

BEFORE THE OFFICE OF THE KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Shawnee County, Kansas

In the Matter of the)
City of South Hutchinson)
Police Department.)

Case No. 2017-OG-000**2**

CONSENT ORDER

NOW on this 20 day of July, 2017 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2016 supp. 45-251(a)(1), which grants the Attorney General authority to enter into consent orders.

In lieu of further legal proceedings concerning violation of the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, the undersigned hereby knowingly and voluntarily agree as follows:

1. On or about November 14, 2016, the Attorney General’s Office received a complaint alleging the City of South Hutchinson Police Department (SHPD) violated the KORA. Following this reported violation, the Kansas Attorney General’s office conducted an investigation into allegations that the SHPD failed to timely respond to the KORA request in violation of K.S.A. 2016 Supp. 45-218(a) and (d), which provide that public records shall be open for public inspection and access unless otherwise provided by law, and that each request for access to a public record shall be acted upon as soon as possible, but not later than the end of the third business day following the date the request is received.

2. The SHPD is a public agency that is subject to the requirements of the KORA, and it must permit access to records and timely respond to requests for records as set forth in the KORA.

3. Investigation and/or statements provided on behalf of the SHPD, as described in a letter dated June 26, 2017, to city attorney Donald L. Gottschalk, which is attached hereto and incorporated by reference as Exhibit A, confirm the following violation of the KORA by a preponderance of the evidence.

- a. On September 15, 2016, the complainant submitted a KORA request to the SHPD seeking “a copy of the incident report and/or investigative reports related to the shooting death of Kaden Nagel...on 12/11/2015...”
- b. The SHPD received this KORA request, but directed the records clerk “not to fulfill the request until advised to do so.”

- c. On September 22, 2016, and November 1, 2016, the complainant contacted the SHPD via email to check on the status of his KORA request. The SHPD did not respond to these inquiries. On October 4, 2016, the complainant contacted the SHPD by phone and email concerning the state of his KORA request. The complainant spoke to a captain concerning his request and sent a follow up email.
- d. On November 6, 2016, the SHPD instructed the records clerk to release page one of the Kansas Standard Offense Report. This response was sent some 53 days after the SHPD received the complainant's KORA request, well outside of the three (3) business days established by K.S.A. 2016 supp. 45-218(d) for a public agency to respond to a KORA request.
- e. On November 10, 2016, the complainant filed a complaint with the Office of the Attorney General alleging that the SHPD failed to respond to his KORA request.
- f. During the investigation, the SHPD contended that it was "under the impression" that the Reno County District Attorney's Office would be responding to the KORA request directed to the SHPD for records held by the SHPD. It further contended that the records were not required to be disclosed by the provisions of K.S.A. 2016 Supp. 45-221(a)(2), (3) and (30).
- g. The SHPD proved the Attorney General's Office a copy of the records requested by the complainant for review. Investigation revealed that the provisions the SHPD asserted to discretionarily close the records did not apply, but that the records were criminal investigation records and not required to be disclosed by K.S.A. 2016 Supp. 45-221(a)(10). Investigation also concluded that the SHPD held records that were responsive to the complainant's KORA request, and thus was required to respond to his request.

4. Based upon the above information, the SHPD admits and agrees that it violated the KORA as set out in paragraph 3 above when it failed to respond to the complainant's KORA request within three (3) business days as required by K.S.A. 2016 Supp. 45-2018(d).

5. The SHPD agrees it fully understands and agrees that it will comply with the requirements of the KORA as set out in K.S.A. 45-215 *et seq.* In responding to each future KORA request it receives.

6. The Attorney General and the SHPD mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. The SHPD understands and waives all rights to further adjudication of facts and law that could be determined pursuant to other enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 45-222(a), 45-251(a)(2) or 45-253 concerning this matter.

8. The SHPD waives any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applied to agency actions that are governed by the provisions of K.S.A. 45-215 *et seq.*, and amendments thereto, relating to open records (the KORA), and subject to an action for civil penalties or enforcement, and thus it does not have a right to appeal under the KJRA.

9. The Attorney General accepts the waivers and stipulations by the SHPD.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence and that it is proper that the SHPD be subject to this Order based on the provisions of K.S.A. 2016 Supp. 45-251(a)(1), which permits the Attorney General to impose conditions or requirements on a public agency for violation of the KORA in a Consent Order;

AND WHEREAS the Attorney General and the SHPD mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, the SHPD consents to the following terms and conditions, and the Attorney General orders that:

10. The SHPD shall:

- a. Ensure that its staff, including its freedom of information officer, the records custodian(s), and any other staff responsible for assuring compliance with the requirements of KORA obtain at least one (1.0) hour of training on the provisions of the KORA to be presented by an attorney experienced in dealing with open records issues, within three (3) months of the date of this Consent Order;
- b. Provide the Attorney General's Office with a written statement confirming that SHPD staff responsible for assuring compliance with the KORA have obtained the required KORA training within (10) days of receiving the training;
- c. Determine if the one (1) page report titled "Provisional Anatomic Diagnoses" from a deputy coroner-medical examiner in Sedgwick County has been declared to be a criminal investigation record pursuant to the provisions of K.S.A. 22a-232(b), and if no such declaration has been made, provide it to the complainant by the most expedient means available within ten (10) days of the effective date of this Consent Order, and provide a copy of such communication with complainant to this office;
- d. Pay a civil penalty of \$100.00. Such payment shall be made payable to the Office of the Attorney General pursuant to K.S.A. 2016 Supp. 75-760; and

e. Not engage in any future violations of the KORA.

11. The SHPD understands and agrees that if it fails to comply with the terms of this Consent Order, the Attorney General may take action to enforce its provisions as authorized by K.S.A. 2016 Supp. 45-251(c) and amendments thereto.

12. The SHPD understands and agrees that if it engages in any future violation of the KORA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

13. The SHPD agrees and understands that this Consent Order does not resolve future and/or currently unknown unlawful conduct that may occur or be brought to the attention of the Attorney General or any other prosecutor, and any such alleged violations of the KORA may be subject to investigation proceedings as provided by K.S.A. 2016 Supp. 45-228 and/or enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 45-222, 45-251(a)(2), or 45-253.

14. In consideration of these admissions and agreements by the SHPD, and the above-agreed to remedies, the Attorney General agrees to forgo further prosecution for the violations of the KORA set forth herein.

15. The SHPD agrees that this Consent Order conforms to Kansas and federal law and the Attorney General has the authority to enter into this Consent Order.

16. Except as provided in paragraphs 11 and 12, this Consent Order shall operate as a complete release of all claims the City may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. The City agrees not to file, or cause to be filed, any litigation or claims in any federal or state court of law or federal or state administrative agency against the Attorney General, the Office of the Attorney General, its agents or employees, individually or in their official capacity. Such litigation or claims include, but are not limited to, any K.S.A. Chapter 60 or Chapter 61 Civil action regarding negligence and/or a 42 United States Code action and/or any administrative petition for redress. The City agrees that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability with the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or e.

