



**H-1  
Administrative Rule  
and Regulation  
Legislative Oversight**

**H-2  
Board of Indigents'  
Defense Services**

**H-3  
Election Security**

**H-4  
Home Rule**

**H-5  
Joint Committee on  
Special Claims Against  
the State**

**H-6  
Kansas Open Meetings  
Act**

**H-7  
Kansas Open Records  
Act**

**H-8  
KPERS' Retirement  
Plans and History**

**H-9  
Senate Confirmation  
Process**

**H-10  
State Employee  
Issues**

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# Kansas Legislator Briefing Book 2018

## State and Local Government

### H-7 Kansas Open Records Act

#### Purpose

The Kansas Open Records Act (KORA)—KSA 45-215 *et seq.*—is one of two main laws that ensure the business of government is conducted in the “sunshine.” The other “sunshine” law is the Kansas Open Meetings Act (KOMA), which is the subject of a separate Briefing Book article. KORA was enacted in 1984, replacing a 1957 act on the topic.

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” (KSA 2016 Supp. 45-217).

Included in this definition are:

- The state;
- Any political or taxing subdivision of the state or any office, 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 officers of the above public entities in connection with their official duties.

In addition, although not included in KORA itself, KSA 2016 Supp. 45-240 requires nonprofit 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 nonprofit entities to document the receipt and expenditure of public funds and make this information available

to the public. Nonprofit entities may charge a reasonable fee to provide this information.

### Exclusions from Open Records Requirement

Certain entities and individuals are excluded from the definition of “public agency” (KSA 2016 Supp. 45-217(f)(2)):

- 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<sup>1</sup>; and
- Any municipal, district, or appellate judge or justice.

The 2016 Legislature removed an additional exclusion from this definition: officers or employees of the state or localities who have their offices open to the public fewer than 35-hours a week. (2016 Sub. for SB 22; L. 2016, ch. 82)

### What Is a Public Record?

“Public record” is defined broadly under KORA, to mean “any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of any public agency; or . . . any officer or employee of a public agency pursuant to the officer’s or employee’s official duties and which is related to the functions, activities, programs or operations of any public agency.” (KSA 2016 Supp. 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, but “private person” shall not include an officer or employee of a public agency who is acting pursuant to the officer’s or employee’s official duties;

- 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 2016 Supp. 45-217(g)(2) and (3)).

The Attorney General opined in 2015 (Op. Atty. Gen. 2015-010) that under certain specific conditions and the law in effect at the time, an e-mail sent by a state employee from his or her private e-mail account related to work funded by public funds is not within the meaning of “public record.” However, in 2016 the definition of and exclusions from “public record” were amended to broaden the definition of “public record” and apply it more specifically to state officers and employees, regardless of location of the record (2016 Sub. for SB 22; L. 2016, ch. 82). The bill also specifically added audio and video recordings made and retained by law enforcement using a body camera or vehicle camera to the definition of a criminal investigation record (open only under specific circumstances) (KSA 2016 Supp. 45-254).

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

All public records are open for inspection unless closed pursuant to specific legal authority (KSA 45-218 (a) and (b)). Members of the public have the right to inspect public records during regular office hours and any established additional hours; the agency may require a written request but shall not require a request to be made in a particular form (KSA 2016 Supp. 45-220(a) and (b)). If the agency has business days on which it does not have regular office hours, it must establish reasonable hours when persons may inspect records and may not require a notice of desire to inspect more than 24 hours in advance of the hours established for inspection and obtaining copies; the agency also may not require the request to be in writing (KSA 2016 Supp. 45-220(d)).

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. 1988-152 [voter registration lists]; Op. Atty. Gen. 1989-106; and Op. Atty. Gen. 1987-137).

However, KORA explicitly states a public agency is not required to make electronic copies of public records by allowing a person to obtain the copies by attaching a personal device to the agency's computer equipment (KSA 2016 Supp. 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 2016 Supp. 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 2016 Supp. 45-220(a));
- Respond to a request for which it is possible to determine the records to

which the requester desires access (KSA 2016 Supp. 45-220(b)); and

- Provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records (KSA 2016 Supp. 45-220(f)).

### **Rights of Public Agencies**

The public agency may:

- Require written certification that the requester will not use names or addresses obtained from the records to solicit sales to those persons whose names or addresses are contained in the list (KSA 2016 Supp. 45-220(c));
- Deny access if the request places an unreasonable burden in producing the record or is intended to disrupt essential functions of 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 but may not exceed costs (KSA 45-218(f) and KSA 2016 Supp. 45-219(c)).

### **Prohibited Uses of Lists of Names and Addresses**

A list of names and addresses cannot be obtained from public records for the purpose of selling or offering for sale any property or service to the persons listed (KSA 2016 Supp. 45-220(c)(2) and 2016 Supp. 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 agency from using names and addresses in its public records for a purpose related to that agency's services or programs (Op. Atty. Gen. 2006-026).

Any person, including the records custodian, who knowingly 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 2016 Supp. 45-230).

## Records That Must Be Closed

Some public records are required to be closed by federal law, state statute, or Supreme Court rule. These types of public records must be closed and generally are referenced in KSA 2016 Supp. 45-221(a)(1). Approximately 280 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 2016 Supp. 38-2209);
- Unexecuted search or arrest warrants (KSA 2016 Supp. 21-5906);
- Grand jury proceedings records (KSA 2016 Supp. 22-3012); and
- Health care provider peer review records (KSA 2016 Supp. 65-4915(b)).

