

Kansas Open Records Act (KORA)

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I. PURPOSE OF KORA

- A. It is the public policy of Kansas that "public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy." K.S.A. 45-216(a). *See also Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, Syl. ¶ 3 (2000).
- B. "The burden of proving an exemption from disclosure is on the agency not disclosing the information." *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 170 (1991). K.S.A. 45-218.

II. RECORDS SUBJECT TO KORA

- A. The Act applies to public records (not to private records): Public records are defined as "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency. . . ." K.S.A. 2007 Supp. 45-217(g). *Harris Ent. v. Moore*, 241 Kan. 59, 63 (1987); public agency is defined at K.S.A 2007 Supp. 45-217(f). A.G. Opin. No. 90-14 (record in possession of public agency).
 - 1. The KORA covers more than just paper copies or written information.
 - a. Any recorded information regardless of form or characteristics" means that "public records are not restricted to written records." *Burroughs v. Thomas*, 23 Kan.App.2d 769, Syl. ¶ 1 (1997). This case held that autopsy photos are public records.
 - b. Computer data is a "record." *State ex rel. Stephan v. Harder*, 230 Kan. 573, 582 (1982) (considering prior records statute). A.G. Opins. No. 87-137, 88-152, 89-106, and 94-104.
 - c. Disclosure of Kansas Offender Registration Act information on the internet is allowed under Kansas statutes. *State v. Stevens*, 26 Kan.App.2d 606 (1999).
 - 2. Records not yet in existence are not subject to KORA; a prospective or standing request for "records as they become available" is not enforceable. A.G. Opin. No. 98-51.
 - 3. The KORA does not require that a record be created in order to respond to requests or in order to answer questions asking for "information." *But see* K.S.A. 2007 Supp. 45-221(d), which requires separation of open from closed information contained in public records; this may have the practical impact of requiring creation of a new document.

III. PUBLIC AGENCIES SUBJECT TO KORA

- A. Public Agency: the state or any political or taxing subdivision, or any office, officer, or agency thereof, or any other entity, receiving or expending and supported in whole or part by public funds. K.S.A. 2007 Supp. 45-217(f).
- B. No entity is included under KORA solely because it receives public funds in exchange for goods or services. K.S.A. 2007 Supp. 45-217(f)(2)(A). However, receipt of public funds may subject the financial records of a not for profit vendor to the KORA if they fall under the provisions of K.S.A. 2007 Supp. 45-240. *See* A.G. Opin. No. 2004-34.
- C. Although most private entities are not subject to the KORA, some nonprofit corporations might be included.
 1. Kansas cases and opinions.
 - a. Nonprofit entities Subject to KORA:
Nonprofit providing mental health services is subject because there is specific statutory authorization for contracts with such nonprofits and in such a capacity it is performing a traditional governmental function. A.G. Opin. No. 94-111.
Nonprofit city hospital because authorized by statute and created by city. A.G. Opin. No. 88-61.
 - b. Nonprofit Entities Not Subject to KORA unless they:
 - i. Meet the terms of K.S.A. 2007 Supp. 45-240, which makes the KORA applicable to financial documents of non-profit entities receiving public funds of \$350 or more a year, unless otherwise exempted.
[Exemptions: (a) those non-profits that file a financial report with some public entity or agency; (b) those non-profits that are health care providers, (c) individual persons and (d) for profit corporations or partnerships.]
[Public funds means money received from the United States, the state of Kansas, or any taxing subdivision thereof, or any officer, board, commission or agency thereof.]
 - ii. Meet the tests that make a non-profit a public agency.
Examples of nonprofits that are not subject to the KORA:
 - In *Memorial Hospital Assn., Inc., v. Knutson*, 239 Kan. 663 (1986), a nonprofit operating a county hospital was determined not to be subject to the Kansas Open Meetings Act, KOMA. The association leased the hospital for \$1.00 per year and received \$228,000 from the county mill levy, budgeted by the county hospital board of trustees.

The Court described this as limited receipt of public funds.

- The NCAA is not subject to KORA because member schools pay dues in exchange for services provided by the NCAA. A.G. Opin. No. 97-64.
- WSU Endowment Assn. A.G. Opin. No. 82-172 (pre KORA).
- Sheltered Living, Inc., A.G. Opin. No. 2004-34 (privately formed non-profit providing services to special population, heavily regulated, funding from various public entities; however, no direct government entity oversight or control).