17. The City understands that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2016 Supp. 45-251(e) and amendments thereto.

18. This Consent Order shall be a public record in the custody of the Office of the Attorney General.

19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

20. This Consent Order shall become effective on the date indicated in the Certificate of Service.

WHEREFORE, the Attorney General and the City consent to these provisions.

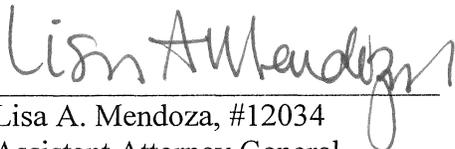
IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL



Derek Schmidt
Kansas Attorney General

Prepared By:



Lisa A. Mendoza, #12034
Assistant Attorney General
Director, Open Government Enforcement Unit
Office of the Kansas Attorney General
120 SW 10th Avenue, Second Floor
Topeka, KS 66612-1597

Modified and Approved By:



Donald L. Gottschalk, #6609
PO Box 1457
Hutchinson, KS 67504
City of South Hutchinson City Attorney

The City of South Hutchinson Police Department:



Pete Murray, Mayor

7-20-2017
Date



Joe Honeycutt, Council President

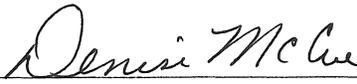
7-20-2017
Date



Scott B. Jones, Police Chief

07/20/2017
Date

ATTEST:



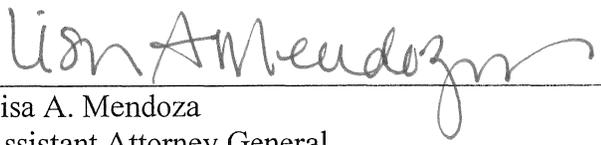
Denise McCue, City Clerk

7-20-17
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 08 day of August, 2017, a true and correct copy of the foregoing Consent Order was deposited in the United State mail, first class postage prepaid, addressed to:

Donald L. Gottschalk
PO Box 1457
Hutchinson, KS 67504
City of South Hutchinson City Attorney



Lisa A. Mendoza
Assistant Attorney General
Open Government Enforcement Unit



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
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(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

June 26, 2017

Donald L. Gottschalk, City Attorney
PO Box 1457
Hutchinson, KS 67504

Re: KORA Complaint – City of South Hutchinson Police Department

Dear Mr. Gottschalk:

On November 14, 2017, we received a complaint from Nick Penzenstadler, a reporter with *USA Today*, alleging that on or about September 20, 2016, the City of South Hutchinson Police Department violated the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, when it failed to respond to his KORA request for records involving the death of Kaden Nagle. As a remedy, he would like to “[R]eceive requested records.”

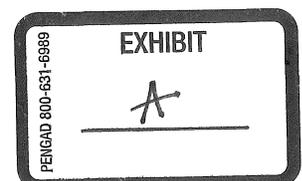
The KORA applies to public agencies.¹ The City of South Hutchinson Police Department (SHPD) meets the definition of a public agency because the City of South Hutchinson is a political or taxing subdivision of the state, and the South Hutchinson Police Department is an office, agency or instrumentality of the City.² This office has jurisdiction to review complaints filed pursuant to the KORA against public agencies.³ Relevant to our inquiry is whether a public agency knowingly violated any provisions of or intentionally failed to furnish information required by the KORA.

To assist in understanding our conclusions, we discuss the applicable law, describe the facts in detail, and then discuss our conclusions.

¹ K.S.A. 2016 Supp. 45-217(f)(1) (“Public agency” means 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.”).

² *Id.*

³ See K.S.A. 2016 Supp. 45-222, 45-223, and 45-228, 45-251, 45-253, and 45-254.



The KORA generally

Kansas has a strong policy of openness by its governmental bodies. The KORA was “passed by the legislature to ensure public confidence in government by increasing the access of the public to the government and its decision-making processes.”⁴ The KORA generally declares that public records shall be open for inspection by any person unless otherwise provided by the Act.⁵ The KORA is to be “liberally construed and applied to promote” the policy of openness.⁶

The KORA provides the public with the ability to access⁷ and obtain copies⁸ of public records.⁹ Key to triggering the KORA’s procedural requirements is the receipt of a request for records. A public agency may require a written request for public records, but otherwise cannot require the request to be made in any particular form.¹⁰ The decision on how to make a KORA request is up to the requester. Using the process established by a public agency for making a request under the KORA is the most prudent course of action. The possibility for error increases whenever a requester does not make a request in keeping with the process established by a public agency for making a KORA request.

Under the KORA, “[E]ach request for access to a public record shall be acted upon “as soon as possible, but not later than the end of the third business day following the date the request is received.”¹¹ The KORA “establishes an extremely short time line for mandatory response” by a public agency.¹² The KORA provides a record custodian with three acceptable options or responses to a KORA request:

... (1) grant access to the public record within 3 business days, (2) give the requestor [sic] a detailed explanation why access cannot be granted within 3 business days but that the record will be available at a later date, or (3) deny the request within 3 business days. . . .¹³

The KORA provides that the public agency must “act” on a request but does not require that a requester receive his or her response within three (3) business days. It also does

⁴ *Data Tree, LLC v. Meek*, 279 Kan. 445, 454-55, 109 P.3d 1226 (2005).

⁵ K.S.A. 45-216(a) (“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.”)

⁶ K.S.A. 45-216(a).

⁷ K.S.A. 45-218.

⁸ K.S.A. 2016 Supp. 45-219(a).

⁹ K.S.A. 2016 Supp. 45-217(g)(1).

¹⁰ K.S.A. 2016 Supp. 45-220(b).

¹¹ K.S.A. 45-218(d).

¹² *Telegram Pub. Co., Inc. v. Kansas Dept. of Transp.*, 275 Kan. 779, 791, 69 P.3d 578, 31 Media L. Rep. 2614 (2003).

¹³ *Id.*, Syl. ¶ 4.

not specify how a public agency must communicate its response. Because the KORA refers to “business days,” intervening Saturdays, Sundays and holidays are not considered when calculating when the three business days expires. Additionally, a public agency’s time to act does not begin to run until the day after it receives a KORA request. In essence, the KORA provides a “window” or interval of time for a public agency to respond when it receives a KORA request.

Because the purpose of the KORA is to provide access to or copies of public records, simply asking questions of a public agency or asking for information does not trigger the KORA. The KORA does not require a public agency to answer questions or create a record to respond to a KORA request; records not yet in existence are not subject to the KORA.

The KORA’s rules apply to existing public records that are not otherwise closed by some law.¹⁴ Public records are presumed open unless permissibly or mandatorily closed based on a specific law applicable to the specific record. The KORA does not allow a public agency unregulated discretionary power to refuse to release information sought by the public.¹⁵ The KORA provides that a public agency may not be required to disclose certain records. However, there are also some 55 categories of records that public agencies are not required to disclose.¹⁶ The burden is on the public agency opposing disclosure to justify the decision not to release the public record.¹⁷ The exceptions to disclosure “are to be narrowly interpreted.”¹⁸ It is important to remember that if a public record contains some material which is not subject to disclosure and some material that is subject to disclosure, a public agency is under a duty to make available that material which is subject to disclosure.¹⁹

If a request for access to a record is denied, “the custodian shall provide, upon request, a written statement of the grounds for denial. Such statement shall cite the specific

¹⁴ Attorney General Opinion No. 2002-029, <http://ksag.washburnlaw.edu/opinions/2002/2002-029.htm#txt25>, accessed May 5, 2017.