## Records That May Be Closed

KSA 2016 Supp. 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. The types of records that may be closed discretionarily include these:

- 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 2016 Supp. 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 2016 Supp. 45-221(a)(22));
- Records that are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure (KSA 3026 Supp. 45-221(a)(2));
- Medical, psychiatric, psychological, and alcohol or drug treatment records that pertain to identifiable individuals (KSA 2016 Supp. 45-221(a)(3));
- Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies (KSA 2016 Supp. 45-221(a)(4));
- Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual and not related to the appointment of persons to fill a vacancy in an elected office (KSA 2016 Supp. 45-221(a)(6));
- Information that would reveal the identity of any undercover agent or any informant reporting a specific violation of law (KSA 2016 Supp. 45-221(a)(5));
- Criminal investigation records (KSA 2016 Supp. 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 2016 Supp. 45-221(a)(12));

- Attorney work product (KSA 2016 Supp. 45-221(a) (25));
- Records of public agencies that identify home addresses of certain public officials such as judges, certain officers of the courts, and county and city attorneys (KSA 2016 Supp. 45-221(a)(51) and (52)); and
- Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy (KSA 2016 Supp. 45-221(a)(30)).

### **Body-worn and Vehicle Camera Recordings: Limited Disclosure**

Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera must be considered a “criminal investigation record,” as defined in KORA, thereby bringing such recordings within the exception to disclosure provision of the Act for criminal investigation records. This provision will expire July 21, 2021, unless reviewed and reenacted prior to that date. (KSA 2016 Supp. 45-254)

In addition to the disclosures under KORA applicable to such recordings as criminal investigation records, the law allows certain persons to request to listen to an audio recording or to view a video recording to allow these specific persons to listen to or view the recording, and the law enforcement agency must allow access subject to a reasonable fee. The persons who may make such a request are the subject of the recording; a parent or legal guardian of a person under the age of 18 years who is a subject of the recording; an attorney for any of the previous persons listed; and an heir-at-law, executor, or administrator of a decedent who is a subject of the recording. (KSA 2016 Supp. 45-254(c))

### **Sunset of Exceptions**

A sunset provision for all exceptions added in 2000 required review of any exception within five years, or the exception would expire. It also required any exceptions continued after legislative review

to be reviewed again five years later (KSA 2016 Supp. 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 exceptions that 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, 2010 (2005 SB 78; L. 2005, ch. 126). 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 (2010 SB 369; L. 2010, ch. 112). During the 2010 Interim, 28 exceptions were reviewed and subsequently were approved in the 2011 Session (2011 HB 2030; L. 2011, ch. 11). During the 2012 Session, exceptions reviewed and extended involved six subject areas and eight statutes (2012 HB 2569; L. 2012, ch. 50).

In 2013, the Legislature reviewed and extended exceptions in 29 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 exemption or reviews and continues the exemption during the 2013 Session or thereafter (2013 HB 2012; L. 2013, ch. 50). In 2014, the Legislature conducted a final review of 32 exceptions. Two were stricken because the statutes creating those exceptions had been repealed (2014 S. Sub. for HB 2182; L. 2014, ch. 72). Twelve were reviewed and continued in 2015 HB 2023 (L. 2015, ch. 6).

Pursuant to 2016 Sub. for SB 22 (L. 2016, ch. 82), exemptions to disclosure were continued in 29 statutes until 2021 (the 2016 Legislature choosing to set a date for another review of these statutes despite 2013 HB 2012). The bill removed an exemption concerning audits of voice over internet protocol (VoIP) providers, as the underlying statute, KSA 2010 Supp. 12-5358, was repealed during the 2011 Session. Legislation repealing the Kansas Electric Transmission Authority (2016 SB 318; L. 2016,

ch. 48) also repealed a KORA exception for that entity's records.

In 2017, enacted HB 2301 (L. 2017, ch. 73) continued exceptions present in 17 statutes and removed the sunset date of July 1, 2021, on exceptions in 18 statutes. Topics include certain motor vehicle records, criminal history record checks, child care facilities, child sexual abuse reports, environmental audit reports, and emergency medical services reports.

### Enforcement of the Open Records Law

2015 HB 2256 (L. 2015, ch. 68) significantly changed enforcement of both KORA and KOMA. The law requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including through coordination with appropriate organizations (KSA 2016 Supp. 75-761). Further, the bill gives the Attorney General or a county or district attorney

various subpoena and examination powers in KORA and KOMA investigations. (KSA 2016 Supp. 45-228; KSA 2016 Supp. 75-4320b)

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 (KSA 2016 Supp. 75-4320d; KSA 2016 Supp. 45-4320f).

### Criminal Penalty for Altering Public Record

Altering, destroying, defacing, removing, or concealing any public record is a class A nonperson misdemeanor (KSA 2016 Supp. 21-5920).

1 See Ted Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 Kan. L. Rev. 216-7. This analysis was utilized as recently as the 2017 Kansas Court of Appeals decision in *State v. Great Plains of Kiowa County, Inc.* (53 Kan. App. 2D 609, 389 P3d 984).

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