2. Cases from other states generally turn on (1) the extent of public funding, (2) whether there is a specific service provided for the funds, (3) whether the entity was created by a governmental entity or statute, and (4) whether it is providing a traditionally governmental service.

D. Judges are not defined as a "public agency" subject to the KORA. K.S.A. 2007 Supp. 45-217(f)(2)(B).

1. A judge's telephone records do not become public merely because another branch of government's data processing facilities maintains the records for the judicial branch. A.G. Opin. No. 96-77.
2. The KORA, by its express terms, does apply to court records. The KORA allows judicial branch to make its own rules, however, by Supreme Court rule. K.S.A. 2007 Supp. 45-221(a)(1).
3. District courts probably have authority to close some records under certain circumstances. Court records under former record act discussed at *Stephens v. Van Arsdale*, 227 Kan. 676 (1980).

E. Records made, maintained or kept by a legislator or member of a governing body are not public records. K.S.A. 2007 Supp. 45-217(g)(2).

F. Records owned by private persons which are not related to a governmental function are not included. K.S.A. 2007 Supp. 45-217(g)(2).

G. Does not include "any officer or employee" if not provided with "an office which is open to the public at least 35 hours per week." K.S.A. 2007 Supp. 45-217(f)(2)(C).

1. "This exclusion applies only to the part time officials personally and not the governmental entity they serve." Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 219-20 (Winter, 1985).
2. Offices which do not have regular office hours are required to establish reasonable hours when persons may inspect and copy documents, but such offices may require 24 hours advance notice. K.S.A. 2007 Supp. 45-220(d). For this provision to have any meaning, the 35 hour per week exclusion of K.S.A. 2007 Supp. 45-217(f)(2)(C) must not apply to the

office, but rather only to individuals, officers or employees, working in such offices.

IV. RIGHT OF PUBLIC TO INSPECT AND MAKE OR OBTAIN COPIES OF RECORDS. K.S.A. 45-219.

- A. Unless closed pursuant to specific legal authority, all records are open for inspection. K.S.A. 45-218(a).
- B. Any person may make abstracts or obtain copies of a public record. K.S.A. 45-219.
- C. If copies cannot be made in the place where the records are kept the custodian shall allow arrangements to be made for use of other copying facilities. K.S.A. 45-219(b).
- D. Members of the public cannot remove a record without written permission of the custodian. K.S.A. 45-218(a).
- E. A public agency is not required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations, unless the items were shown or played at a public meeting, but not if copyrighted by someone other than the public agency. K.S.A. 45-219(a). However, under K.S.A. 2007 Supp. 45-220, access to the record must be provided unless there is an exception from disclosure based upon the content or nature of the item.
- F. 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 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. A.G. Opins. No. 88-152 (voter registration lists); 89-106; 87-137.
- G. Agency may prescribe reasonable fees:
 - 1. Fees for copies shall not exceed the actual cost, including the cost of staff time.
 - a. 20 cents per page charged by a school district was not unreasonable as it reflected actual costs. A.G. Opin. No. 87-4. Other jurisdictions have generally not upheld copying costs in excess of \$.25 per page.
 - b. K.S.A. 45-219(c)(5) applies to fees for access to or copies of public records of a public agency within the executive branch of the state government. Any person requesting records may appeal the reasonableness of the fees charged for providing access to or furnishing copies of such state agency records to the secretary of administration whose decision shall be final. A fee for copies of public records possessed by such a state agency which is equal to or less than \$.25 per page shall be deemed a reasonable fee.

- c. Fees, *i.e.* staff time, for retrieval of information are contemplated by KORA since the statute provides for fees for "staff time required to make the information available." K.S.A. 45-219(c)(1). *See, Frederickson, Letting the Sunshine In*, 33 Kan. L.Rev. 225-27 (Winter 1985).
- 2. If records are maintained on computers, fees may include the cost of any computer services, including staff time. A.G. Opin No. 93-126. Proration of costs of computerizing is probably precluded, as such costs are normally required even without record requests.
- 3. When public records are repackaged in a computerized form in order to facilitate public access to the records, additional fees for computerization may be charged, so long as the basic records are available elsewhere at cost. A.G. Opin No. 95-64.
- 4. Fees for providing access of copies of public records are to recoup the actual costs associated with providing access or copies. Such fees are not meant to pay for costs that would be incurred by a public agency even without a record request. *E.g.* Overhead, capital improvements, utility bills, rent/building payments, etc.
- 5. Fees may include the cost of staff time spent in redacting open from closed information. *Data Tree, L.L.C. v. Meek*, 279 Kan. 445 (2005).

