stricken because the statutes creating those exemptions were repealed. Twelve were reviewed and continued in 2015 HB 2023. In 2015 HB 2256, exceptions were added for records of a public agency on a public website that are searchable by a keyword search and identify the home address or home ownership of a municipal judge, city attorney, assistant city attorney, special assistant county attorney, or special assistant district attorney.

Enforcement of the Open Records Law

The 2015 Session resulted in significant changes to enforcement of both KORA and the Kansas Open Meetings Act (KOMA) *via* HB 2256. The bill requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including through coordination with

appropriate organizations. Further, the bill gives the Attorney General or a county or district attorney various subpoena and examination powers in KORA and KOMA investigations.

Among other enforcement provisions, the bill allows the Attorney General or a county or district attorney to accept a consent judgment with respect to a KORA or KOMA violation, in lieu of filing an action in district court, and allows the Attorney General to enter into a consent order with a public agency or issue a finding of violation to the public agency upon discovery of a KORA or KOMA violation.

Criminal Penalty for Altering Public Record

Altering, destroying, defacing, removing, or concealing any public record is a class A nonperson misdemeanor (KSA 21-5920).

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