

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 Frontenac,)
A public agency pursuant)
to K.S.A. 2019 Supp. 45-217(f)(1) and)
45-251(a)(2).)

Case No. 2020-OG-0001

FINDING OF VIOLATION

NOW on this 11th day of February, 2020, this matter comes before the Attorney General for the purposes of resolving a Kansas Open Records Act (KORA) complaint pursuant to the provisions of K.S.A. 2019 Supp. 45-251(a)(2), which grants the Attorney General authority to issue a finding of violation to a public agency.

The Attorney General gives notice of the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. The City of Frontenac, Kansas, is a political or taxing subdivision of the state, and thus is a public agency.
2. On September 16, 2019, the Frontenac City Council voted 6-2 to fire City Attorney Tim Fielder, City Administrator Brad Reams, and City Clerk Terri Kutz, and to rehire Jayme Mjelde as interim city clerk. Mayor Linda Grilz subsequently resigned, believing the terminations to be “outrageous.”
3. In a letter dated September 18, 2019, Zach Dodge, reporter, KOAM and Fox 14 News, sent a KORA request to the City of Frontenac (“the city”) requesting “an opportunity to inspect or obtain copies of public records that include personal and work texts and emails between August 1st, 2019, and September 18th, 2019, between all Frontenac city council members in regard to firing city of Frontenac employees Tim Fielder, Brad Reams, and Terri Kutz, in regards to a vote to fire city employees Tim Fielder, Brad Reams, and Terri Kutz, and in regards to rehiring Jayme Mjelde. . . .”
4. In his KORA request, Mr. Dodge asked to be informed if the fees would exceed \$100.00. He also requested a waiver of fees in part because he believed the disclosure of the requested information was in the public interest.

5. On September 19, 2019, Interim City Clerk Jayme Mjelde sent a letter to Mr. Dodge acknowledging his KORA request.

6. On September 25, 2019, the city sent Mr. Dodge a letter advising that “[W]e have performed an initial assessment of the time and costs associated with your request.” The city further advised that consistent with its ordinance it would charge \$25.00 per hour per employee who performed the search, as well as \$.25 per page for copies. It also charged for the interim city attorney’s time at the rate of \$225.00 per hour. The city requested advance payment in the amount of \$3,500.00 for providing access to or furnishing copies of records.

7. The city’s letter to Mr. Dodge dated September 25, 2019, did not explain the basis for the requested fee of \$3,500.00, or how this was equivalent to the actual costs necessary to provide Mr. Dodge with the records he requested.

8. The city’s Ordinance 2013-01 establishes fees to be charged to persons for access to or copies of public records, including \$25.00 per hour for staff time and \$.25 per page for copies. The city’s ordinance does not establish any per hour fee for attorney time.

9. On or about October 1, 2019, the city received a letter from Ron Keefover written on behalf of the Kansas Sunshine Coalition for Open Government, the Kansas Press Association, and the Kansas Association of Broadcasters. This letter threatened legal action based in part on the city’s fee request. After receiving this letter, the city began working on a revised fee request that would have reduced the requested fees from \$3,500.00 to \$520.00. This fee anticipated 20 hours of staff time at \$25.00 per hour and copying costs of \$20.00.

10. Mr. Dodge did not pay the requested fees. Instead, on October 2, 2019, he filed a KORA complaint with this office alleging, in part, that the city’s fee request of \$3,500.00 was unreasonable. Additional information about Mr. Dodge’s complaint is set forth in a letter dated February 11, 2020, a copy of which is attached hereto and incorporated by reference as Exhibit A.

11. On or about October 23, 2019, this office notified the city that it had received a KORA complaint from Mr. Dodge, and was initiating an investigative inquiry.

12. The city did not send its revised fee request to Mr. Dodge; instead, it focused all of its efforts on responding to the investigative inquiry from this office related to Mr. Dodge’s request.

CONCLUSIONS OF LAW

13. K.S.A. 45-216(a) provides that “[I]t is declared to the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by [the KORA] and [the KORA] shall be liberally construed and applied to promote such policy.”

14. K.S.A. 2019 Supp. 45-219(c) provides that a “public agency may prescribe reasonable fees for providing access to or furnishing copies of public records.” “In the case of fees for copies of records, the fees shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available.” K.S.A. 2019 Supp. 45-219(c)(1). The KORA does not require a public agency to waive fees in the public interest.

15. Frontenac Ordinance 2013-01, Section 12(a), Inspection Fee, provides that there shall be no inspection fee where a request has been made for a public record that is readily available to the records custodian. Section 12(b) provides that “[I]n all cases not covered by subsection (a), a record inspection fee shall be charged at the rate of \$25.00 per hour per employee engaged in the record search. . . .” Section 13, Copying Fee, provides for a fee of \$.25 per page for photocopying public records.