V. PROCEDURES FOR OBTAINING ACCESS OR COPIES OF RECORDS. K.S.A. 45-220.

- A. Each public agency is to appoint a freedom of information officer to assist the public with KORA requests and disputes. K.S.A. 45-226. That officer is to provide information on KORA including a brochure stating the public's basic rights under KORA. K.S.A. 45-227.
- B. Each public agency is to adopt procedures to be followed. Use the same procedure for all requests. K.S.A. 2007 Supp. 45-220(a).
- C. Each agency must provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records. K.S.A. 2007 Supp. 45-220(e).
- D. Members of the public can inspect during regular office hours and any established additional hours. K.S.A. 45-218(b).
- E. If the agency does not have regular office hours it shall establish reasonable hours when persons may inspect records. An agency without regular office hours may require 24 hour notice of desire to inspect. Notice shall not be required to be in writing. K.S.A. 2007 Supp. 45-220(d).
- F. The public agency may require proof of identity. K.S.A. 2007 Supp. 45-220(b).
- G. The public agency may require the request to be written, but not on a specific form. K.S.A. 2007 Supp. 45-220(b).
- H. The public agency may require written certification that the requester will not use names and addresses obtained from the records to solicit sales to those persons whose names are contained in the list. K.S.A. 2007 Supp. 45-220(c)(2). *See also* K.S.A. 2007 Supp. 45-230. Other than to ask for the name/identity of the

requestor, and this certification, the public agency should not require other information from requesters before complying with the KORA request.

- I. K.S.A. 45-217 and K.S.A. 2007 Supp. 45-220 permit the official custodian to designate other persons to carry out custodial duties. A.G. Opin. No. 90-89.
- J. The public agency must respond to the request as soon as possible, but not later than the end of the third business day following the date the request was received. K.S.A. 45-218(d).
 - 1. If access is not granted immediately, the public agency must give a detailed explanation for the delay. K.S.A. 45-218(d).
 - 2. If the request is denied, a written statement of the legal grounds for the denial shall be given upon request. K.S.A. 45-218(d). Some degree of specificity is required. "The burden of establishing the applicability of an exemption from disclosure under the Kansas Open Records Act requires the party claiming the exemption to provide more than conclusory language, generalized allegations, or mere arguments of counsel. A sufficiently detailed record must be provided to show the reasons why an exemption applies to the materials requested." *Southwest Anesthesia Associates v. Southwest Medical Center*, 23 Kan.App.2d 950, Syl. ¶ 2 (1997).
- K. Access may be denied if the request places an unreasonable burden in producing the record or is intended to disrupt the agency. K.S.A. 45-218(e). CAUTION - this provision should be used only in extreme circumstances. Refusal under this section must be sustained by a preponderance of evidence.
- L. The public agency may require payment of allowed fees in advance. K.S.A. 45-218(f).

VI. PROHIBITED USES OF CERTAIN RECORDS

- A. 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. K.S.A. 2007 Supp. 45-220(c)(2), K.S.A. 2007 Supp. 45-230.
 - 1. 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 to those persons/entities on the list. A.G. Opin. No. 98-51. A group of local ministers may use lists from public records to provide information about area churches. A.G. Opin. No. 2000-35. An agency may use its own records to inform of its own services or programs. A.G. Opin. No. 2006-26.
 - 2. This provision does not prohibit use of lists of names obtained from public records to solicit the purchase of property from the persons listed. A.G. Opins. No. 96-68 (water meters); 98-55 (promissory note underlying contract for deed).
 - 3. This provision pertains to the names and addresses of businesses listed in the public records, as well as individuals. A.G. Opin. No. 87-73.