¹⁵ *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 274 Kan. 194, Syl. ¶25, 50 P.3d 66, 30 Media L. Rep. 2505 (2002).

¹⁶ K.S.A. 2016 Supp. 45-221(a)(1) – (55).

¹⁷ *Data Tree, supra*, 279 Kan. at 455; *see also Telegram Pub. Co., Inc., supra*, 275 Kan. 779, Syl. ¶ 3.

¹⁸ *Id.*

¹⁹ *See* K.S.A. 2016 Supp. 45-221(d) (“If a public record contains material which is not subject to disclosure pursuant to this act, the 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. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency shall delete the identifying portions of the record and make available to the requester any remaining portions which are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals’ identities are reasonably ascertainable, the public agency shall not be required to disclose those portions of the record which pertain to such individual or individuals.”); *see also* Attorney General Opinion 2002-29, *supra*; and *see Tew v. Topeka Police & Fire Civ. Serv. Comm’n*, 237 Kan. 96, Syl. ¶7 (1985) (discussing prior law).

provision of law under which access is denied and shall be furnished to the requester not later than the end of the third business day following the date that the request for the statement is received.”²⁰

Background

On September 15, 2016, Mr. Penzenstadler contacted the SHPD and spoke with SHPD Records Clerk Jackie White. He identified himself as a reporter for *USA Today*, and asked how to obtain a copy of a police report. Ms. White advised him to submit a written request to the SHPD along with a check in the amount of \$3.00. She further advised him that the SHPD had three (3) days to respond his request. She also advised him that the records could not be sent electronically. After exchanging this information, Mr. Penzenstadler mentioned that he was inquiring about a case involving the death of 3 year old Kaden Nagle, whose father was a Reno County Sheriff's deputy at the time of Kaden's death.²¹ According to the SHPD, when she received this information, Ms. White advised Mr. Penzenstadler that under Kansas law, “juvenile records are not to be released.” Mr. Penzenstadler apparently questioned this statement because the victim, Kaden Nagle, was deceased. Ms. White then placed Mr. Penzenstadler on hold so that she could speak with Capt. Mark Thompson and receive clarification on how to handle this inquiry. Capt. Thompson advised Ms. White that the request for records should be forwarded to the Reno County District Attorney's Office because the case had been turned over for prosecution. Ms. White conveyed this information to Mr. Penzenstadler, provided contact information for the district attorney's office and ended the phone call. She also advised Police Chief Scott Jones of the conversation and records request.

On September 15, 2016, at 10:03 a.m., Mr. Penzenstadler submitted a written KORA request via email to the SHPD, which was sent to shpd@southhutchpd.com, seeking the following:

. . . The following is a request for records under applicable portions of Kansas Open Records Act § 45-215 et seq., [sic]

I am seeking:

- A copy of the incident report and/or investigative reports related to the shooting death of Kaden Nagle on the 100 block of E. Avenue B, South Hutchinson on 12/11/2015. . . .

He also mailed a copy of his KORA request by depositing a copy of the letter in the U.S. mail addressed Ms. White. In his email, Mr. Penzenstadler indicated that he requested a similar set of records from the district attorney's office.

²⁰ K.S.A. 45-218(d).

²¹ Riedl, Matt, *Reno County deputy's 3-year-old son dies after accidentally shooting self with handgun*, <http://www.kansas.com/news/state/article49325890.html>, accessed May 5, 2017.

The SHPD states that it did receive Mr. Penzenstadler's written KORA request and a check. It is unclear whether the SHPD cashed or returned the check.

According to the SHPD, Ms. White did not respond to Mr. Penzenstadler's September 15, 2016, email. She did advise Chief Jones and Capt. Thompson that she received the mailed KORA request. Capt. Thompson advised Ms. White "not to fulfill the request until advised to do so."

On September 22, 2016, Mr. Penzenstadler emailed shpd@southhutchpd.com to ask if his request had been received and was being processed. Chief Jones acknowledges that he received this email and states that no response was sent to this inquiry. According to Chief Jones, he "spoke with the Reno County District Attorney's office and was under the impression that their office would be responding to this request(s) [sic]."

On October 4, 2016, Mr. Penzenstadler spoke to Capt. Thompson on the phone, and then followed up with an email explaining he was interested in "the first incident report that would provide a short narrative as well as who responded. It's my understanding that no charges were filed in this case and likely won't be charged to either the boy's father nor [sic] the roommate. Given that the investigation appears to be closed—we'd argue in favor of public disclosure of the entire investigative file." It is unclear whether Mr. Penzenstadler intended this last statement to amend his original KORA request, and it does not appear that Capt. Thompson or the SHPD clarified what Mr. Penzenstadler intended.

On October 4, 2016, Capt. Thompson contacted the city attorney to advise him of the request, and indicated that he was "not comfortable in releasing information related to the death investigation of the 3 year old in 2015."

On November 1, 2016, Mr. Penzenstadler again contacted Chief Jones via email to follow up on his KORA request. He advised Chief Jones that Ms. White had advised him "the records would have to come from the Reno DA [sic]. I submitted a request with DA Schroeder as well. Mr. Schroeder has indicated that the incident report and any reports from the case would be under the purview of the SHPD. I last spoke with Capt. Mark Thompson on Oct. 4 about our request and he indicated an official response was forthcoming. Can you give me an update on the request?" After receiving this email, Chief Jones contacted District Attorney Keith Schroeder about Mr. Penzenstadler's request. According to Chief Jones, the district attorney advised that his office "would not be fulfilling Mr. Penzenstadler records request [sic], nor continuing any further discussion with Mr. Penzenstadler." Chief Jones did not respond to Mr. Penzenstadler's email or to a voicemail left the same day. Mr. Penzenstadler indicates that he also left a voicemail for Capt. Thompson, but did not receive a return phone call.

On November 6, 2016, Capt. Thompson “instructed Records Clerk Jackie White to release page one of the Kansas Standard Offense Report (KSOR) of case 2015-3870, redacting social security numbers and phone numbers.” This is confirmed by the SHPD’s KCJIS²² Secondary Dissemination Log, p. 390. The SHPD did not provide a copy of its letter or other correspondence showing the transmission of this record to Mr. Penzenstadler, thus is it unclear whether it provided any explanation for the delay in responding to his request, or if it explained why it was only providing the front page of the KSOR to him. The KCJIS Secondary Dissemination Log does not indicate how Ms. White provided the records to Mr. Penzenstadler, however, based on her prior statements him, the SHPD does not provide records to requesters electronically.