16. K.S.A. 2019 Supp. 45-251(a)(2) provides that a finding of violation issued by the Attorney General may require a public agency to cease and desist from further violation, comply with the provisions of K.S.A. 45-215 *et seq.*, complete training, and pay a civil penalty in an amount not to exceed \$500.00 for each violation.

17. The city’s September 25, 2019, fee request letter to Mr. Dodge did not explain how it calculated the requested fee or how the amount it requested was equivalent to the actual costs necessary to provide Mr. Dodge with the records he requested. Although the city referenced Ordinance 2013-01, it did not state the number of hours or employees that would be required to search for records, or the number of pages that it anticipated would be responsive to Mr. Dodge’s request. The city’s September 25, 2019, letter contained no indication that when calculating the requested fee it considered the format, location and number of records that might be responsive to the request; how much staff time and effort it would take to search for and reproduce the records; the classification of each employee who would search for and prepare responsive records for production and the hourly rate for each employee; the amount of time necessary to review and redact records; or the total number of hours it would take to respond to the request. The letter did nothing to justify its request for \$3,500.00 or explain why it was seeking \$225.00 per hour for any time spent by its attorney.

18. The city may prescribe fees for providing access to or furnishing copies of public records. Such fees cannot exceed the actual cost of furnishing copies, including the cost of staff time to make the information available. 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.

19. Here, the city did not provide Mr. Dodge with any information to justify or support its fee request of \$3,500.00, including a rate of \$225.00 per hour for attorney time. Although the city did undertake efforts to revise its fee request and adjust the hourly rate for attorney time downwards to \$25.00 per hour consistent with Ordinance 2013-01, it never sent the revised fee request to Mr. Dodge. The city's actions were too little, too late.

20. Under these facts, the city's fee request was unreasonable, and thus violated the KORA.

21. The KORA grants the Attorney General broad authority to remedy violations. The purpose of this authority is to ensure that public agencies recognize and comply with the public policy of the Act "that public records be open for inspection by any person unless otherwise provided" by the KORA and that the KORA is "liberally construed and applied to promote" this policy.

22. The Attorney General finds that formal action is warranted in order to remedy the city's violation of the KORA. After due consideration of the facts of this case, the Attorney General determines that a Finding of Violation is the appropriate sanction to remedy this violation and deter any future violations. Accordingly, the Attorney General imposes the following requirements on the city:

- a. Cease and desist from any further violation of the KORA;
- b. Ensure compliance with the provisions of the KORA by taking the following actions:
 - (i) Review and amend as necessary the provisions of Ordinance 2013-01 to ensure that it complies with the requirements of K.S.A. 2019 Supp. 45-219;
 - (ii) Adopt, review and/or update any internal city policies that govern how city staff respond to KORA requests, including the calculation of actual costs necessary to respond to a records request; and

(iii) Establish and maintain a checklist for city staff to use and consider when calculating the actual costs necessary to respond to a KORA request;

c. Identify and attend at least 1.5 hours of training on the KORA. The following individuals are required to attend this remedial training: any interim or permanently appointed city attorney, city administrator and city clerk; all city records custodians or others who are required to respond to or process records requests; and each member of the city council; and

d. Provide the Attorney General with a written report of compliance with the provisions of paragraphs 22.b. and 22.c.

23. This Finding of Violation and the remedial action it requires serve as a warning to the city that its actions fell below the expected standards for a public agency in complying with the KORA; and to remind the city that it has a responsibility to safeguard the public policy embodied by the KORA.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Attorney General finds that the city be and is hereby sanctioned by the imposition of this Finding of Violation and the actions it requires.

The city shall submit to the Attorney General its written report of compliance as required by paragraph 22.d. within 60 days of the date of this Finding of Violation. The city shall send its report to the Attorney General at 120 SW 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597.

IT IS SO ORDERED.