4. Any person (including the records custodian) who violates this law and gives, or receives records for such purpose can be penalized with the same civil fines and penalties in K.S.A. 45-223.
 - a. The agency may require a person who requests such records to provide written certification that she or he will not use the record for that prohibited commercial purpose. A.G. Opin. No. 87-137; K.S.A. 2007 Supp. 45-220(c).
 - b. If requestor makes this certification the custodian is relieved of liability if custodian provides records in good faith reliance on certification. A.G. Opin. No. 94-132.
5. Cannot circumvent this provision indirectly; a third party who obtains this information from a "requestor" violates the law if it is used for commercial purposes.
 - a. A newsletter service which provides lists of names and addresses obtained from public records for its subscribers to solicit, is the type of activity prohibited under the KORA. A.G. Opin. No. 86-1.
 - b. Use of information obtained from public records to publish land ownership maps (A.G. Opin. No. 86-39) and "ownership product" documents (A.G. Opin. No. 89-47) does not violate the law.

VII. RECORDS THAT ARE MANDATORILY CLOSED

- A. Some public records are mandatorily closed by federal law, state statute, or Supreme Court Rule. These types of public records must be closed. The record custodian has no discretion or choice about whether to provide copies or access. Examples include but are not limited to:
 1. Child in need of care records and reports, including certain juvenile intake and assessment reports. K.S.A. 2007 Supp. 38-2212.
 2. Juvenile court records if under 14 and ordered closed by judge, K.S.A. 2007 Supp. 38-2309; juvenile law enforcement records, municipal court records if under 14, K.S.A. 2007 Supp. 38-2310; victims of sex offense by juvenile, K.S.A. 2007 Supp. 38-2310; "[a]ll records, reports and information obtained as a part of the juvenile intake and assessment process for juvenile offenders shall be confidential and shall not be disclosed except as provided in this section or by rules and regulations established by the commissioner of juvenile justice." K.S.A. 2007 Supp. 38-2310.
 3. Individually identifiable drug abuse treatment records. K.S.A. 2007 Supp. 45-221(a)(3).
 4. Financial information of an identifiable taxpayer filed with the county appraiser, or any financial information of a personal nature required or requested by a public agency or officer, including a name, job description or title revealing the salary or other compensation of officers, employees

- or applicants for employment with a firm, corporation or agency, except a public agency. K.S.A. 2007 Supp. 45-221(b).
5. Criminal history record information in possession of law enforcement agency. K.S.A. 22-4701 *et seq.*; K.S.A. 22-4707; K.A.R. 10-12-2. (Conviction information is in some circumstances open, nonconviction information is closed.) *See* A.G. Opin. No. 98-38. Custody time information is open. A.G. Opin. No.2002-29.
 6. Ballots. K.S.A. 25-2422. However, election petitions are open. A.G. Opin. No. 97-22.
 7. Unexecuted search or arrest warrants. K.S.A. 21-3827. Affidavits and sworn testimony given to obtain such a warrant is closed except as to the defendant or as otherwise ordered by the court, K.S.A. 22-2502(c); A.G. Opin. No. 87-100. (It is a crime to disclose an unexecuted warrant, but this does not apply to personnel of a law enforcement agency disclosing a search warrant: (1) For the purpose of encouraging the person named in the warrant to voluntarily surrender; or (2) issued in a case involving the abduction of a child unless such disclosure is specifically prohibited by the court issuing such warrant).
 8. Presentence reports. K.S.A. 21-4605(b).
 9. Grand jury proceeding records. K.S.A. 22-3012. (Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecuting attorney for use in the performance of his duties).
 10. Adult Authority presentence report, the parole report, the pre-postrelease supervision report and the supervision history. K.S.A. 22-3711.
 11. Mentally ill persons' commitment and treatment records. K.S.A. 59-212; K.S.A. 2007 Supp. 59-2979.
 12. All information, records and reports received or developed by an ombudsman or volunteer concerning long-term care facility residents' information. K.S.A. 2007 Supp. 75-7310.
 13. Peer review records. K.S.A. 65-4915(b).
 14. Adoption records. K.S.A. 59-2122; K.S.A. 65-2423; K.S.A. 59-2979; and K.S.A. 65-5601 to 65-5605.
 15. Income tax reports and returns. K.S.A. 2007 Supp. 79-3234(b).
 16. Racing Commission KBI background checks. K.S.A. 2007 Supp. 74-8804(o).
 17. Kansas Department of Health and Environment vital statistics - marriage, birth and death certificates. K.S.A. 2007 Supp. 65-2422d (restrictions are only on information in hands of vital statistics).
 18. Kansas Civil Rights Commission may not disclose investigation information without consent. K.S.A. 2007 Supp. 44-1005, K.A.R. 21-43-6.

