

K Open Government Crash Course: Access to Public Records and Meetings in Kansas

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Introduction

- [Max Kautsch](#) is the legal hotline attorney for the Kansas Press Association, the Kansas Association of Broadcasters, and the Kansas Sunshine Coalition for Open Government
 - Serves in similar roles for media trade associations in Nebraska
- Serves as the President of the [Kansas Coalition for Open Government](#)
- In private practice, helps media outlets and members of the public access government records
 - Previously practiced criminal defense for about ten years in Douglas County
- Adjunct professor at the University of Kansas School of Law



Introduction

- Sources:
 - Best place to find Kansas laws is the website for the Kansas Revisor of Statutes, <https://www.ksrevisor.org/ksa.html>
 - Best place to find Attorney General Opinions is <https://ksag.washburnlaw.edu/>
 - Relevant cases included in this presentation are linked from [Google Scholar](#)
 - Details about the information herein can be found at the [Kansas Open Government Guide](#) published by the Reporters Committee for Freedom of the Press.

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Kansas Open Records Act (KORA)

- Common KORA issues:
 - Calculation and explanation of the “reasonable” fee/actual costs
 - Records provided did not meet requester's expectations
 - Requester believes there should be existing public records, but none are found
 - Is agency/entity covered by KORA, and if not, why not?
 - Failure to respond within 3 business days
 - Failure to provide the requested records
 - Access to criminal investigation records
 - Application of exemptions to disclosure and redaction

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Kansas Open Records Act (KORA)

- The Kansas Open Records Act (KORA) was enacted in 1984 at [K.S.A. 45-215](#) *et seq.* of the Kansas Statutes.
 - The Attorney General “noted” that the previous version of the law, “the so-called ‘open records act’[,] could more properly be labeled a ‘closed records act.’”
 - *Report on Kansas Legislative Interim Studies to the 1980 Legislature*, Proposal No. 16, p. 265 (1979).

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Kansas Open Records Act (KORA)

- “[R]ecords are often the only tangible proof of governmental action and that such evidence must be open if the public is to be able to understand government, to identify governmental excesses, and to measure governmental successes.”
 - *Report on Kansas Legislative Interim Studies to the 1980 Legislature*, Proposal No. 16, p. 265 (1979).

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Public Policy in favor of Openness

- “It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and *this act shall be liberally construed and applied to promote such policy.*”
 - [Cypress Media, Inc. v. City of Overland Park](#), 268 Kan. 407, 416 (2000), citing [K.S.A. 45-216\(a\)](#)(emphasis in original).
 - See also [Wichita Eagle and Beacon Publ’g. Co., Inc. v. Simmons](#), 50 P.3d 66, 274 Kan. 194 (2002).

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Public Policy in favor of Openness

- Liberal construction
 - “The function of liberal construction is called into use where there is ambiguity in the language of the statute or, in other words, where there are one or more interpretations which may fairly be made.” *Salina Journal v. Brownback*, 54 Kan.App.2d 1, 9, 394 P.3d 134 (2017).

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Public Policy in favor of Openness

- “The KORA, K.S.A. 45-215 *et seq.*, was passed by the legislature to ensure public confidence in government by increasing the access of the public to government and its decision-making processes.”
 - [Telegram Publishing Co. v. Kansas Dept. of Transportation, 275 Kan. 779](#), Syl. ¶ 2, (2003), cited by [Data Tree, LLC v. Meek, 279 Kan. 445, 454](#) (2005).

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Operative Provisions

- Public records are presumed open to the public
 - “All public records shall be open for inspection by any person, except as otherwise provided by this act.” [K.S.A. 45-218\(a\)](#).
 - “Any person may make abstracts or obtain copies of any public record to which such person has access under this act.” [K.S.A. 45-219\(a\)](#).

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Operative Provisions

- Some government records are expressly exempt from disclosure, including those made by:
 - Judges
 - Vendors
 - Elected leaders of governing bodies
 - Includes members of city councils and county commissions
 - Legislators

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Operative Provisions

- Public agencies, as set forth in [K.S.A. 45-221](#), “possesses discretionary authority to allow or prohibit public access” to public records. [AGO 89-107](#).
 - KORA itself does not require closure of any record.
 - Other statutes or rules may mandate closure via [K.S.A. 45-221\(a\)\(1\)](#), discussed *infra*.

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Operative Provisions

- There are a total of 55 enumerated exception to, or exemptions for, the general rule that a public agency must disclose public records upon request. [2022 K.S.A. 45-221\(a\)\(1\) through \(55\)](#).

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What is a “public record”?

- Definitions for various terms within KORA are found at [K.S.A. 45-217.](#)

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What is a “public record”?

- A “public record” means any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of:
 - (A) Any public agency; or
 - (B) 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.
- See [K.S.A. 45-217\(I\)](#).

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What is a “public record”?

- Emails and electronic data sent from private accounts that relate to official business are public records.

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What is a “public record”?

- Definition of “public record” was broadened in 2016 include emails government officials send on their private accounts related to government business
 - The amendment broadening the definition was [promulgated by the Attorney General’s](#) office and had the effect of reversing [AGO 15-10](#).
 - Amendment arose out of [governor’s refusal to provide emails](#) sent by the budget director to lobbyists related to the 2015 budget.

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What is a “public record”?

- The words “regardless of form or characteristics” means that “public records are not restricted to just written information.”
 - [*Burroughs v. Thomas*](#), 23 Kan. App.2d 769, 771 (1997).

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What is a “public record”?

- “The plain language of K.S.A. 45-219(a) requires a public agency, upon request, to provide a copy of a public record in the format in which it maintains that record.”
 - [*Roe v. Phillips County Hospital*](#), Kansas Supreme Court Case No. 122,810, Syl. 4, January 6, 2023.

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What is a “public record”?

- Front page of a standard offense report except SSN (other parts of police reports remain discretionarily closed). [AGO 98-38](#); [87-25](#).
 - If a police department does not maintain a blotter, it is under a common law duty to disclose basic information about arrests reasonably contemporaneously with the arrest. [Kan. Att’y Gen. Op. 98-38](#).
 - Mug shots may be discretionarily withheld. [AGO 87-25](#).

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What is a “public record”?

- Atuopy reports, unless they have been designated as a criminal investigation record. See [K.S.A. 22a-232\(b\)](#); AGO 86-05.

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What is a “public record”?

- “Statistical information not descriptive of any identifiable person is subject to disclosure. K.S.A. 2014 Supp. 45-221(e).”
Kansas Open Records Act Guidelines, Kansas Attorney General’s Office, Rev. July 1, 2015, p. 19.

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What is a “public record”?

- Narrative statements in attorney billing records for services rendered to public agency client. [*Cypress Media, Inc. v. City of Overland Park*](#), 268 Kan. 407 (2000).

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What is a “public record”?

- Settlement agreements involving public agencies
 - Contractual provisions and settlement agreements attempting to circumvent KORA are void because they violate public policy. See [AGO 93-55](#); 91-116.
 - [KU's settlement agreements involving rowers](#) who were the victims of sexual assault.
 - The [city of Overland Park's employment settlement](#) related to the shooting death of John Albers by OP police.

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What is not a “public record”?