Derek Schmidt
Attorney General

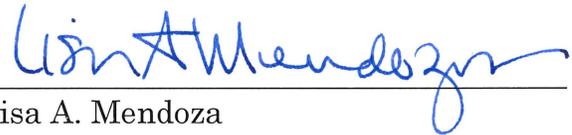
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Finding of Violation was served on this 11th day of February 2020, by certified mail, return receipt requested, to:

Dave Fornelli
Mayor, City of Frontenac
313 E. McKay Street
Frontenac, KS 66763

Jayne Mjelde
Frontenac City Clerk
313 East McKay Street
Frontenac, KS 66763

Steve Angermayer
Frontenac City Attorney
c/o Fern & Angermayer LLC
107 W. 4th Street
Pittsburg, KS 66762



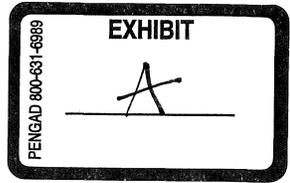
Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

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February 11, 2020

**SENT BY CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**

Stephen B. Angermayer
Frontenac City Attorney
c/o Fern & Angermayer LLC
107 W. 4th Street
Pittsburg, KS 66762

Re: KORA Complaint – City of Frontenac
Our File Number CV-19-001903

Dear Mr. Angermayer:

On October 2, 2019, we received a KORA complaint from Zach Dodge, reporter, KOAM and Fox 14 News, alleging the City of Frontenac violated the Kansas Open Records Act (KORA).¹ Specifically, Mr. Dodge alleged that on September 16, 2019, “KOAM made a FOIA² request for copies of work and personal emails and texts from Frontenac City Council members in regard to the firing of employees between the dates of 9/1/2019 and 9/18/2019.³ September 19th- Interim city clerk sent KOAM an email, stating they could not fulfill our request at that time because they didn’t have a city attorney to review the request. . . .” On September 27, 2019, Mr. Dodge received a letter from the city requesting advance payment of \$3,500.00 to search for and provide the records. Mr. Dodge indicated he did not pay any of the requested fees. As a remedy, he would like to receive the requested records.

The purpose of this letter is to inform you of the results of our review. We relied on the complaint and the city’s responses, as well as the provisions of the KORA, relevant Attorney General Opinions, and case law.

It is clear that the city is a public agency subject to the KORA,⁴ thus this office has jurisdiction to investigate any alleged violations and take action to enforce its provisions.⁵

¹ K.S.A. 45-215 *et seq.*

² Mr. Dodge’s supporting documents show that he actually referred to the KORA when making his records request.

³ Mr. Dodge’s actual request sought records between August 1, 2019, and September 18, 2019.

⁴ K.S.A. 2019 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.”).

⁵ See K.S.A. 2019 Supp. 45-222, 45-223, 45-228, 45-251, 45-253, and 45-254.

Letter to Stephen B. Angermayer
February 11, 2020
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The facts here are relatively straightforward. On September 16, 2019, the Frontenac City Council voted 6-2 to fire City Attorney Tim Fielder, City Administrator Brad Reams, and City Clerk Terri Kutz. Mayor Linda Grilz subsequently resigned, believing the terminations to be “outrageous.”

In a letter dated September 18, 2019, Mr. Dodge submitted a KORA request to the city seeking the following: “an opportunity to inspect or obtain copies of public records that include personal and work texts and emails between August 1st, 2019, and September 18th, 2019, between all Frontenac city council members in regard to firing city of Frontenac employees Tim Fielder, Brad Reams, and Terri Kutz, in regards to a vote to fire city employees Tim Fielder, Brad Reams, and Terri Kutz, and in regards to rehiring Jayme Mjelde. . . .”⁶

On or about Thursday, September 19, 2019, Interim City Clerk⁷ Jayme Mjelde emailed a letter to Mr. Dodge acknowledging his KORA request. She further advised him that “[C]urrently we are without a City Attorney who would normally review such request. Once the City of Frontenac has an Attorney in place, we will contact you and your request will be processed in a timely manner. . . .” Ms. Mjelde sent this letter after consulting with the Kansas League of Municipalities (“KLM”), “who advised her that the City needed to respond within three days. She was advised to state that the City did not have an attorney, and the City would respond to the request once an attorney was in place. The KLM advised that the City did not need to produce the records immediately.”

On Monday, September 23, 2019, the council appointed interim city officials. This included appointing you as the Interim City Attorney.⁸ You reported that “the previous administration did not communicate with the newly appointed, interim city officials except to deposit with our office boxes of voluminous records on a large number of open projects, lawsuits, boundary disputes, building projects, highway issues, code issues, and other matters. City officials met daily for hours at a time to get up to speed on City matters . . . A Pro Tem Judge had to be arranged along with managing the daily issues that accompany a Municipal Court. The former City Clerk and former City Administrator filed a wage claim, a contract claim, an unemployment claim, and a wrongful termination claim against the City. Critical time deadlines had to be met. . . .” That same day, you advised “all parties began to educate themselves on the KORA requests. We considered that there were more than One Thousand emails on the former city manager’s computer . . . We considered we would have to process the cell phones, tablets, and computers of 12 or more individuals who were connected to City Government. . . .”