19. Crime Victim Compensation Board, all records and information given to the Board is confidential. K.S.A. 74-7308(e).
 20. Social security numbers under some circumstances. K.S.A. 2007 Supp. 75-3520. *See* 5 U.S.C. § 552a note.
 21. Certain student information or educational records. 20 U.S.C. § 1232g.
 22. Convictions for violating a maximum posted speed limit of 55 miles per hour or more but not exceeding 70 miles per hour, by not more than 10 miles per hour in excess of such maximum speed limit. K.S.A. 2007 Supp. 8-1560d.
 23. Reports of contagious disease. K.S.A. 65-118.
- B. There are many federal, state or court laws/rules that may protect or close certain information in public records. The record custodians possessing such records should be familiar with the laws that apply to the records in their possession. If the record custodian denies a request for access or copies, K.S.A. 45-218(d) requires the custodian to provide a written citation to the law(s) being relied upon, if that information is requested.

VIII. RECORDS THAT MAY BE DISCRETIONARILY CLOSED--K.S.A. 45-221

- A. K.S.A. 2007 Supp. 45-221(a) lists 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. A.G. Opin. No. 89-107. However, the burden of showing that a record fits within an exception rests with the party intending to prevent disclosure. *Southwest Anesthesia Serv. v. Southwest Med. Ctr.*, 23 Kan.App.2d 950 (1997).
- B. Some of the records which may be discretionarily closed include:
1. Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies. K.S.A. 2007 Supp. 45-221(a)(4). A.G. Opin. No. 91-127. The personnel exception is designed to protect information that is normally kept in personnel records files, such as documentation of discipline, references and resumes, ADA and FMLA issues, as well as specific personal information such as home address and social security number. K.S.A. 2007 Supp. 45-221(a)(4) lists three categories of records which may be exempt from the disclosure requirement: "personnel records, performance ratings or individually identifiable records," all of which must pertain to the public agency's employees or applicants for employment. A.G. Opin. No. 99-55.
 - a. However, the "names, positions, salaries and lengths of service" of public officers and employees must be made public. K.S.A. 2007 Supp. 45-221(a)(4); A.G. Opins. No. 88-61; 91-50 (salary

- deduction not open); 92-132 (pension plan part of salaries); 2000-8 (names of members appointed to states boards must be disclosed).
- b. K.S.A. 2007 Supp. 45-221(a)(4) opens actual compensation employment contracts or employment-related contracts or agreements.
 - c. Home addresses of public employees may be closed. A.G. Opin. No. 97-52. *See also United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) (disclosure of home addresses can be a clearly unwarranted invasion of personal privacy.) Employee's photos, telephone numbers and family members names may be closed. A.G. Opin. No. 2006-8.
 - d. The exemptions in K.S.A. 2007 Supp. 45-221(a)(4) and (15) do not apply to nonemployees or to independent contractors. Independent contractors are not "personnel," so records concerning them may not be closed under this exception. *Southwest Anesthesia Serv. v. Southwest Med. Ctr*, 23 Kan.App.2d 950 (1997).
 - e. Most terms in employment contracts are open, except to the extent that a term contains personal or other information specifically closed by other laws. A.G. Opin. No. 99-55.
2. Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual, K.S.A. 2007 Supp. 45-221(a)(6), unless the recommendation is for someone to fill an elected or appointed office.
 3. Criminal investigation records. Defined at K.S.A. 2007 Supp. 45-217(c).
 - a. While criminal investigation records may be discretionarily closed, this is the one category of records for which criteria for judicial review of the decision is established in the statute. The factors to be considered in opening the records basically weigh public interest in disclosure vs. harm of disclosure. K.S.A. 2007 Supp. 45-221(a)(10)(A)-(F). K.S.A. 2007 Supp. 45-221(a)(10) requires custodians of criminal investigation records to, upon request, identify which factor(s) in (A) - (F) are applicable to the record(s) being closed under this exception.
 - b. "'Public interest' . . . means an interest in a matter affecting a right or expectancy of the community at large. Mere curiosity about the circumstances surrounding an investigation is not sufficient." *Harris Enterprises, Inc. v. Moore*, 241 Kan. 599 (1987). The legislative intent behind the criminal investigation records exception to the Kansas Open Records Act is to protect innocent persons whose names might be involved in an investigation, either as possible suspects or as informants. *Seck v. City of Overland Park*, 29 Kan. App. 2d 256 (2000).