On November 10, 2016, Mr. Penzenstadler filed a KORA complaint with this office. His complaint does not include any allegations concerning how the district attorney handled his KORA request. According to Mr. Penzenstadler, he also left a voicemail for Chief Jones on this date, but did not receive a return phone call.

In a letter dated December 13, 2016, which was received in this office on December 15, 2016, you responded to our inquiries, and advised “[W]hether or not your office wishes to divulge the information disclosed herein and make it available to USA Today is up to the Attorney General’s office. The [SHPD] is all together uncomfortable with any such release by your office. However, we will respect your decision. . . .”

In a letter dated January 27, 2017, which was received in this office on March 1, 2017, you advised the city found “itself between a rock and a hard place” concerning the release of the records as “[t]here is a real possibility of a lawsuit by the parents for providing information to a publication causing them further humiliation, grief, invasion of privacy and embarrassment . . . I am concerned . . . the parents could potentially file a lawsuit against the City for invasion of privacy thereby submitting them to ridicule and embarrassment within the community . . . As City Attorney for the City, I am unwilling to provide this publication with these records notwithstanding the provisions of KORA; my feeling that these facts qualify as exemptions to the provisions of KORA [sic] . . . If you feel the Police Department has handled this issue inappropriately and decide to fine the department for violation of KORA, so be it. I am certain the legislature of this state never anticipated the prospect of communities being sued for providing confidential investigative information whether it be in violation of KORA or not. . . .”

We will discuss additional facts as necessary to assist in understanding our conclusions.

Response within three business days

Under the KORA, a public agency must act on a KORA request “as soon as possible, but not later than the end of the third business day following the date the request is

²² Kansas Criminal Justice Information System.

*received.*²³ The key to triggering the KORA's procedural requirements is the receipt of a request for records. If access is not granted 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."²⁴

Here, it is clear that Mr. Penzenstadler made a written KORA request and directed it to the SHPD. There is no question as to whether he was making a KORA request, as his request for records to the SHPD clearly referenced the Kansas Open Records Act and provided a citation to the act.

The SHPD acknowledges that it received this request on Thursday, September 15, 2016. Under the KORA, the SHPD's response was due no later than the end of the third *business* day after receipt of this request. Because the day the request is received, as well as Saturdays, Sundays and holidays do not "count" in calculating the three *business* days, the SHPD's response was due on Tuesday, September 20, 2016.

Once Ms. White received the KORA request, she notified Chief Jones and Capt. Thompson. Capt. Thompson told Ms. White "not to fulfill the request until advised to do so." Ms. White took no further action to respond to the KORA request, and did not give Mr. Penzenstadler a detailed explanation for the delay or a date and time at which the records he requested would become available as required by K.S.A. 2016 Supp. 45-218(d). Chief Jones acknowledges that a follow up inquiry from Mr. Penzenstadler to the shpd@southhutchpd.com email account on September 22, 2016, was received and likewise ignored. SHPD did not respond to Mr. Penzenstadler's request until November 6, 2016, some 53 days after it received his KORA request. It is unclear what finally prompted the SHPD to respond. The SHPD's response was made well outside the window of time established by K.S.A. 45-218(d) of three (3) business days.

There is some suggestion from the SHPD that Chief Jones, after having some contact with the Reno County District Attorney's office, was "under the impression" that the district attorney's office would be responding to Mr. Penzenstadler's request. However, there is no indication that the SHPD did not have records that were responsive to Mr. Penzenstadler's KORA request. If it did not have any records, the SHPD was required to notify the requester and furnish the name and location of the custodian of the public record, if known to or readily ascertainable.²⁵ Moreover, there is no "provision or exemption in KORA allowing a public agency to refuse to produce records because such records are available from another or more 'appropriate' source."²⁶

²³ K.S.A. 45-218(d); emphasis added.

²⁴ *Id.*

²⁵ K.S.A. 45-218(c) ("If 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.").

²⁶ *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 274 Kan. at 222.

In light of the foregoing, it is clear that the SHPD violated the KORA when it failed to respond to Mr. Penzenstadler's KORA request within three (3) business days as required by K.S.A. 45-218(d).

Does an exemption or exception to disclosure under the KORA or any other law apply?

A public agency receiving a KORA request always has the statutory obligation to “decide whether the request is for access to [a] public record and, if so, whether an exception applies. The public agency is bound by KORA when making its decisions.”²⁷ The burden is on a public agency to show that an exemption or exception to disclosure applies to the requested records.²⁸

We next examine whether the requested records were “public records,” and whether the reasons proffered by the SHPD to support its position that the KORA does not require disclosure of the requested records.

A. Were the requested records “public records” within the meaning of the KORA?

Under the KORA, a “[P]ublic 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. . . .”²⁹ It is clear that the SHPD is a public agency within the meaning of the KORA.

During our review of this matter, and pursuant to the provisions of K.S.A. 2016 Supp. 45-228(a) and (b),³⁰ we requested the SHPD provide us with unredacted copies of the records Mr. Penzenstadler requested. We made this request so that we could gain a better understanding of the nature and content of the records the SHPD had that were responsive to Mr. Penzenstadler's request. In response, the SHPD provided us with 22 pages of records. These records consisted of the following:

²⁷ *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 170, 815 P.2d 66 (1991); see also *Hunter Health Clinic v. WSU*, 52 Kan.App.2d 1, 15, 362 P.3d 10, 324 Ed. Law Rep. 1096 (2015).

²⁸ *Data Tree, supra*, 279 Kan. at 454-55.

²⁹ K.S.A. 2016 Supp. 45-217(g)(1).

³⁰ (a) In investigating alleged violations of the open records act, the attorney general . . . may: . . . (3) examine . . . any records or other documentary material of whatever nature relevant to such alleged violations; . . . (b) If a public agency claims in writing that any records or documents, or any portion thereof, obtained by the attorney general . . . pursuant to subsection (a) are exempt from disclosure for any reason, the attorney general . . . shall not further disclose that record or document, nor the contents thereof, unless ordered to do so by a district court enforcing the open records act in connection with such record or document. Such records and documents in the possession of the attorney general . . . shall not be subject to a request for inspection and copying under the open records act and shall not be subject to discovery, subpoena or other process. . . .”

- Kansas Standard Offense Report and the Kansas Standard Offense Supplement Report (4 pages);
- renderings of the crime scene using software called ScenePD (2 pages);
- narrative reports from responding officers, as well as a narrative report concerning a witness interview (15 pages); and
- report titled “Provisional Anatomic Diagnoses” from the Deputy Coroner-Medical Examiner in Sedgwick County (1 page).

On behalf of the SHPD, you declined to provide “photographs of the body of the victim in respect for the mother and father of the child,” but offered to have the SHPD provide them for review, while also noting that the photographs “are gruesome and shock[] the conscience of the viewer.” The photographs were not necessary for the purposes of our review. Otherwise, “the complete record of the investigation report by” the SHPD was provided to this office for review.