- Truly private records
 - “Records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds....” [K.S.A. 45-217\(l\)\(3\)\(A\)](#).
 - Privacy interests are ordinarily protected via K.S.A. 45-217(b)(definition of “clearly unwarranted invasion of personal privacy”) and 45-221(a)(30)(allows public agencies to exercise discretion not to disclose records that constitute a “clearly unwarranted invasion of personal privacy”). See *infra*.

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What is not a “public record”?

- Records in the possession of legislators and governmental executives
 - “Records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state” are excluded from the definition of “public records” and thus unavailable under KORA. See [K.S.A. 45-217\(l\)\(3\)\(B\)](#).

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What is not a “public record”?

- This provision is intended to “exclude records kept by individual members but not records of the governing bodies they serve.”
 - Ted P. Frederickson, *Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act*, 33 U. Kan. L. Rev. 205, 221 (1985).

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What is not a “public record”?

- Records not yet in existence
 - “The Kansas Open Records Act does not require provision of records based upon a standing request or prospective request for documents not yet in existence.” [AGO 98-51](#).

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What is a “public agency”?

- Only “public agencies” are required to respond to KORA requests
 - “Public agencies” are defined under the law as “the state or any political or taxing subdivision of the state or any office, agency or instrumentality thereof, or **any other entity receiving or expending and supported in whole or in part by the public funds** appropriated by the state or by public funds of any political or taxing subdivision of the state.” [K.S.A. 45-217](#)(k)(1)(emphasis added).
 - Common examples include cities, counties, school boards, and the courts

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What is a “public agency”?

- Certain nonprofit organizations
 - “Each not-for-profit entity that receives public funds in an aggregated amount of \$350 or more per year shall be required to document the receipt and expenditure of such funds...[and] shall, upon request, make available to any requester a copy of documentation of the receipt and expenditure of such public funds received by such not-for-profit entity.” [K.S.A. 45-240\(a\)](#).

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What is a “public agency”?

- Certain nonprofit organizations
 - “Receipt of public funds may subject the financial records of a not-for-profit to the KORA, even if such not-for-profit would otherwise be considered a vendor.” [AGO 2004-34](#).
 - “[C]onsultants hired to perform 'governmental functions'” are subject to KORA.” [AGO 94-111](#).
 - However, the NCAA (a nonprofit) is not subject to KORA because it is a vendor “providing specific services in exchange for the public funds it receives.” [AGO 97-64](#).

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What is a “public agency”?

- Certain nonprofit organizations
 - K.S.A. 45-240 also does “not apply to any: (1) Health care provider; (2) individual person; (3) for profit corporation; or (4) partnership.”
[K.S.A. 45-240](#)(d).

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What is a “public agency”?

- Instrumentalities also included
 - “KORA explicitly includes instrumentalities of political and taxing subdivisions of the state in its definition of public agencies.
 - “An instrumentality is ‘a thing used to achieve an end or purpose, or a means or agency through which a function of another entity is accomplished.’” [*State v. Great Plains of Kiowa County, Inc.*](#)

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What is a “public agency”?

- Instrumentalities also included
 - In that 2018 case, at the urging of the Attorney General’s Office, the Kansas Supreme Court ruled a community nonprofit hospital established by the county’s authority under state statute was an instrumentality and had to turn over its finances to the county commission because it was an “arm of the county government”;
 - hospital had argued it was a “vendor.”
 - See also [AGO 88-61](#)(discussion of “instrumentality”)

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What is not a “public agency”?

- Vendors
 - “[N]o entity is included under the KORA solely because it receives public funds in exchange for goods or services.” AGO [2004-34](#).
 - However, when a county contracted with a private company to provide computer access to county records, the AG found that the contract did not relieve county of KORA obligations to the extent the county retained the public records that had been computerized. [AGO 2009-14](#).

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What is not a “public agency”?

- Vendors
 - Transparency impact? One example:
 - In 2015, the [Topeka school district claimed](#) “information” about a driver charged with a felony “has to come from” the private contractor. The school district claimed that it didn’t “even have a list of the drivers. It’s their company and their employees.”
 - Was the contractor an “instrumentality”?

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What is not a “public agency”?

- The judicial branch
 - KORA’s definition of “[p]ublic agency’ shall not include...any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court.” [K.S.A. 45-217\(k\)\(2\)\(B\)](#).
 - The legislature chose to exempt the judiciary because “a separation of powers problem could have arisen...[which was] a result reached by the Kentucky Supreme Court” regarding that state’s open records law. See Frederickson, *Letting the Sunshine In*, p. 218-19.

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Requesting Records: Procedural hurdles

- Agency policies and procedures for responding to KORA requests must:
 - provide full access to public records,
 - protect public records from damage and disorganization,
 - prevent excessive disruption of the agency's essential functions,
 - provide assistance and information upon request and
 - insure [ensure] efficient and timely action in response to applications for inspection of public records.”
 - [K.S.A. 45-220\(a\)](#).

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Requesting Records: Procedural hurdles

- Agencies are required to designate a “public information officer” to receive and respond to such requests under [K.S.A. 45-226](#).
- Agencies must make information available to the public about how to access the agency’s public records. [K.S.A. 45-227](#).

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Requesting Records: Procedural hurdles

- Make a written request.
 - Although a written request is not technically required by the law, the law allows each agency to require a written request if the agency so chooses, and as such, most do. [K.S.A. 45-219\(a\)](#).
 - See also [AGO 2009-18](#).

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Requesting Records: Procedural hurdles

- Identification of the requestor may be required.
 - A public agency may require proof of identity of any person requesting access to a public record. [K.S.A. 45-220\(b\)](#).

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Requesting Records: Procedural hurdles

- The agency may require that in order to process the request, the requester must indicate in writing that the requester will not: (A) Use any list of names or addresses contained in or derived from the records or information for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed; or (B) sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records or information for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed.

[K.S.A. 45-220\(c\)\(2\)](#).

- Violators are subject to civil penalties. See [K.S.A. 45-230](#).

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Making the Request

- Forms are available, sometimes from the agency itself, but the [requester must ultimately decide](#) how to frame the specific request.
 - Some agencies, such as the Unified Government of WY CO and the city of Junction City, use an [automated web interface](#).
- Not legally required to use the agency's form, see [AGO 2009-18](#), but may be helpful to engender goodwill between the requester and the agency
- No matter the format, it is the substance of the request that is crucial.

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Making the Request

- Regardless of how the request is phrased, it must be a request for records, not information.
 - A request for “information about finances” does not describe a record that exists
- An agency is not required to create a record in response to a request.

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Making the Request

- If it is essential to obtain all the records an agency has related to a particular topic, it may be necessary to request “any and all” document that fit the description.

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Making the Request

- But considering applicable fee provisions and relationships with government entities a better approach sometimes may be to ask for “documents sufficient to identify” the subject matter.

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Making the Request

- In order to get the most information about the requested record(s), the request should include the following language: “If this request is denied, KORA requires pursuant to K.S.A. 45-218(d) that your agency provide me with a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied.”
 - See [K.S.A. 45-218](#)(d) (“If the request for access is denied, the custodian shall provide, **upon request**, a written statement of the grounds for denial....”)(emphasis added).