- c. Court records and docket sheets may not be closed as criminal investigation records. K.S.A. 2007 Supp. 45-217(c); A.G. Opin. Nos. 87-145 and 93-103.
 - d. Police blotter, roster of jail inmates and the front page of a standard offense report are required to be open to the public; mug shots and standard arrest report are not required to be open to the public. A.G. Opin. No. 87-25, 98-38. If a police department does not maintain a blotter, they are under a common law duty to disclose basic information about arrests reasonably contemporaneously with the arrest. A.G. Opin. No. 98-38. Custody time is open. A.G. Opin. No. 2002-29.
 - e. A log of breath test machine results is a criminal investigation record and not required to be open. A.G. Opin. No. 87-63.
 - f. Coroner reports are subject to disclosure unless they have been filed with the clerk of the district court and designated as a criminal investigation record. A.G. Opin. No. 86-5 and K.S.A. 22a-232. Autopsies as part of coroner's reports are open unless the coroner's report is filed as a criminal investigation record. *Burroughs v. Thomas*, 23 Kan.App.2d 769 (1997).
 - g. Other records of investigations of a death may be closed even if the death turns out to be from natural causes so long as there was initially a criminal investigation. *Seck v. City of Overland Park*, 29 Kan. App. 2d 256 (2000).
4. Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law. K.S.A. 2007 Supp. 45-221(a)(5).
 5. Notes, preliminary drafts, research data in the process of analysis, memoranda or other records in which opinions are expressed or policies or actions are proposed. This exception does not apply when such records are cited or identified in a public meeting. K.S.A. 2007 Supp. 45-221(a)(20). A.G. Opin. No. 90-14. *See also*, K.S.A. 2007 Supp. 45-221(a)(21) and (22); records of public agency having legislative powers. A.G. Opin. No. 90-92.
 - a. These three provisions "are intended to protect an agency's internal predecisional deliberations from early disclosure." Frederickson, *Letting the Sunshine In*, 33 Kan. L.Rev. 205, 249 (Winter 1985).
 - b. Although reports prepared by a consultant for an agency are probably protected by this exception, other documents disclosed outside of government probably cannot be withheld based upon this exception. *See Dept. of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001).
 6. Library patron and circulation records which pertain to identifiable individuals. K.S.A. 2007 Supp. 45-221(a)(23). Library archive and

- museum materials contributed by private parties may be closed if closure was a condition of donation. K.S.A. 2007 Supp. 45-221(a)(7).
7. Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy. K.S.A. 2007 Supp. 45-221(a)(30). A.G. Opins. No. 92-149 (victim of sex offense); 99-55, 98-38, 87-168 (social security number). *See* K.S.A. 2007 75-3520 about social security numbers and their release.
 - a. This is a very limited exception, and often turns upon the circumstances of each individual situation.
 - b. K.S.A. 2007 Supp. 45-217(b) defines "clearly unwarranted invasion of personal privacy" to mean "revealing information that would be highly offensive to a reasonable person including information that may pose a risk to a person or property and is not a legitimate concern to the public."
 - c. Cases from other states are not consistent, but generally employ a balancing test of public interest vs. private harm, allowing closure only when there is a demonstrable harm.
 - d. Social Security numbers, mothers' maiden names and dates of birth contained in public records held by a county register of deeds can be closed to a business information provider. *Data Tree, L.L.C. v. Meeks*, 279 Kan. 445 (2005).
 - e. K.S.A. 75-451 *et seq.* allows victims of domestic violence, sexual assault, trafficking or stalking to obtain a "fake" address from the Secretary of State's office for use when responding to record requests.
 8. Records concerning prospective location of a business or industry where no previous disclosure has been made. K.S.A. 2007 Supp. 45-221(a)(31).
 9. Exceptions related to bids:
 - a. Specifications for competitive bidding until the specifications are approved. K.S.A. 2007 Supp. 45-221(a)(27).
 - b. Sealed bids until a bid is accepted or all rejected. K.S.A. 2007 Supp. 45-221(a)(28). *But see*, A.G. Opin. No. 2008-3 when a document is otherwise open per another statute.
 10. Engineering and architectural estimates for public improvements. K.S.A. 2007 Supp. 45-221(a)(33). (To prevent bidders from learning agency's estimates of cost of a project.)
 11. Financial information submitted by contractor in qualification statements. K.S.A. 2007 Supp. 45-221(a)(34). *See also* K.S.A. 2007 Supp. 45-221(c)(2) and K.S.A. 60-432, trade secrets.
 12. Records concerning emergency or security information or procedures. K.S.A. 2007 Supp. 45-221(a)(12) and (45); also not subject to subpoena or discovery.
 13. Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure. K.S.A. 2007 Supp.