The paper and electronic records, as well as photographs, concerning the SHPD’s investigation into the death of Kaden Nagle are recorded information that was made, maintained, kept by and are in the possession of the SHPD, a public agency. Based on our review, it is clear that these records are public records within the meaning of the KORA,³¹ and the SHPD does not argue otherwise.

B. Asserted exemptions to disclosure

Not all public records are required to be open for public inspection. Thus, having determined that the records in question are public records, we next inquire whether any exemption or exception to disclosure applies. It is important to remember that the KORA does not prohibit disclosure of all records contained within its disclosure exceptions, but rather makes their release discretionary with the public agency’s official records custodian.³² K.S.A. 2016 Supp. 45-221(a) provides a list of records that a public agency has discretion to keep confidential. In addition to the KORA, there are other state and federal laws that may apply to mandate closure of public records.

We asked the SHPD to explain what exemptions to disclosure, if any, might apply to support its denial of access to the requested records. We will address each proffered exemption to disclosure in turn.

³¹ K.S.A. 2016 Supp. 45-217(g)(1).

³² K.S.A. 2016 Supp. 45-221(a); *see also Data Tree, supra*, 279 Kan. at 455 (citing *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 63-64, 734 P.2d 1083 (1987)).

1. *K.S.A. 2016 Supp. 45-221(a)(30)*

The SHPD first asserts that K.S.A. 2016 Supp. 45-221(a)(30) provides a discretionary basis to support denial of access to the requested records. This section provides as follows:

(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. . . .

K.S.A. 2016 Supp. 45-217(b) defines a “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 of legitimate concern to the public.”

The purpose of the KORA’s “privacy exception” has been described as follows:

[The privacy exception] is intended to exempt information in government records that relates to the intimate details of a person’s private life. The public’s right to have access to information contained in government records is thus qualified by protection of an individual’s right to maintain the privacy of personal matters having no bearing on matters of public interest. . . .³³

In support of the SHPD’s position that this exemption to disclosure applies to the requested records, you provided the following information:

- The Department “is not comfortable releasing [the requested records] to any news agency requesting them”;
- this section applies because, “[T]he parents of this child so tragically and accidently killed are simply devastated and any public disclosure of records to a news agency would only exacerbate their grief for the most prurient of purposes”;
- providing information to a publication would cause the victim’s parents “further humiliation, grief, invasion of privacy and embarrassment”;

³³ Attorney General Opinion 87-168, <http://ksag.washburnlaw.edu/opinions/1987/1987-168.pdf>, accessed May 5, 2017, citing Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 U. Kan. L. Rev. 205, 256 (1985).

- “[a]ny reasonable person would find offensive any publication which ridicules the parents of this tragically killed three year old child”; and
- this section applies because “if our Police Department provides investigation [sic] of this incident to USA Today, the parents could potentially file a lawsuit against the City for invasion of privacy thereby submitting them to ridicule and embarrassment within the community. . . .”

The definition of “clearly unwarranted invasion of personal privacy” does not encompass whether a public agency is “comfortable” or “not comfortable” with releasing records in response to a KORA request, thus this reason, standing alone, is insufficient to support a nondisclosure decision under the KORA.

Additionally, the SHPD provided no evidence that the requester’s publication, *USA Today*, intended to “ridicule[] the parents of this tragically killed three year old child,” thus this reason, standing alone, is also insufficient to support a nondisclosure decision under the KORA.

What disclosures are “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”? There are few Kansas cases that discuss this particular exemption. One that does is *Data Tree, LLC v. Meek*.³⁴ *Data Tree* involved a challenge against a county register of deeds over whether personally identifying information, such as social security numbers, mothers’ maiden names, and dates of birth, should be redacted under this “personal privacy” exemption. The court held that under the facts of that case, such information was exempt from disclosure under the KORA. Relying on a Kentucky case discussing a similar provision under its open records law, the court first considered whether the information sought was of a “personal nature.” If so, the next determination is whether public disclosure would constitute a clearly unwarranted invasion of personal privacy. “This requires a ‘comparative weighing of antagonistic interests,’ where the ‘privacy interest in nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good,’ and the circumstances of a given case affect the weighing or balancing of interests.”³⁵

The Kentucky case involved information in injury reports filed with the Kentucky Department of Workers Compensation that contained personal information, including names, home addresses, telephone numbers, dates of births, social security numbers, and more. The Kentucky court found the information was “clearly of a personal nature.”³⁶

³⁴ *Data Tree, LLC v. Meek*, 279 Kan. 445, 109 P.3d 1226 (2005).

³⁵ *Id.*, 279 Kan. at 460.

³⁶ *Id.*

Here, the KSOR and attached narrative reports describe facts related to a father discovering and attempting to help his mortally wounded child and the aftermath of that discovery, including law enforcement officers carrying out their duty to record and describe the scene, as well as determine what happened and whether any person might be criminally responsible for these tragic events. Given the nature of the reports, we find that the records contain information of a personal nature because the records concern individual private lives, relationships and emotions.

Having determined the information sought in these public records is of a “personal nature,” we next consider whether public disclosure would constitute a clearly unwarranted invasion of personal privacy. This requires a balancing test: the general public policy rule of openness for the public good must be balanced against the countervailing public interest in personal privacy. Will the release of the records serve the principal purpose of the KORA?

The KORA 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.³⁷ The policy of disclosure found in the KORA is to serve the public interest, not merely to satisfy the public’s curiosity. Among the considerations are whether the information is restricted or intended for the use of a particular person, and whether the information found in the reports would reveal anything about the agency’s conduct.³⁸

Applying this balancing test to the facts at hand, we believe most people would consider the information contained in these reports to be of a private and personal nature. Certainly its use and dissemination is restricted by the SHPD, in part because the reports may contain criminal history record information,³⁹ and also so as to not interfere with ongoing investigations. Additionally, the district attorney uses such information to make prosecution decisions.

However, we believe that disclosure of the records also serves the public interest of the community at large. This case involved the death of a young child who managed to obtain and use a loaded, unsecured weapon. His father is a Reno County sheriff’s deputy, the loaded, unsecured weapon in the apartment where the young child died belonged to his roommate,⁴⁰ and the death was investigated by local law enforcement—the SHPD—as well as the Kansas Bureau of Investigation.⁴¹ The public has an interest

³⁷ *Data Tree*, *supra*, 279 Kan. at 444, citing *Telegram Publishing Co. v. Kansas Dept. of Transportation*, 275 Kan. 779, Syl. ¶ 2, 69 P.2d 578 (2003).

³⁸ *Id.* 279 Kan. at 462-63.

³⁹ See K.S.A. 22-4701 *et seq.*

⁴⁰ Bill Draper, *Kansas deputy learns hard lesson in son’s accidental shooting death*, The Associated Press, <http://cjonline.com/news-state/2016-10-14/kansas-deputy-learns-hard-lesson-sons-accidental-shooting-death>, accessed May 5, 2017.

⁴¹ See Footnote 21, *supra*.

in ensuring that law enforcement is held to the same standard as other non-law enforcement individuals faced with the same circumstances, and in knowing whether the investigation conducted by local and law enforcement officers involving a local law enforcement officer was handled properly.