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Making the Request

- Unless this language is delivered in writing, the agency has the option to refuse to explain the reason for why the request was denied under the statute.

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Making the Request

- Send the request to the agency's records custodian/PIO, ideally via email (so a record of the request is automatically created).
 - Default recipient is usually the governing body's clerk.

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Making the Request

- The law further provides that “[i]f the person to whom the request is directed is not the custodian of the public record requested, such person shall so notify the requester and shall furnish the name and location of the custodian of the public record, if known to or readily ascertainable by such person.”
 - [K.S.A. 45-218\(c\)](#).

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Agency response: Generally

- A KORA request “shall be acted upon as soon as possible, but not later than the end of the third business day following the date that the request is received.”
 - [K.S.A. 45-218](#)(d).
 - The three-day clock begins the day after the request is received

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Agency response: Generally

- If the agency is unable to produce the record “immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection.”
 - [K.S.A. 45-218](#)(d).

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Agency response: Generally

- Interpreting the words “immediately” and “as soon as possible” to mean it is permissible for an agency to respond anytime within the three-day period, such as by waiting until 5 p.m. of the third day to deliver requested records, “appears to contradict the language of the act and the intention of the legislature.”
 - Ted P. Frederickson, *Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act*, 33 U. Kan. L. Rev. 205, 224 (1985).

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Agency response: Generally

- Unreasonable burden or disruption
 - An agency “may refuse to provide access to a public record, or to permit inspection, if a request places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency. However, refusal under this subsection must be sustained by preponderance of the evidence.”
[K.S.A. 45-218\(e\)](#).
 - “**CAUTION**—this provision should be used only in extreme circumstance.”
Kansas Open Records Act Guidelines, Kansas Attorney General’s Office, Rev. July 1, 2015, p. 7. (emphasis in original).

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Agency response: Costs

- If the agency produces records, it “may require a written request and advance payment of the prescribed fee.” [K.S.A. 45-219\(a\)](#).
- Such fee must be “reasonable” and related only to the “actual costs” associated with producing the records, but the agency is also permitted to charge for “staff time” spent responding to the request. See K.S.A. 45-219(c). See also [Data Tree, LLC v. Meek](#), 279 Kan. 445 (2005).
 - Agency should produce an itemization of the expenses to help establish reasonableness

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Agency response: Costs

- The AG's office charges "25¢ per page for paper copies, [\\$0.125 per page for electronic copies](#)"
 - At the AG's office, "Attorney time will be charged at \$60 per hour. Clerical time will be charged at \$18 per hour. Information Technology services will be charged at \$38 per hour."
- Executive agencies required to provide the first 100 pages free of charge. [Executive Order 18-5](#) (has not been rescinded by any subsequent administration)
- Unlike FOIA, there is no procedure under KORA to ask the agency to waive the fee associated with responding to the request.

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Agency response: Costs

- In a 2020 [attorney general KORA enforcement action, that office](#) found that “While the city may recover its actual costs in responding to a KORA request, those costs must still be reasonable. An hourly rate of [\\$225.00 per hour for attorney time is per se unreasonable.](#) Outside counsel may charge a governmental entity for its services. However, based on the public policy and purpose of the KORA, it is unreasonable for a public agency to pass those costs onto a requester without a significant reduction in the hourly fee rate.”



Agency response: Redact and disclose

- If an agency is in possession of records that are responsive to the request, but the records also contain information subject to nondisclosure under K.S.A. 45-221, a “public agency shall separate or delete such material and make available to the requester that material in the public record which is subject to disclosure pursuant to this act.” [K.S.A. 45-221](#)(d).
 - Redaction “may have the practical impact of requiring creation of a new document.” Kansas Open Records Act Guidelines, Kansas Attorney General’s Office, Rev. July 1, 2015, p. 10.

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Agency response: Redact and disclose

- “Redaction is required if public record contains material that is not subject to disclosure. K.S.A. 2014 Supp. 45-221(d); see also *Tew v. Topeka Police & Fire Civ. Serv. Comm’n*, 237 Kan. 96, Syl. ¶ 7 (1985) (discussing prior law); *State ex rel. Stephan v. Harder*, 230 Kan. 573, Syl. ¶ 3 (1982) (discussing prior law).”
 - Kansas Open Records Act Guidelines, Kansas Attorney General’s Office, Rev. July 1, 2015, p. 19.

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Agency response: Redact and disclose

- Thus, blanket closure of the record, simply because it contains information that may be subject to nondisclosure, is not permissible.

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Public records generally subject to disclosure upon request; exceptions

- Whether a record is available upon request often depends on whether and to what extent the public agency to whom the request is directed asserts any of the 55 exemptions set forth in the law that provide an agency “shall not be required to disclose” certain records. [K.S.A. 45-221\(a\)\(1\) thru \(55\)](#).

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Public records generally subject to disclosure upon request; exceptions

- Public agencies have discretion to withhold disclosure of certain records depending on the nature or character of that record.

K Public records generally subject to disclosure upon request; exceptions

- “The burden of establishing the applicability of an exemption from disclosure under [KORA] 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).

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Public records generally subject to disclosure upon request; exceptions

- Three general policy reasons records may be closed:
 - Personal privacy, i.e., medical records, see, e.g., [K.S.A. 45-221\(a\)\(3\)](#) and [AGO 11-05](#).
 - Safety/security, i.e., criminal investigation records, see, e.g., K.S.A. 45-221(a)(10).
 - Internal communications while policies are developed or administrative procedures are underway, see, e.g. K.S.A. 45-221(a)(20), [AGO 13-5](#).

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Public records generally subject to disclosure upon request; exceptions

- KORA does not govern record retention
 - “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).
 - State agencies and counties are subject to the Records Preservation Act and are prohibited from destroying public records except as permitted by minimum records retention schedules as set forth by the State Records Board. [K.S.A. 45-403](#); 45-404(b).
 - Unless some specific law applies to a specific record, all other public agencies may dispose of their records as they deem advisable.

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Agency response: Nondisclosure

- [K.S.A. 45-221](#)(a)(1): agency may choose not to disclose “[r]ecords the disclosure of which is specifically prohibited or restricted” by federal or state law.
 - Thus, any provision in the Kansas statutes that references closure of records can become a basis under KORA for an agency’s basis of denial.
 - Allows for application of federal laws such as HIPAA and FERPA to protect certain types of information, such as medical or education records
 - Allows for statutes requiring closure to be applied via KORA, i.e., Child in Need of Care statutes, Care and Treatment statutes

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Agency response: Nondisclosure

- But beware agency overreach of (a)(1)
- Example: Public agencies should not rely on [statements of third-party corporations](#) to determine whether disclosure of a record is a “trade secret” under any other statute and thus subject to nondisclosure under K.S.A. 45-221(a)(1).
 - See, e.g., [A private company asked Kansas to hide public information, so the state obliged](#), November 18, 2021, Kansas News Service.

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Agency response: personnel

- [K.S.A. 45-221](#)(a)(4): personnel records exemption, which excludes records related to job applicants and employees except for records containing “names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such.”
 - The Court of Appeals [interpreted this language to also apply to applicants for political appointments](#) in 2017.