45-221(a)(2). (Includes attorney client privilege. Possibly includes trade secrets, K.S.A. 60-432.)

- a. Attorney billing records are not closed, per se, as either attorney client privilege or work product privilege, and therefore generally must be disclosed if in the possession of a public agency. All narrative statements in attorney billing statements are not *per se* privileged. Rather, parties claiming the privilege will have to show its application to particular narrative statements in billing records. Parties objecting to discovery on the basis of the attorney-client privilege bear the burden of establishing that the privilege applies. To carry the burden, they must describe the documents or information to be protected, state precise reasons for the objection to discovery, and provide sufficient information to enable the court to determine whether each element of the asserted privilege is satisfied. A blanket claim as to the applicability of a privilege does not satisfy the burden of proof. Some detail may be closed, but the burden is on the public agency to justify it. *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407 (2000).
- b. An investigation by an attorney for a client for the purpose of providing legal advice may be closed as attorney client privileged. A.G. Opin. No. 99-48.

14. Attorney work product. K.S.A. 2007 Supp. 45-221(a)(25).
15. Medical, psychiatric, psychological, alcohol or drug treatment records which pertain to identifiable individuals. K.S.A. 2007 Supp. 45-221(a)(3).
16. Investigatory records of agencies involved in civil or administrative adjudication, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent. K.S.A. 2007 Supp. 45-221(a)(11).
 - a. An agency's civil investigatory file becomes open at the completion of the case. A.G. Opin. No. 97-76.
 - b. Records pertaining to an internal investigation of an agency's employee, disclosure of which would not interfere with a prospective administrative adjudication or civil litigation nor disclose the identity of a confidential informant, may nevertheless still be discretionarily closed if they fit the definition of a personnel record. A.G. Opin. No. 91-127.
 - c. Correspondence between a public agency and a private individual, other than correspondence intended to give notice of an agency action, policy or determination. K.S.A. 2007 Supp. 45-221(a)(14). A complaint to a professional licensing board may be closed, the letter in response to the complaint is open because it is a determination if there is a finding of no probable cause. A.G. Opin. No. 97-76.
17. Peer review/risk management records concerning certain health care professionals and facilities. K.S.A. 2007 Supp. 45-221(a)(35).

18. Software, except that register about what information the agency has on computer and what is available in what format. K.S.A. 2007 Supp. 45-221(a)(16).
- C. Unless otherwise required by law, a taxpayer's financial information required or requested by a county appraiser to determine property value for ad valorem taxation shall not be disclosed. K.S.A. 2007 Supp. 45-221(b). A.G. Opin. No. 89-118.
- D. Statistical information not descriptive of any identifiable person is subject to disclosure. K.S.A. 2007 Supp. 45-221(e).

IX. OTHER LIMITS ON CLOSURE

- A. Contractual provision attempting to close certain terms is void as against public policy, provided no other closure exemptions apply. A.G. Opin. No. 91-116; 93-55.
 1. A settlement agreement can not be closed by the parties, except to the extent that the KORA would allow closure, *i.e.*, some parts may constitute a personnel record, some might be clearly unwarranted invasion of privacy.
 2. There have been several district court cases involving agreements to close settlement agreements involving public agencies. Not only have the courts held the agreements to be open, they awarded attorneys fees to the plaintiff in at least one case.
- B. If a public record contains material not subject to disclosure, that portion of the record must be deleted and the record made available. K.S.A. 45-220(d). *See also, Tew v. Topeka Police & Fire Civ. Serv. Comm'n*, 237 Kan. 96 (1985); *State ex rel. Stephan v. Harder*, 230 Kan. 573 (1982); K.S.A. 45-221(d).
- C. If a record is reviewed and discussed during an open meeting, a record that may ordinarily be discretionarily closed, generally becomes open. A.G. Opin. Nos. 92-132 and 95-119.

