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James Fisher
Senior Research Analyst
785-296-6490
James.Fisher@klrd.ks.gov

Elections and Ethics

D-3 Kansas Open Records Act

Purpose

The Kansas Open Records Act (KORA) 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 KORA?

KORA applies to those entities considered a “public agency” under the law (KSA 2018 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 2018 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. Like public agencies, nonprofit entities may charge a reasonable fee to provide this information.

Exclusions from Open Records Requirement

Certain entities and individuals are expressly excluded from the definition of “public agency” (KSA 2018 Supp. 45-217(f)(2)):

- Entities included only because they are property, goods, or services paid for with public funds;¹ and
- Any municipal, district, or appellate judge or justice.

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 2018 Supp. 45-217(g) (1)). Specifically 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 2018 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 (KSA 2018 Supp. 45-217 (g)(1)). Additionally, audio and video recordings made and retained by law enforcement using a body camera or vehicle camera were added to the definition of a criminal investigation record (open only under specific circumstances) (KSA 2018 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 2018 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 notice to be in writing (KSA 2018 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 2018 Supp. 45-219(b)). Members of the public cannot remove a record without written permission of the custodian (KSA 45-218(a)).

KSA 2018 Supp. 75-3520 requires any document or record that contains any portion of an individual’s Social Security number be redacted before it is made available for public inspection or copying. This does not apply to documents recorded in the official records of any county recorder of deeds or in the official records of the courts. An agency also is required to give notice, offer credit monitoring service at no cost, and provide certain information to individuals if

the agency becomes aware of the unauthorized disclosure of their personal information.

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 allow a person to obtain the electronic copies by attaching a personal device to the agency's computer equipment (KSA 2018 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 2018 Supp. 45-219(a)).

Duties of Public Agencies

Under KORA, 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 to request and obtain documents (KSA 2018 Supp. 45-220(a));
- Respond to requests where it is possible to determine the records to which the requester desires access (KSA 2018 Supp. 45-220(b)); and

- Provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records (KSA 2018 Supp. 45-220(f)).

Rights of Public Agencies

The public agency may:

- Require written certification 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 2018 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 such costs (KSA 45-218(f); KSA 2018 Supp. 45-219(c)). [Note: Executive Order 18-05 waives any charge or fee for the copying of documents, up to and including the first 100 pages, for all executive branch departments, agencies, boards, and commissions under the jurisdiction of the Office of the Governor in response to a KORA request made by any resident of Kansas.]

Prohibited Uses of Lists of Names and Addresses

With some specified exceptions, 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 2018 Supp. 45-220(c)(2) and KSA 2018 Supp. 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 2018 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 are broadly referenced in KSA 2018 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 2018 Supp. 38-2209);
- Unexecuted search or arrest warrants (KSA 2018 Supp. 21-5906);
- Grand jury proceedings records (KSA 2018 Supp. 22-3012);
- Health care provider peer review records (KSA 2018 Supp. 65-4915(b)); and
- Certain records associated with the Kansas Department of Health and Environment's investigation of maternal death cases (2018 HB 2600).

Records That May Be Closed

KSA 2018 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 to 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 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;
- 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;
- Records that are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure;
- Medical, psychiatric, psychological, and alcohol or drug treatment records that pertain to identifiable individuals;
- Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies;
- 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;
- Information that would reveal the identity of any undercover agent or any informant reporting a specific violation of law;
- Criminal investigation records;

- Records of emergency or security information or procedures of a public agency; 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;
- Attorney work product;
- 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; and
- Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy.

Limited Disclosure Provisions

Some statutes provide for disclosure of limited information in response to KORA requests, rather than disclosure of the complete record requested. Recently created limited disclosure provisions include those concerning body-worn and vehicle camera recordings and certain records of the Department for Children and Families (DCF) regarding child fatalities.

Body-worn and Vehicle Camera Recordings

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 for criminal investigation records. This provision will expire July 21, 2021, unless reviewed and reenacted prior to that date (KSA 2018 Supp. 45-254).

In addition to any disclosures generally authorized for such recordings as criminal investigation records under KORA, the law allows

certain persons to request to listen to an audio recording or to view a video recording. The law enforcement agency must allow access to these certain persons, within 20 days of the request, subject to a reasonable fee. The persons who may make such a request include the subject of the recording, any parent or legal guardian of a person under the age of 18 years who is a subject of the recording, an heir-at-law of a deceased subject of a recording, or an attorney for any of the previous persons listed (KSA 2018 Supp. 45-254(c)).

Child Fatality Information

House Sub. for SB 336 (2018), among other provisions, added a requirement that the Secretary for Children and Families (Secretary), as allowed by applicable law, release within seven days the following information when child abuse or neglect results in a child fatality and a request is made under KORA: age and sex of the child; date of the fatality; a summary of any previous reports of abuse or neglect received by the Secretary involving the child, along with the findings of such reports; and any service recommended by DCF and provided to the child (KSA 2018 Supp. 38-2212(f)(3)).

The bill added a similar provision requiring the Secretary, as allowed by applicable law, to release the following information within seven days when a child fatality occurs while the child was in the custody of the Secretary and a request is made under KORA: age and sex of the child, date of the fatality, and a summary of the facts surrounding the death of the child (KSA 2018 Supp. 38-2212(f)(4)).

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 2018 Supp. 45-229).

In 2013, the Legislature modified the review requirement in KSA 2018 Supp. 45-229 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 2019, HB 2290 (L. 2019 ch. 62) continued 19 exemptions present in 17 statutes. Topics included, but were not limited to, certain reports prepared by the State Bank Commissioner, Health Care Stabilization Fund payments, Kansas Bureau of Investigation biological sample records, personal information of judges, certain affidavits, records relating to certain investigation by various state boards, certain student data, and various records for peer review related to technical professions.

Enforcement of the Open Records Law

HB 2256 (L. 2015, ch. 68) changed enforcement of both KORA and Kansas Open Meetings Act (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 2018 Supp. 75-761). Further, the statute gives the Attorney General or a county or district

attorney various subpoena and examination powers in KORA and KOMA investigations (KSA 2018 Supp. 45-228; KSA 2018 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 2018 Supp. 75-4320d; KSA 2018 Supp. 45-4320f).

Finally, HB 2290 provides for repayment by a state agency to the Tort Claims Fund of the cost of defense or indemnification provided for the agency or employee arising out of an alleged violation of KORA.

Criminal Penalty for Altering Public Record

Altering, destroying, defacing, removing, or concealing any public record is a class A nonperson misdemeanor (KSA 2018 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).

For more information, please contact:

James Fisher, Senior Research Analyst
James.Fisher@klrd.ks.gov

Robert Gallimore, Managing Research Analyst
Robert.Gallimore@klrd.ks.gov

Jill Shelley, Principal Research Analyst
Jill.Shelley@klrd.ks.gov

Kansas Legislative Research Department
 300 SW 10th Ave., Room 68-West, Statehouse
 Topeka, KS 66612
 Phone: (785) 296-3181