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Agency response: personnel

- In March 2021, a Johnson County District Court judge ordered that the city of Overland Park disclose records related to a \$70,000 severance package the city paid to an officer who killed 17-year-old John Albers in January of 2018.
 - City argued (rather bizarrely) that “an agreement setting forth the terms and conditions to end employment (i.e. severance agreement)” did not “constitute[] an ‘employment related agreement.’”

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Agency response: personnel

- The judge [ordered disclosure of the records](#), ruling that if such agreements were kept secret, “how would the public ever know what amounts have been paid and under what conditions? ... One of the fundamental concepts behind Kansas’ open records law is to provide for transparency and accountability in government. If an agency felt that these types of agreements were not subject to disclosure what incentive would there be to use tax dollars responsibly if the amount would never be disclosed?”

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Criminal investigation records

- Under KORA, “criminal investigation records” means “records of an investigatory agency or criminal justice agency...compiled in the process of preventing, detecting or investigating violations of criminal law....” [K.S.A. 45-217\(e\)\(2\)](#).

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Criminal investigation records

- Definition “does not include police blotter entries, court records, rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide as defined by K.S.A. 21-3405, prior to its repeal, or K.S.A. 2022 Supp. 21-5406, and amendments thereto.” *Id.*

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Criminal investigation records

- Public agencies engaged in law enforcement “shall not be required to disclose...criminal investigation records, except as provided herein.”
[K.S.A. 45-221](#)(a)(10)(internal punctuation omitted).

(10) Criminal investigation records, except as provided herein. The district court, in an action brought pursuant to K.S.A. 45-222, and amendments thereto, may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure:

(A) Is in the public interest;

(B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution;

(C) would not reveal the identity of any confidential source or undercover agent;

(D) would not reveal confidential investigative techniques or procedures not known to the general public;

(E) would not endanger the life or physical safety of any person; and

(F) would not reveal the name, address, phone number or any other information that specifically and individually identifies the victim of any sexual offense described in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.

If a public record is discretionarily closed by a public agency pursuant to this subsection, the record custodian, upon request, shall provide a written citation to the specific provisions of subparagraphs (A) through (F) that necessitate closure of that public record.

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Criminal investigation records

- “This exception, like the others, is discretionary, meaning that the records custodian has the discretionary power to release them.”
 - Ted P. Frederickson, *Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act*, 33 U. Kan. L. Rev. 205, 243 (1985).

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Criminal investigation records

- “But it is unique in that it provides an opportunity for a requester to contest the custodian's decision.” *Id.*
 - “The district court, in an action brought by a requester, ‘may’ order disclosure of the records of a specific criminal investigation, subject to such conditions as the court may impose, if the court finds that disclosure is in the public interest....” *Id.*; see [K.S.A. 45-221\(a\)\(10\)](#).

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Criminal investigation records

- Disclosure often hinges on whether such disclosure is in the “public interest,” a term of art that is undefined in KORA.
 - [K.S.A. 45-221\(a\)\(10\)\(A\)](#).

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Criminal investigation records

- Defining the term was central to the first appellate case interpreting the “criminal investigation records” exception, [*Harris Enterprises, Inc., v. Moore*](#), 241 Kan. 59 (1987).

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Criminal investigation records

- There, a local newspaper made a KORA request for the police reports in a Johnson County triple homicide case after the defendant was convicted at trial.

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Criminal investigation records

- “After a four-day bench trial, the district court determined the evidence was sufficient to establish a public interest in the disclosure of some of the records sought by the appellant.” *Harris* at 62.

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Criminal investigation records

- The district court found that “to be a matter involving public interest, it must be a matter which affects a right or expectancy of the community at large and must derive meaning within the legislative purpose embodied in the statute.” *Harris* at 66.
 - Public interest means “more than ‘mere curiosity.’”

K

Criminal investigation records

- Plaintiff had proved “public interest” in the records because there was a “pattern of disputed or disagreed upon facts and circumstances arising out of the investigation” on the part of various public officials that had “thrust controversy concerning their official actions into the public spotlight and attention.” *Harris* at 66.

K

Criminal investigation records

- “However, after conducting an in camera inspection of the records, the court held the documents contained no information which would promote the public interest.” *Id.*

K

Criminal investigation records

- The Kansas Supreme Court affirmed the district court's reasoning and decision to refuse to order disclosure of the records.

K

Criminal investigation records

- Thus, *Harris* may stand for the proposition that even if a requester proves public interest, “it is still within the trial court's discretion whether or not to order disclosure.” *Harris* at 65.
 - See also [Seck v. Overland Park](#), 29 Kan. App.2d 256 (2000).

K

Criminal investigation records

- But by 2002, fifteen years after *Harris* was decided, the Kansas Supreme Court noted that “the manner in which our appellate courts would construe the K.S.A. 45-221(a)(10) exception is not presently clear in light of *Harris*.”
 - [*Willis v. Kansas Highway Patrol*](#), 273 Kan. 123 (2002).

K

Criminal investigation records

- As such, *Harris* is not dispositive.
- In an absence of controlling appellate precedent, it is instructive to review district court cases where “public interest” in “criminal investigation records” was at issue

K

Criminal investigation records

- In 2021, a [Sedgwick County District Court judge ordered disclosure of records](#) despite the defendant's reliance on *Harris*.
 - See *Wichita Eagle and Beacon Publishing Co., Inc. v. The City of Wichita, Kansas*, Sedgwick County District Court Case No. 17 CV 2745.

K

Criminal investigation records

- [In that case](#), the *Wichita Eagle* sought copies of body camera footage of two separate incidents involving questionable investigative practices by the Wichita Police Department.

K

Criminal investigation records

- The city denied the requests in part based on K.S.A. 45-221(a)(10)(A).

K

Criminal investigation records

- City argued in court that the *Eagle* could not prove that disclosure was in the public interest and even if it could, the court still should follow *Harris* and decline to order disclosure.

K

Criminal investigation records

- In granting the paper's motion for summary judgment, the district court ignored the City's assertion that the *Eagle* had to prove public interest in order to compel disclosure of the records, instead citing the statute itself for the proposition that the burden of proof is on the agency to sustain its decision to deny access.

K

Criminal investigation records

- The court cited *Harris* for “guidance” to define public interest.
 - “[T]o be a matter involving public interest, it must be a matter which affects a right or expectancy of the community at large and must derive meaning within the legislative purpose embodied in the statute.’ *Id.* at 66.”
 - [Memorandum Decision](#), p. 13.

K

Criminal investigation records

- The court ruled that disclosure of the footage in both cases was in the public interest because “the community at large has an expectation that police investigations will be conducted fairly and appropriately.”
- Judge ordered disclosure of the footage

K

Criminal investigation records

- Also ruled in favor of the *Eagle's* request for attorney fees, noting it was “apparent that the City acted in bad faith and without a reasonable basis in law” in part because it had claimed disclosure would interfere with an ongoing investigation under K.S.A. 45-221(a)(10)(B) when there was no evidence of any such investigation.

K

Criminal investigation records

- Then, in April of 2021, during a KORA lawsuit brought by a Kansas City-area television station, the City of Overland Park did not even wait for a court order before it [released criminal investigation records](#) related to the shooting death of John Albers.
 - The *Washington Post* used the records the station obtained to produce [a short documentary film](#) highlighting the deficient internal investigation related to John's death.