X. SUNSET OF CLOSURE EXEMPTIONS

- A. Specific closure laws must be reviewed and renewed every five years; otherwise they expire. The next expiration date is July, 2010. K.S.A. 2007 Supp. 45-229(b)-(h).

XI. ENFORCEMENT OF THE KORA

- A. Investigations
 1. Investigative subpoenas may be issued by the Attorney General and District/County Attorneys. K.S.A. 45-228.
 2. Attorney General and County/District Attorneys will accept complaints from public. A.G. normally refers complaints against local government to the County/District Attorney.
 3. Ordinarily, the Attorney General's office requests that complaints be timely made and be put in writing. This is done in order to verify facts,

keep a record of the statements made, and in general assist with any investigation that becomes necessary.

B. Litigation

1. Any person, the Attorney General, or a County/District attorney, may file suit in district court.
 - a. Suit must be brought in the county where the records are located. If the records are located out of state, there is no cause of action under KORA. *Altevogt v. Youth Friends*, 29 Kan.App.2d 473 (2001). *See also Wichita Eagle v. Simms*, 50 P.3d 66, 274 Kan. 194 (2002).
2. District court may order injunction or mandamus.
3. The court "shall" award attorney fees against defendant if it finds denial of access was not in good faith or against plaintiff if the action was not in good faith. K.S.A. 2007 Supp. 2007 Supp. 45-222. Reasonable attorney fees may be assessed, even upon appeal, as part of costs. *See Telegram Pub. Co. Inc., v. KDOT*, 275 Kan. 779 (2003).
4. Fines of up to \$500 for "each violation" against public agency if the agency "knowingly violates any of the provisions of this act or that [it] intentionally fails to furnish information as required by this act. . . ." Such cases seeking a fine may only be brought by the Attorney General, District or County Attorney. K.S.A. 45-223.
5. Such actions to be given precedence by the court.

XII. KANSAS PUBLIC RECORDS PRESERVATION ACT. K.S.A. 45-401 *et seq.*

The KORA does not speak to preservation of public records. "Nothing in this act shall be construed to require the retention of a public record nor to authorize the discard of a public record." K.S.A. 45-216(b). However, other laws may require that a public record be kept for a period of time.

- A. State agencies and counties are subject to the Preservation Act and are prohibited from destroying public records except as permitted by minimum records retention schedule as set forth by State Records Board. K.S.A. 45-403; 45-404(b).
- B. State Records Board, while technically attached to the Kansas Department of Administration, in practice functions through State Historical Society, Div. of Archives. K.S.A. 75-3501 *et seq.*
- C. The Records Board has published a Local Government Records Manual which sets forth the schedule of minimum retention periods for counties. Information, including a copy of the schedule, may be accessed at <http://www.kshs.org/government/records/localgovt/index.htm>. County commissions may petition Records Board for departures from local government general schedule. K.S.A. 45-405(c).
- D. Records Board has published State Records Retention Manual, which contains general schedule for state agencies. Information, including a copy of the schedule, may be accessed at <http://www.kshs.org/government/records/stategovt/index.htm>. State agencies are required to appoint a records officer to act as liaison to Records Board. K.A.R. 53-4-1. State agencies' records officers prepare and submit to the

Records Board proposed specific retention schedules, which are approved by the Board.

- E. Electronic Records are also subject to retention. *See* www.kshs.org/government/records/electronic/index.htm
- F. Altering, destroying, defacing, removing or concealing any public record without legal authority is a class A misdemeanor. K.S.A. 21-3821.
- G. Counties, with approval of state archivist, may transfer noncurrent records to a county historical society, library, college, etc. K.S.A. 45-405(d). Any transferred records must not be of a confidential or restricted nature.
- H. Cities are not subject to the records retention board's schedule. However, the state archivist can advise on retention issues and there are statutory requirements for retention of certain city records. *See* K.S.A. 12-120.