Because these records contain information that has a bearing on matters of public interest and may significantly serve the principal purpose of the KORA by ensuring public confidence in government by increasing the access of the public to government and its decision-making processes, we cannot say that the release of these records would constitute a clearly unwarranted invasion of personal privacy.

We emphasize that making such a determination is a fact intensive review and that the SHPD did little to support its assertion other than by making conclusory statements about the impact the release of these records might have on the victim's family, rather than showing how it analyzed and applied this particular exemption to disclosure. While the SHPD made an attempt to show that the release of these records might be highly offensive to the victim's parents, it did not present any information showing how release of the information might pose a risk to a person or property. There is also no evidence to suggest that the SHPD attempted to contact the victim's parents about the KORA request to seek their input, allow them to explain the risk it might pose to them or why it was highly offensive, permit them an opportunity to seek legal counsel to protect any rights they might have, or file a declaratory judgment action seeking to keep the records closed. Even recognizing that a law enforcement officer was involved, it did not present any evidence or argument that release of the records would present any danger. Importantly, it provided no evidence or argument to show that the information was not of legitimate concern to the public.

While this is a difficult balancing test, we heed the KORA's admonition that it is to be liberally construed and applied to promote the policy of openness.

Having concluded that this exemption ultimately does not support the denial of access to the requested records, we next consider the other proffered reasons that the SHPD alleges to support denial of access to the records.

2. *K.S.A. 2016 Supp. 45-221(a)(2)*

The SHPD also asserted that the records were not required to be released pursuant to the provisions of K.S.A. 2016 Supp. 45-221(a)(2). This section provides that:

- (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

...

(2) Records which are privileged under the rules of evidence, *unless the holder of the privilege consents to the disclosure.*

(Emphasis added).

The rules of evidence are set out beginning at K.S.A. 60-401 *et seq.* The rules of evidence concerning privilege are set out at K.S.A. 60-423 through 60-440. In the law of evidence, certain subject matters are privileged, and for public policy reasons are not subject to disclosure or discovery. Some privileges exist because society values the privacy or purpose of certain relationships and the need in those relationships to encourage full and frank communications. Kansas recognizes several protected relationships and individual privileges to refuse to disclose certain matters, including the attorney-client privilege,⁴² the physician-patient privilege,⁴³ marital privilege,⁴⁴ penitential communication privilege,⁴⁵ religious belief,⁴⁶ political vote,⁴⁷ trade secret,⁴⁸ secret of state,⁴⁹ official information,⁵⁰ communication to a grand jury,⁵¹ identity of informer,⁵² and the privilege of an accused against self-incrimination.⁵³ If a person has and/or claims a privilege, he or she can refuse to disclose, and prevent others from disclosing the privileged information unless a judge finds that there is no privilege, or that the privilege has been waived.

Although the SHPD asserted this provision applies, it did not identify the particular privilege that it relied on to support its claim, or otherwise explain how this particular exemption to disclosure applied. Rather, it argued that “[I]n the event the District Attorney subsequently files criminal charges in this case, the records of [the SHPD] are most certainly relevant to any such prosecution. To my knowledge the holder of the privilege has not consented to the disclosure thereof.”

Merely because the SHPD has reports that may be evidence in a criminal or civil case does not mean that they are also privileged under the rules of evidence. “Evidence” is “[S]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the evidence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact <the bloody glove is the key piece of

⁴² K.S.A. 60-426.

⁴³ K.S.A. 60-427.

⁴⁴ K.S.A. 60-428.

⁴⁵ K.S.A. 60-429.

⁴⁶ K.S.A. 60-430.

⁴⁷ K.S.A. 60-431,

⁴⁸ K.S.A. 60-432.

⁴⁹ K.S.A. 60-433.

⁵⁰ K.S.A. 60-434.

⁵¹ K.S.A. 60-435.

⁵² K.S.A. 60-436

⁵³ K.S.A. 60-423.

evidence for the prosecution>.”⁵⁴ “Evidence’ is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.”⁵⁵

So far as we are able to determine, the records responsive to this KORA request may be evidence in a criminal or civil case because they are documents that may tend to prove or disprove an alleged fact. However, without more, including reference to a particular privilege recognized in the law, we cannot say that the records are privileged under the rules of evidence and thus not subject to disclosure under the KORA.

3. *K.S.A. 2016 Supp. 45-221(a)(3)*

In addition to the foregoing, the SHPD also asserted that the records were not required to be released pursuant to the provisions of K.S.A. 2016 Supp. 45-221(a)(3). This section provides that:

(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(3) Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients. . . .

It is unclear why the SHPD asserted this exemption to disclosure. The only reference we could locate to this exemption is contained in your letter dated December 13, 2016:

. . . My client, the South Hutchinson Police Department, is not comfortable in releasing the enclosed records to any news agency requesting them. K.S.A. 45-220 [sic] (2), (3) and especially K.S.A. 45-220 [sic] (30) exempts from public disclosure of records [sic] containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. The parents of this child so tragically and accidentally killed are simply devastated and any public disclosure of records to a news agency would only exacerbate their grief for the most prurient of purposes. . . .

No further explanation is provided to support how this provision applies to the current case.

In reviewing the records you provided, we did not identify any medical, psychiatric, psychological or alcoholism or drug dependency records pertaining to an identifiable patient. We did identify a one (1) page report titled “Provisional Anatomic Diagnoses”

⁵⁴ Black’s Law Dictionary (10th ed. 2014), accessed via Westlaw on May 5, 2017.

⁵⁵ K.S.A. 60-401(a).

from a deputy coroner-medical examiner in Sedgwick County (1 page). This record sets out a deputy coroner-medical examiner's preliminary findings on the cause of death of Kaden Nagle.

Although medical records compiled prior to a decedent's death are privileged as confidential physician-patient communications, and thus exempt from disclosure under the KORA,⁵⁶ coroner's records are not considered medical records.⁵⁷ Therefore, the provisions of K.S.A. 2016 Supp. 45-221(a)(3) do not apply to exempt this record from disclosure. Additionally, the KORA's prohibition on disclosure of public records that would constitute a clearly unwarranted invasion of personal privacy does not prohibit disclosure of coroner's records under K.S.A. 2016 Supp. 45-221(a)(30).⁵⁸

Are coroner's records otherwise subject to disclosure? K.S.A. 22a-232 sets out a coroner's duties. A upon receipt of notice, a coroner is required to "take charge of the dead body, make inquiries regarding the cause of death and reduce the findings to a report in writing. Such report shall be filed with the clerk of the district court of the county in which the death occurred if known, or if not know the report shall be filed with the clerk of the district court of the county in which the dead body was found. . . ."⁵⁹ "If in the opinion of the coroner information is present in the coroner's report that might jeopardize a criminal investigation, the coroner shall file the report with the clerk of the district court of such county and designate such report as a criminal investigation record, pursuant to subsection (a)(10) of K.S.A. 45-221, and amendments thereto."⁶⁰

The SHPD provided no information concerning whether the coroner in this matter designated its report, including the one (1) page report titled "Provisional Anatomic Diagnoses," as a criminal investigation record. As such, we are unable to complete our assessment as to whether this one (1) page report should be subject to disclosure under the KORA. This is a matter that the SHPD will be required to address.