K

Criminal investigation records

- body camera and vehicle camera footage
 - Such data is “considered a criminal investigation record as defined in K.S.A. 45-217, and amendments thereto.” [K.S.A. 45-254\(a\)](#).

K

Criminal investigation records

- body camera and vehicle camera footage
 - The “subject” of such video (or their estate) is entitled to view the video within 20 days of making a request to the agency to make the video available for such purpose. [K.S.A. 45-254](#)(b) and (c).

K

Agency response: Privacy

- [K.S.A. 45-221](#)(a)(30): “Clearly unwarranted invasion of personal privacy”
- An agency can choose not disclose records that would reveal “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 of legitimate concern to the public.” [K.S.A. 45-217](#)(d).
 - The Kansas Supreme Court has found that social security numbers, dates of birth, and mother’s maiden name are “of a personal nature” and thus not subject to disclosure. [Data Tree, LLC v. Meek](#), 279 Kan. 445 (2005).

K

Agency response: Privacy

- Therefore, if the requested records contain information that is of [legitimate public concern](#), they must be disclosed under KORA, even if such information may be considered highly offensive.

K

Internal Communications

- Government not required to disclose “[n]otes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed....” K.S.A. 45-221(a)(20).
 - See also [AGO 13-5](#) (internal communications while policies are developed or administrative procedures are underway not required to be disclosed).

K

Internal Communications

- These provisions “are intended to protect an agency’s internal predecisional deliberations from early disclosure.” Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. at 249.
- This “exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.” K.S.A. 45-221(a)(20).

K

Enforcement

- “Any person whose request for public records has been denied or impeded has statutory standing to enforce the purposes of KORA by filing a cause of action in the district court of any county in which the records are located.”
 - [*Hunter Health Clinic v. Wichita State University*](#), 52 Kan. App. 2d 1, Syl. ¶ 4, 362 P.3d 10 (2015); see also K.S.A. 45-222(a).

K

Enforcement

- However, KORA does not specifically direct the procedural mechanism by which a case brought pursuant to its provisions should be resolved.
 - K.S.A. 45-222(g) references a “hearing and trial.”
 - In some cases, KORA suits have been resolved through a bench trial. See *Harris Enterprises v. Moore*, 241 Kan. 59, 62, 734 P.2d 1083 (1987).
 - In some cases, the matter has been submitted to the court on stipulated facts. See *Hunter Health Clinic*, 52 Kan. App. 2d at 2.
 - In other cases, cross-motions for summary judgment have been used. See [*State v. Great Plains of Kiowa County, Inc.*](#), 308 Kan. 950, 952, 425 P.2d 290 (2018).

K

Enforcement

- If no suit is brought, the Attorney General's Office is the state's de facto enforcement agency
 - [file a complaint](#) with the Attorney General's Office on its website.
 - Legislature granted additional enforcement powers as of July 1, 2015.
 - See [K.S.A. 45-251](#)
- Requester may also file a complaint with either the county or district attorney in which the public agency is located

K

Burden of proof

- “In any action hereunder...the burden of proof shall be on the public agency to sustain its action.” [K.S.A. 45-222](#).
- See *Telegram Pub. Co., Inc. v. Kansas Dept. of Transp.*, 275 Kan. 779, 69 P.3d 578 (2003); *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 50 P.3d 66, 274 Kan. 194 (2002).

K

Burden of proof

- “The burden of proving that an item is exempt from disclosure is on the agency not disclosing.”
 - *Cypress Media v. City of Overland Park*, 268 Kan. 407, 416, 997 P.2d 681 (2000), cited by *Wichita Eagle and Beacon Publishing Co., Inc. v. The City of Wichita, Kansas*, Sedgwick County District Court Case No. 17 CV 2745, [Memorandum Opinion](#), p. 10.

K

Attorney Fees

- “The court shall award costs and a reasonable sum as an attorney’s fee for services rendered in such action, including proceedings on appeal, to be recovered and collected as part of the costs to the plaintiff if the court finds that the agency’s denial of access to the public record was not in good faith and without a reasonable basis in fact or law.”
 - [K.S.A. 45-222\(d\)](#).

K

Attorney Fees

- Private plaintiff will not recover attorney fees unless the agency's denial was both "not in good faith" AND "without a reasonable basis in fact or law."

K

Attorney Fees

- Agency can ask for fees to be assessed against the plaintiff; same standards apply.
 - Fees have never been awarded to agency



Kansas Open Meetings Act (KOMA)

- The Kansas Open Records Act (KORA) was enacted in 1982 at [K.S.A. 75-4317](#) *et seq.* of the Kansas Statutes.
 - Allows the public to observe meetings of governing bodies
 - Presumption of openness for public meetings dates to at least 1868
 - “Every board of county commissioners....shall sit with open doors, and all persons conducting in an orderly manner may attend their meeting....”
[K.S.A. 19-218.](#)



Kansas Open Meetings Act (KOMA)

- Common KOMA issues and concerns
 - Executive sessions
 - Improper motions for executive session
 - Discussing subject matter not referenced in motion for recess
 - Entering executive session without making minutes and having vote
 - Failing to return to open session as described in motion
 - Taking binding action in executive session
 - Serial communications
 - Subordinate groups subject to KOMA
 - Agendas and minutes
 - Failure to provide notice

K

Kansas Open Meetings Act (KOMA)

- “[I]t is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.” [K.S.A. 75-4317\(a\)](#).

K

Kansas Open Meetings Act (KOMA)

- KOMA codifies the Legislature’s “recognition of the fact that a representative government is dependent upon an informed electorate....” [K.S.A. 75-4317\(a\)](#).

K

Kansas Open Meetings Act (KOMA)

- KOMA has been enacted for the “public benefit” and therefore is “subject to broad construction in order to carry out the stated legislative intent.” [State ex rel. Murray v. Palmgren](#), 231 Kan. 524, 531 (1982).

K

Which bodies are subject to KOMA?

- KOMA is broad in scope
 - Generally, “all meetings for the conduct of the affairs of, and the transaction of business by, **all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof...**shall be open to the public.” [K.S.A. 75-4318](#)(a)(emphasis added).

K

Which bodies are subject to KOMA?

- KOMA is broad in scope
 - Governing bodies subject to KOMA include “boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds....”
 - [K.S.A. 75-4318\(a\)](#)

K

Which bodies are subject to KOMA?

- KOMA is broad in scope
 - “State political and taxing subdivisions” include, but are not limited to:
 - State agencies and boards, unless otherwise provided. AGO 86-176.
 - Cities, counties, townships. AGO 81-288.
 - School districts, community colleges. AGO 81-258.
 - Watershed districts. AGO 85-161.
 - Rural water districts. AGO 89-92; 88-97.
 - Drainage districts. AGO 90-69.
 - Local historic preservation committees administering K.S.A. 75-2724. AGO 99-22.

K

Which bodies are subject to KOMA?

- Meetings of “subordinate groups”
 - It is the “nature of the group, not its designation, which determines whether it is subject to the KOMA.”
 - [AGO 86-92](#); see also AGOs 86-38; 80-201; 77-53; 76-140; 76-122; 73-235.

K

Which bodies are subject to KOMA?

- Meetings of “subordinate groups”
 - The law was originally interpreted so that “subordinate groups” were clearly subject to KOMA
 - “Advisory committees appointed by a body subject to the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., are themselves subject to the act....As such committees participate in the decision-making process by gathering information, evaluating options, and making recommendations to the governing body, they participate in ‘the conduct of the affairs of’ the governing body, and so are covered by the scope of K.S.A. 1983 Supp. 75-4318(a).” [AGO 84-81](#).

K

Which bodies are subject to KOMA?

- Since that original interpretation, the Kansas Supreme Court has recognized “two types of entities, whatever form they may take, which are not subject to the open meetings laws:
 - (1) those which are merely advisory and have no decision-making authority, and
 - (2) those which are basically independent entities which have some connection, by contract or other tie to a government entity, but are not actually created by some form of government action.”
 - [*Mem. Hospital v. Knutson*](#), 239 Kan. 663, 671 (1986).

K

Which bodies are subject to KOMA?

- However, even a group that is “merely advisory” (i.e., has no decision-making authority) is still subject to KOMA “[w]here it can be shown that a public body has intentionally, and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine for the elected board what course should be pursued..., the meetings of such groups should be open to public scrutiny. Public bodies cannot be allowed to do indirectly what the legislature has forbidden.”
 - [*Mem. Hospital v. Knutson*](#), 239 Kan. at 671.

K

Which bodies are subject to KOMA?

- See also [AP v. Sebelius](#), 31 Kan.App. 2d 1107 (2003) (“administration transition group” was not a “subordinate group” and thus not subject to KOMA because Sebelius, as governor-elect, rather than the government, created it, so it was not a state agency or otherwise subordinate to any such agency).



Which bodies are subject to KOMA?

- Examples of “subordinate groups” subject to KOMA:
 - 1) School District Advisory Board. AGO 84-81.
 - 2) Fire District Advisory Board. AGO 86-84.
 - 3) Mayor’s Commission. AGO 88-25.
 - 4) Appointed employee grievance committees. AGO 91-31.
 - 5) SRS Drug Utilization Review Board. AGO 93-41.
 - 6) Parental boards under Recreation Commission. AGO 93-73.
 - 7) House and senate conference committees. AGO 93-113.

K

Which bodies are subject to KOMA?

- “Kansas Attorney General opinions have identified four criteria to be used in determining whether a body is an agency subject to the KOMA:
 - 1) If the agency has the authority to make governmental decisions and act for the state, it is covered by an open meetings law. If it only collects information, makes recommendations or renders advice, it is not.
 - 2) Does the agency have independent authority in the exercise of its functions?
 - 3) Is the agency subject to governmental audits or otherwise have its business procedures supervised?
 - 4) Finally, one court has defined ‘governmental agency’ to include corporate instrumentalities that accomplish public ends, both governmental and proprietary.” [AGO 94-99](#).

K

What is a “meeting”?

- As used in the open meetings act, “meeting” means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication **by a majority of the membership of a public body** or agency subject to this act for the purpose of discussing the business or affairs of the public body or agency.
 - [K.S.A. 75-4317a](#)(emphasis added).

K

What is a “meeting”?

- “Majority” means “the number one more than half” of the total number of members. [AGO 93-140](#); see also 2002-41; 87-152; 87-132; 87-45; 86-110; and 83-174.

K

What is a “meeting”?

- If a quorum is present and a majority of the members voting vote in favor of a particular matter, abstentions from voting are to be counted as acquiescence with the votes of the majority, and the action will bind the body. [AGO 82-43](#).



What is a “meeting”?

- Serial interactive communications
 - If members of a public body communicate individually with one another about a topic, they may be conducting a “meeting” under KOMA.
 - Failure to notify the public of any “meeting” violates K.S.A. 75-4318(b)(“notice of the date, time and place of any regular or special meeting of a public body or agency...shall be furnished to any person requesting such notice.”).

K

What is a “meeting”?

- Serial interactive communications
 - “[I]nteractive communications in a series shall be open if they collectively involve a majority of the membership of the public body or agency, share a common topic of discussion concerning the business or affairs of the public body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the public body or agency.”
 - [K.S.A. 75-4318\(f\)](#)



What is a “meeting”?

- Serial interactive communications: email
 - In [AGO 2009-22](#), an “interactive communication” did not occur where a non-member of a body or agency communicated with a majority of that body and a member responded and shared the response with other members.



What is a “meeting”?

- Serial interactive communications: email
 - AGO 2009-22
 - Don’t hit “reply all”!
 - Would have been a violation if the other members had further responded to the continuation of the thread.
 - “Should there be further interactive communications among a majority of the members concerning the business of the body, and there is an intent by any or all of the participants to reach agreement on a matter that would require binding action, those communications are subject to KOMA.” [AGO 2009-22](#).

K

What is not a “meeting”?

- Under [K.S.A. 75-4318\(g\)](#), KOMA expressly “shall not apply”:
 - To any administrative body that is authorized by law to exercise quasi-judicial functions when such body is deliberating matters relating to a decision involving such quasi-judicial functions; i.e.,
 - 1) Zoning boards. AGO 78-13.
 - 2) City grievance panels. AGO 91-31.
 - 3) Hearing panels. AGO 97-40.

K

What is not a “meeting”?

- Under [K.S.A. 75-4318](#)(g), KOMA expressly “shall not apply”:
 - To the prisoner review board when conducting parole hearings or parole violation hearings held at a correctional institution;
 - To any impeachment inquiry or other impeachment matter referred to any committee of the house of representatives prior to the report of such committee to the full house of representatives; and
 - If otherwise provided by state or federal law or by rules of the Kansas senate or house of representatives.

K

What is not a “meeting”?

- Staff meetings are not subject to KOMA; a body’s staff is not the “administrative body or agency as defined by the KOMA.” See [AGO 99-22](#).

K

What is not a “meeting”?

- Generally, nonprofits are not subject to KOMA
- However, KOMA applies to a nonprofit corporation if:
 - the corporation receives or expends public funds;
 - the corporation is subject to control of governmental unit(s) (i.e., county hospitals under [K.S.A. 19-4605](#)); and
 - the corporation acts as a governmental agency in providing services or has independent authority to make governmental decisions. See [AGO 2004-34](#) and AGO 94-99.

K

Kansas Open Meetings Act (KOMA)

- Binding action must be taken in open session
 - “...[N]o binding action by...public bodies or agencies shall be by secret ballot.” [K.S.A. 75-4318](#) (emphasis added).
 - “The purpose of this provision is to make public every official’s vote on the public's business.” [AGO 86-176](#), citing *Olathe Hospital Foundation, Inc. v. Extendicare*, 217 Kan. 546, 562 (1975); see also AGOs 93-55; 81-106; and 79-167.
 - Binding action “connote[s] finality within the scope of the powers delegated.” [AGO 86-176](#).

K

Kansas Open Meetings Act (KOMA)

- KOMA only confers the right to attend and observe meetings, not make comments. [AGO 2005-03](#).
 - Public comments may be regulated by ordinance under the [forum doctrine](#) (i.e., time, place, and manner).