Additional exemption to disclosure not asserted by the SHPD

Surprisingly, one exemption to disclosure the SHPD did not assert deals with criminal investigation records. Although we asked specifically if this exemption to disclosure applied to the requested records, the SHPD did not address its applicability.

The phrase "criminal investigation records" is defined by the KORA:

⁵⁶ *Burroughs v. Thomas*, 23 Kan. App.2d 769, 772, 937 P.2d 12 (1997).

⁵⁷ *Id.*, 23 Kan. App. 2d 769, Syl. ¶ 3.

⁵⁸ *Id.*, at Syl. ¶ 4.

⁵⁹ K.S.A. 22a-232(a).

⁶⁰ K.S.A. 22a-232(b).

(c) 'Criminal investigation records' means: (1) Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera as defined by K.S.A. 45-254, and amendments thereto; and (2) records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701, and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law, but 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. 21-5406, and amendments thereto. . . .⁶¹

K.S.A. 2016 Supp. 45-221(a)(10) provides that a public agency is not required to disclose criminal investigation records except under certain circumstances:

(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

...
(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 which specifically and individually identifies the victim of any sexual offense 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 paragraphs (A) through (F) that necessitate closure of that public record. . . .

(Emphasis added).

⁶¹ K.S.A. 2016 Supp. 45-217(c).

This statute provides criteria for judicial review of a public agency's decision not to disclose such records in response to a KORA request. Under this exemption to disclosure, a public agency cannot be compelled to disclose criminal investigation records unless an action is first brought for that purpose and a court finds disclosure meets the conditions of K.S.A. 2016 Supp. 45-221(a)(10)(A)-(F). Essentially, the statute sets out factors to weigh in considering the public interest in disclosure versus any harm that may arise from disclosure.⁶² This exemption to disclosure is unique because the first requirement of K.S.A. 2016 Supp. 45-221(a)(10)(A) is that disclosure is in the public interest. A requester bears the burden of establishing that disclosure is in the public interest under this subsection, and that the records to be disclosed will in fact promote and serve that interest.⁶³ A public agency bears the burden under the remaining subsections to show why the record(s) should remain closed.

Not all records created by a law enforcement agency will fall under this exemption to disclosure. For instance, traffic records, police blotters, and rosters of inmates are not defined as criminal investigation records, and thus must be open to the public.

Here, it is clear that the SHPD meets the definition of a criminal justice agency in K.S.A. 22-4701. Are the records responsive to Mr. Penzenstadler's KORA request criminal investigation records? From our review of the records, it is clear that the records were compiled in the process of investigating possible violations of criminal law involving the death of a three year old child. The records are comprised of the following: Kansas Standard Offense Report, Kansas Standard Offense Supplement Report, narrative reports from first on scene and investigating officers, witness statements, crime scene renderings, and supplemental narratives, as well as photographs. The information contained in these records describes the course of events in this tragedy, and actions taken by law enforcement officers, as well as witnesses, and records the scene of the incident. The information could be used to prosecute a defendant, as well as to assist law enforcement in preventing and detecting violations of the law.

What reasons set out in K.S.A. 2016 Supp. 45-221(a)(10)(A) through (F) support discretionary closure of these records? Although the SHPD failed to properly raise and offer arguments in support of closure on this basis, we nevertheless think, based on its submissions, its general arguments are two-fold: that disclosure is not in the public interest due to the harm it would cause Kaden Nagle's family, and that because it is possible the Reno County District Attorney could still file charges, releasing the records would interfere with a prospective law enforcement action, criminal investigation or prosecution. Thus, it would contend that K.S.A. 2016 Supp. 45-221(a)(10)(A) and (B) necessitate closure of the records.

⁶² *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 65, 734 P.2d 1083 (1987).

⁶³ *Id.*

We find that the records at issue are criminal investigation records under K.S.A. 2016 Supp. 45-221(a)(10). With one exception, which we discuss below, criminal investigation records are not required to be disclosed by a public agency. However, a district court may order that the records be disclosed subject to any conditions that it may impose only after an action is brought for that purpose and the court finds disclosure meets the conditions of K.S.A. 2016 Supp. 45-221(a)(10)(A)-(F).⁶⁴ Because the KORA has a process in place that can be used to determine whether criminal investigation records should be released, we decline to supplant this process or substitute our judgment for that of a district court, especially where a requester has not had the opportunity to argue why release of the records may be in the public interest.

The one exception to criminal investigation records relevant here involves the Kansas Standard Offense Report. Prior Attorney General Opinions have found that only the front page of the KSOR is open because it contains information of a general nature that is not a criminal investigation record and thus must be open for public inspection and copying.⁶⁵ The front page contains the date, time and location of the reported offense, the nature of the crime, and the name and other contact information concerning the victim, witness or other person reporting the incident. The remainder of the KSOR is considered to be a criminal investigation record.

Notably, the front page of the KSOR in this matter contains the statement "FRONT PAGE OPEN PUBLIC RECORD." The reverse side contains the statement "CRIMINAL INVESTIGATION RECORD / NOT AN OPEN PUBLIC RECORD." The reverse side contains places to record information concerning suspects, evidence, the crime scene, a narrative statement from the reporting officer and the like.

The front page of the Kansas Standard Offense Supplement Report also contains the statement "FRONT PAGE OPEN PUBLIC RECORD." The reverse side of this report contains the statement "BACK PAGE OPEN PUBLIC RECORD." The supplement report appears to be additional space to record victim, witness and reporting person contact information.

Based on the information the SHPD provided in response to our inquiries, it appears that it ultimately provided the KSOR and supplemental KSOR to Mr. Penzenstadler on November 6, 2016. According to the SHPD, Capt. Thompson instructed Records Clerk Jackie White to release page one of the KSOR after redacting social security numbers and phone numbers. We note that the KSOR does not record the social security number of the victim or witnesses on the portions of the report that are designated for public release. Additionally, it does not appear that the SHPD explained why it was redacting

⁶⁴ *Id.*, 241 Kan. 59, Syl. ¶ 2

⁶⁵ Attorney General Opinion 98-38, <http://ksag.washburnlaw.edu/opinions/1998/1998-038.htm>, and Attorney General Opinion 87-25, <http://ksag.washburnlaw.edu/opinions/1987/1987-025.pdf>, accessed May 5, 2017.

the phone numbers from the front page of the KSOR, which generally would be open. It is also unclear whether the SHPD explained why it was only providing the first page of the KSOR to Mr. Penzenstadler when it responded to his KORA request on November 6, 2016. Based on timing, it seems reasonable to conclude that Mr. Penzenstadler filed his November 10, 2016, KORA complaint with this office before he received the SHPD's response.