K

Kansas Open Meetings Act (KOMA)

- Public Comment
 - Although the Tenth Circuit (which includes Kansas) has not opined directly on the public comment policy issue, the Ninth Circuit has held that “The First Amendment requires a person’s speech in a city council meeting must actually disrupt a meeting before that person may be removed from the meeting.”



Kansas Open Meetings Act (KOMA)

- Public Comment

- The following policy was [deemed constitutional by the Ninth Circuit](#):

- “It shall be unlawful for any person in the audience at a council meeting to do any of the following ... (1) Engage in disorderly, disruptive, disturbing, delaying or boisterous conduct, such as, but not limited to, handclapping, stomping of feet, whistling, making noise, use of profane language or obscene gestures, yelling or similar demonstrations, which conduct substantially interrupts, delays, or disturbs the peace and good order of the proceedings of the council.”

K

Kansas Open Meetings Act (KOMA)

- Attendees may record meetings, subject to reasonable regulations by the public body.
 - “The use of cameras, photographic lights and recording devices shall not be prohibited..., but such use shall be subject to reasonable rules designed to insure the orderly conduct of the proceedings at such meeting.” [K.S.A. 75-4318\(e\)](#).



Kansas Open Meetings Act (KOMA)

- Meetings may be conducted electronically (virtual conference, telephone) so long as notice and public access requirements are met.

K

Kansas Open Meetings Act (KOMA)

- Informal discussions between members of body before and after meetings may be a “meeting” under KOMA
 - Apply definition of “meeting” set forth in [K.S.A. 75-4317a](#) to determine if violation has occurred (i.e., was the informal gathering an “assembly in person...for the purpose of discussing the business or affairs of the public body or agency.”)

K

Notice of meeting

- “Notice of the date, time and place of any regular or special meeting” of a public body “shall be furnished to any person requesting such notice.” [K.S.A. 75-4318\(b\)](#).
 - Such request must be furnished annually to the body. K.S.A. 75-4318(b)(3).

K

Agenda

- Although the law does not require public bodies to create an agenda for their public meetings, “any agenda relating to the business to be transacted at such meeting shall be made available to any person requesting the agenda.” K.S.A. 75-4318(d).

K

Agenda

- “[A]ll topics to be discussed known at the time of the preparation” of the agenda are to be included. [Stevens v. City of Hutchinson](#), 11 Kan. App. 2d 290, 293 (1986).
 - See also *Klein v. Johnson County Bd. of County Comm’rs*, 77 P.3d 1009 (table), 2003 WL 22176046 (Court of Appeals, 2003) (unpublished opinion) (commission violated agenda requirement because it planned to discuss a particular item at an upcoming meeting, declined to put that item on the agenda, but then discussed the item anyway)

K

Minutes

- Under KOMA, minutes are not required except to recess into executive session. See [AGO 90-47](#); [K.S.A. 75-4319\(a\)](#).
 - But additional minutes may be required under local rule or ordinance.

K

Recess to executive session

- “Upon formal motion made, seconded and carried, all public bodies and agencies subject to the open meetings act may recess, but not adjourn, open meetings for closed or executive meetings.”
 - Members of the body may recess for discussion of certain enumerated topics out of public view.
 - Permitted to invite individuals who would provide information to aid the discussion

K

Recess to executive session

- Motions for recess “shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the public body or agency” [K.S.A. 75-4319\(a\)](#).

K

Recess to executive session

- “Any motion to recess for a closed or executive meeting shall include:
(1) A statement describing the subjects to be discussed during the closed or executive meeting;

K

Recess to executive session

- “Any motion to recess for a closed or executive meeting shall include:
(1) A statement describing the subjects to be discussed during the closed or executive meeting; (2) the justification listed in subsection (b) for closing the meeting;

K

Recess to executive session

- “Any motion to recess for a closed or executive meeting shall include: (1) A statement describing the subjects to be discussed during the closed or executive meeting; (2) the justification listed in subsection (b) for closing the meeting; and (3) the time and place at which the open meeting shall resume.” [K.S.A. 75-4319\(a\)](#).

K

Recess to executive session

- The 15 “justifications” for recess under [K.S.A. 75-4319\(b\)](#) “permitting certain subjects to be discussed behind closed doors were enacted on the basis that in certain instances the interests involved in preserving confidentiality outweigh the public's right to know.” [AGO 88-25](#).

K

Recess to executive session

- The 15 “justifications” for recess under [K.S.A. 75-4319\(b\)](#) include:
 - (1) To discuss personnel matters of nonelected personnel;
 - (2) for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship;
 - (4) to discuss data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;
 - (6) for the preliminary discussion of the acquisition of real property;

K

Recess to executive session

- (1) nonelected personnel
 - Must be to discuss an individual, not groups. [AGO 88-25](#); 81-39; 80-102.
 - Topic must be related to an identifiable person; can't recess to discuss policy
 - **Must stay on topic!!!**

K

Recess to executive session

- (1) nonelected personnel
 - But see [State of Kansas v. USD 305 et al.](#), 13 K.A.2d 117 (1988) (discussion of exempt and nonexempt topics in executive session; separation burdensome and impractical, if not impossible).
 - “At what point discussion moves from permissible discussion to impermissible discussion of the policy itself will depend upon the facts.” [AGO 2009-21](#).
 - “Personnel” does not include independent contractors. AGO 2002-28; 87-169.

K

Recess to executive session

- (2) attorney client privilege
 - Privilege applies “(1) Where legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) communications made in the course of that relationship (4) made in confidence (5) by the client...unless waived.”
 - See [K.S.A. 60-426](#) and [Cypress Media, Inc. v. City of Overland Park](#), 268 Kan. 407, 418 (2000)(citations omitted).

K

Recess to executive session

- (2) attorney client privilege
 - Additionally, to apply during executive session:
 - The body's attorney must be present,
 - The communication must be privileged, and
 - No other third parties may be present. See AGO 92-56; 82-247; 82-176; 82-130; 78-303.
 - Cannot be used to discuss letter received from attorney if the attorney is not present. AGO 86-162.

K

Recess to executive session

- (4) trade secrets
 - Must be for data that is truly confidential in nature. See [K.S.A. 60-3320\(4\)](#); [Southwestern Bell Telephone Co. v. KCC](#), 6 K.A.2d 444, 457 (1981), rev. den. 230 Kan. 819 (1981); *All West Pet Supply v. Hill's Pet Products*, 840 F.Supp. 1433, 1437 (Kan. 1993).

The Kansas Supreme Court has established criteria to determine whether information constitutes trade secrets:

"An exact definition of a trade secret may not be possible, but factors to be considered in recognizing a trade secret are: (1) the extent to which the information is known outside the business, (2) the extent to which it is known to those inside the business, i.e., by the employees, (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information, (4) the savings effected and the value to the holder in having the information as against competitors, (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

- AGO 1988-148, citing [Koch Engineering Co. v. Faulconer](#), 227 Kan. 813, 826 (1980).

K

Recess to executive session

- (4) trade secrets
 - “[D]iscussions which do not focus on confidential financial data or trade secrets do not fall under the exception.”
 - “When in doubt, members of the Commission should remember that exceptions to the open meetings law are interpreted narrowly.”
 - “[I]f the business does not request that the matter be privately discussed, discussion should be held in an open meeting as the exception was designed to protect private business, not the public body.”
 - [AGO 1988-148](#), p. 6.

K

Recess to executive session

- (6) acquisition of real property
 - Applies to acquisition only, not sale; sale must be discussed in open meeting. AGO 87-91.
 - This exception can be used only when the primary focus of the discussion is real property; negotiating strategy alone is insufficient. [AGO 89-92](#).

K

Recess to executive session

- Since 2018, a “statement of subjects to be discussed” is also required to be documented in the minutes prior to recess (motion for recess must be recorded “in its entirety”).
 - [AGO 2018-1](#)

K

Recess to executive session

- That year, the [Attorney General ruled](#) that the “statement describing the subjects to be discussed during the closed or executive meeting must be more than a generic or vague summary, or a list of the subject(s) to be discussed.” AGO 2018-1.
 - “However, the KOMA does not require that the statement describing what will be discussed to be so detailed that it negates the usefulness of a closed or executive meeting. The determination of whether a motion to recess into a closed or executive meeting sufficiently describes the subject(s) to be discussed in a specific situation is a factsensitive question which must be determined on a case-by-case basis.” *Id.*

K

Recess to executive session

- “No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act.” [K.S.A. 75-4319\(c\)](#).

K

Recess to executive session

- Resuming open session
 - “[A] recess may not stretch across multiple days,” and “a closed or executive meeting must be held contemporaneously with an open meeting.” [Kan. A’tty Gen. Op. 2017-20](#).

K

Recess to executive session

- Public bodies wishing to extend closed-door discussions must return to open session and make a new motion to recess.



Recess to executive session

- Example: KOMA violation?
 - Commission member #1 moved, seconded by commission member #2, to go into executive session for ten minutes at 9:15 a.m. to discuss matters of nonelected personnel to assure compliance with the policies and laws with County Clerk present
 - Commission discussed bills submitted by contract attorneys - the rate of payment and impact on the district court clerk's budget

K

Recess to executive session

- Example: KOMA violation?
 - Motion was a summary instead of a complete motion
 - Subject was vague and generic; did not give an accounting of what was to be discussed or how subject related to nonelected personnel
 - Location where the open meeting was to resume was not provided
 - Justification recognized by the KOMA but commission discussed matters that did not actually involve nonelected personnel

K

Location

- “It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in [[K.S.A. 75-4317](#)](a).”
 - K.S.A. 75-4317(b).

K

Location

- Meeting location must not be “inaccessible” to the public.
 - [*Stevens v. City of Hutchinson*](#), 11 Kan. App. 2d 290, 292 (1986); see also AGOs 2011-23; [86-153](#) (board meeting at convention center in Kansas City, MO was not “inaccessible”); [82-133](#) (meeting at resort in Colorado mountains was “inaccessible”); 80-148; 79-253.

K

Location

- Executive session
 - “A public body or public agency has the discretion to designate the location of a closed or executive meeting if the location of the closed or executive meeting allows the public body or public agency to conduct the closed or executive meeting contemporaneously with the open meeting.”
 - [AGO 17-20.](#)

K

KOMA enforcement

- Actions taken in violation of KOMA “shall be voidable”
 - “[A]ny binding action which is taken at a meeting not in substantial compliance with the provisions of the open meetings act shall be voidable in any action brought by the attorney general or county or district attorney in the district court of the county in which the meeting was held **within 21 days** of the meeting, and the court shall have jurisdiction to issue injunctions or writs of mandamus to enforce the provisions of the open meetings act.”
 - [K.S.A. 75-4320](#)(a)(emphasis added).

K

KOMA enforcement

- In an enforcement action brought by the AG, DA, or CA, court may also fine the member of the body who violated the law up to \$500 for each violation. [K.S.A. 75-4320\(a\)](#).
- AG's office has broad investigative and enforcement power. See [K.S.A. 75-4320b](#).
- Private enforcement action also available. [K.S.A. 75-4320a](#).

K

Probable Cause Affidavits

- PCAs are documents drafted by law enforcement and delivered to the judge that contain allegations constituting “probable cause to believe both that a crime has been committed and that the defendant has committed it.” [K.S.A. 22-2302\(a\)](#).
 - The information law enforcement relies on in order to curtail freedom; i.e., arrest someone under K.S.A. 22-2302(c) or search someone’s home under [K.S.A. 22-2502\(e\)](#).

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Probable Cause Affidavits

- These documents are not available under KORA but are available under the Kansas code of criminal procedure.

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Probable Cause Affidavits

- Probable cause affidavits “shall be made available” to “any person, when requested, in accordance with” statutory requirements.
- Request is made by “filing such request with the clerk of the court.” See [K.S.A. 22-2302\(c\)\(2\)](#); [K.S.A. 22-2502\(e\)\(2\)](#).
 - Form to file request is provided by the Kansas Judicial Council:
<https://www.kansasjudicialcouncil.org/legal-forms/requests-disclosure-warrant-information/request-disclosure-affidavit-or-sworn-testimony>

K

Probable Cause Affidavits

- Both defendant and prosecution can file motions, under seal, opposing the disclosure of the affidavit, or recommending disclosure with redactions. See, e.g., K.S.A. 22-2302(c)(3).
 - Bases for redaction and seal include whether release of affidavit would result in:
 - Jeopardizing the physical, mental or emotional safety or well-being of a victim, witness, confidential source or undercover agent, or cause the destruction of evidence
 - Interfering with any prospective law enforcement action, criminal investigation or prosecution
 - Endangering the life or physical safety of any person
 - A [clearly unwarranted invasion of personal privacy](#)

K

Probable Cause Affidavits

- Judge can order disclosure of the affidavit in its entirety, disclose it with redactions, or order it remained sealed
- Judge has 10 days to act on the request

K

Probable Cause Affidavits

- Now that the PCA access statutes have been on the books a few years, and combined with high-profile disclosures in 2021, it may be fair to say that Kansas courts are getting used to disclosing these records
 - Kansas Reflector, [*Kansas Senate majority leader had 0.17 blood alcohol level in wrong-way pursuit*](#), April 8, 2021; see also *State v. Suellentrop*, [Order Pursuant to K.S.A. 22-2302 and arrest affidavit](#), Shawnee County District Court Case No. 2021-CR-58
 - Fox 4 KC, ['I'm going to unleash the wrath of God on you': Court papers detail charges against Kansas Rep. Samsel](#), May 25, 2021.

K

The three-legged stool of government transparency

- Three legs: Open meetings, open records, and public notice
- Essential elements of public notice:
 - Accessibility
 - Independence
 - Verifiability
 - Archivability
 - Creates a record of the notice

K

The three-legged stool of government transparency

- In many cases, newspapers have been building their audiences for decades
 - Expected source of public notice information

K

The three-legged stool of government transparency

- At the same time, newspapers serve as a repository for information about local events that is irreplicable on the world wide web
 - We find things in newspapers we weren't expecting to see.
 - On the internet, we search for specific information and ignore everything else.

K Open Government Crash Course: Access to Public Records and Meetings in Kansas

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