In light of the foregoing, we find that K.S.A. 2016 Supp. 45-221(a)(10)(A) and (B) provides a basis to decline to release the remainder of the requested records.

Redaction

Although we offered the SHPD the opportunity to address why the requested records could not be redacted, it did not provide a further response or explanation to this portion of our inquiry.

Under the KORA, if the requested records contain a mix of information—some of it open, but other parts that are closed by law—the public agency is required to redact the record to eliminate the closed information and provide the remaining portions of the public record.⁶⁶

Having reviewed the records and given the purpose of K.S.A. 2016 Supp. 45-221(a)(10), we think we generally understand the reason why the records were not redacted. However, we decline to substitute our judgment as to whether, why and how to redact the records. This is because under the KORA, it is the SHPD that has a duty to redact the closed information and make the remaining portion of the public record available to the requester. Because the SHPD apparently did not consider its redaction obligation, this portion of the KORA process remains incomplete. Ultimately it may be up to a court to determine whether any of the criminal investigation records must be released or redacted prior to release.

Public agencies must honor their legal obligations under the KORA to review and redact public records so that redacted versions of the records can be released if possible. Because of this, we take this opportunity to remind the SHPD of its obligations under the KORA, which include efforts to separate or delete material that is not subject to disclosure and then release the redacted records in response to a KORA request. The SHPD should undertake efforts to ensure that it meets its KORA obligations in this regard.

⁶⁶ K.S.A. 2016 Supp. 45-221(d).

Penalties under the KORA

The KORA provides for civil penalties in an amount not to exceed \$500.00 for each violation of the KORA.⁶⁷ Completion of training concerning the requirements of the KORA may also be required.⁶⁸ In addition to the above remedies, a court has jurisdiction to enforce the KORA by injunction, mandamus, declaratory judgment or other appropriate order.⁶⁹ A court may also review the records in controversy *in camera* before reaching a decision.⁷⁰ A court may also award costs and attorney fees, as well as reasonable expenses and investigation costs.⁷¹

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the SHPD violated the KORA when it failed to respond to Mr. Penzenstadler's KORA request within three (3) business days.

We are at a loss to understand the SHPD's flat refusal to respond to this KORA request within three (3) business days by directing staff not to respond, then waiting 53 days to act by providing records that are clearly subject to disclosure. Certainly we have great sympathy for the parents and family of Kaden Nagle. However, this does not outweigh a public agency's obligations under the KORA. The KORA establishes a process that, if followed, would have allowed the SHPD to avoid a clear violation of the KORA, timely raise any exemptions to disclosure, and potentially allow a district court to determine whether the requested records should be disclosed, thus protecting it from liability.

Under the facts presented here, we believe the SHPD fell well short of meeting its KORA obligations to timely respond to a records request.

Although you initially indicated the SHPD would respect any decision by this office,⁷² you later adopted a somewhat more combative stance by indicating that as "City Attorney for the City, I am unwilling to provide this publication with these records notwithstanding the provisions of KORA; my feeling that these facts qualify as exemptions to the provisions of the KORA [sic] . . . If you feel the Police Department has handled this issue inappropriately and decide to fine the department for violation of KORA, so be it."

⁶⁷ K.S.A. 2016 Supp. 45-223(a); *see also* K.S.A. 2016 Supp. 45-251(a).

⁶⁸ K.S.A. 2016 Supp. 45-222(a); *see also* K.S.A. 2016 Supp. 45-251(a).

⁶⁹ K.S.A. 2016 Supp. 45-222(a).

⁷⁰ K.S.A. 2016 Supp. 45-222(b).

⁷¹ K.S.A. 2016 Supp. 45-222(d), (e), and (f).

⁷² Letter from Gottschalk to Mendoza dated December 13, 2016, p. 2: "Whether or not your office wishes to divulge the information disclosed herein and make it available to USA Today is up to the Attorney General's office. The [SHPD] is all together uncomfortable with any such release by your office. However, we will respect your decision. . . ."

Where the SHPD fell short was in failing to meet its statutory obligation to respond to the KORA request within three (3) business days. It was ultimately correct in concluding certain records were not required to be released, albeit for the wrong reasons.

We note that we have not identified any prior substantiated violations of the KORA by the SHPD.

We appreciate that the SHPD was attempting to protect Kaden Nagle's parents from further scrutiny. However, the fact that it refused to comply with the statutory mandate to respond within three (3) business days simply cannot be ignored.

Based on the totality of the circumstances, we believe remedial action is required to ensure the SHPD's compliance with the KORA. However we have determined to seek the SHPD voluntary compliance through the means of a Consent Order as provided for by the KORA.⁷³ We have also determined to seek a civil penalty to ensure future compliance with the KORA.⁷⁴

We have enclosed the Consent Order for the SHPD's review. The Consent Order requires the SHPD to acknowledge the KORA violation for failing to respond within three (3) business days. It also requires the following:

- a. Training: Because we strongly believe that training is an effective means to ensure that a public agency understands its obligations under the KORA, the Consent Order requires SHPD personnel responsible for handling KORA matters, and those individuals in their chain of command, to attend at least one (1) hour of KORA training within three (3) months of the effective date of the Consent Order. We urge the SHPD, and indeed the City of South Hutchinson, to send all its personnel to a KORA training to ensure each employee and official understands a public agency's obligations under the KORA;
- b. Written verification of training: the SHPD must provide a written statement confirming that SHPD staff responsible for KORA compliance have obtained the required training;
- c. Determination of record status: review and determine whether the one (1) page report titled "Provisional Anatomic Diagnoses" prepared by a deputy coroner-medical examiner in Sedgwick County has been declared to be a criminal investigation record pursuant to

⁷³ K.S.A. 2016 Supp. 45-251(a)(1).

⁷⁴ K.S.A. 2016 Supp. 45-251(a)(1)(A)(ii).

the provisions of K.S.A. 22a-232(b), and to promptly provide it to Mr. Penzenstadler if no such declaration has been made;

- d. Civil Penalty: pay a civil penalty in the amount of \$100.00; and
- e. Future Compliance: the SHPD agrees not to engage in any future violations of the KORA.

These items are spelled out in detail in paragraph 10 of the enclosed Consent Order.

Our offer of a Consent Order as authorized by K.S.A. 2016 Supp. 45-251(a)(1), is effective up to **5:00 p.m. on Friday, July 28, 2017**. We believe this will offer you sufficient time to confer with the City Commission, and others as necessary, about this matter.

If the Consent Order is approved, please secure the necessary signatures and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, July 28, 2017**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2016 Supp. 45-222, 45-251(a)(2), or 45-253.

We note that our office periodically offers training on the KORA. This training is free to the public. You may find more information about upcoming training here: <https://ag.ks.gov/open-government/upcoming-training>.

We look forward to hearing from you. Please feel free to contact me at (785) 296-2215 or lisa.mendoza@ag.ks.gov with any questions or concerns.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL
DEREK SCHMIDT



Lisa A. Mendoza
Assistant Attorney General
Director, Open Government Enforcement Unit

Enclosure (Consent Order)