⁶ Mr. Dodge’s request was one of seven (7) KORA requests the city received in the aftermath of the council’s actions taken during its September 16, 2019, meeting. As you put it, “[I]n one evening, the working government of Frontenac was eliminated. Immediately there was a media firestorm. The open records requests came pouring in. . . .”

⁷ Pursuant to Frontenac City Ordinance 2013-01, Section 8, the city clerk is “appointed as the local freedom of information officer. . . .” The city clerk is also designated as the records custodian for “[A]ll public records kept and maintained in the city clerk’s office and all other public records not provided for” in Section 7 of Ordinance 2013-01, such as records maintained by the city treasurer, chief of police, fire chief, city attorney, and clerk of the municipal court.

⁸ In December 2019, the city council appointed you the city attorney.

On Wednesday, September 25, 2019, the city sent Mr. Dodge a fee request letter advising that “[W]e have performed an initial assessment of the time and costs associated with your request.” The city further advised that consistent with its ordinance it would charge \$25.00 per hour per employee who performed the search, as well as \$.25 per page for copies; it believed it could charge for your time at the “attorney market rate” of \$225.00. The city also advised Mr. Dodge that “[W]e will be required to contract with a third-party vendor to access the information.”⁹ The city requested advance payment of \$3,500.00 for providing access to or furnishing copies of records.

After sending Mr. Dodge its September 25, 2019, letter, the city received a letter from Ron Keefover, President of the Kansas Sunshine Coalition, threatening legal action. Given the threat of legal action, you attempted to obtain additional information about how to properly calculate and seek advance payment of the estimated costs to respond to the multiple KORA requests the city received. To that end, you contacted the Kansas League of Municipalities, Assistant Attorney General Philip Michael,¹⁰ and eventually, Elizabeth Harlenske, an assistant city attorney in Wichita. You stated that “[T]he League told us to buy their book. We bought the book. Your office advised that no legal advice could be given . . . Later Beth Harlenske gave some clarifying advice and we prepared a follow-up response to the KORA Requests. The follow-up responses were set to go out when we received [Mr. Dodge’s] complaint on October 28, 2019. We had been working on responses to make sure we were in compliance with the Act. . . .” The revised fee request would have reduced the attorney rate to \$25.00 per hour consistent with Ordinance 2013-01. The city still anticipated that the city attorney would be required to review all records prior to release due to the anticipated and ongoing litigation. The city’s revised request was 20 hours of staff time at \$25.00 per hour for a total of \$500.00, and copying costs of \$20.00, for a revised total of \$520.00. The revised fee request was not sent; instead, the city focused all of its efforts on responding to an investigative inquiry from this office related to Mr. Dodge’s request.

On or about November 25, 2019, the city sent Mr. Dodge a letter setting out the provisions of K.S.A. 45-217(g)(3)(B)¹¹ and stated “[A]ccordingly, the City of Frontenac will follow the statute.” As you put it more succinctly in your response to this office, you told Mr. Dodge “the records requested were not public records under” that section.

On November 27, 2019, the city provided its response to our investigative inquiry. As part of our investigative inquiry, we asked the city to provide us with an unredacted copy of all

⁹ It is unclear why this was considered or necessary.

¹⁰ Mr. Michael is assigned to a separate division in the Attorney General’s Office, and is not assigned to the Open Government Enforcement Unit. Mr. Michael provides general information and assistance to governmental officials concerning the open meetings act and the open records act; he also provides training on the KOMA and the KORA to government officials and the public.

¹¹ This section provides that “[N]otwithstanding the provisions of subsection (g)(1) [defining a public record], ‘public record’ shall not include: . . . (B) 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. . . .”

records that were responsive to Mr. Dodge's KORA request.¹² This required the city to search for records. Frontenac city council members do not have city-issued cell phones or computers, but they do have city-issued iPads. "Many of the Council Members did not use the iPad and attempts by the previous administration at using the electronic devise [sic] did not get off of the ground. The effort to communicate electronically was unsuccessful." "Each Council Member was made aware that they needed to complete a thorough search of their cell telephone, electronic devices, and computers. Each Council Member completed a search, and thoroughly reviewed their cell telephone, electronic devices, and computers. No Council Member sent or received any communications by personal text, work texts, or by email between August 1, 2019 and September 18, 2019 email [sic] about the firing of Tim Fielder, Brad Reams, and Terri Kutz or the rehiring [sic] Jayme Mjelde. No records exist." For reasons that are unclear, you did not advise Mr. Dodge that the city searched for but did not identify any records that were responsive to his request.

Each council member submitted a signed affidavit confirming that cell phones, computers and electronic devices were searched, and that he or she did not send or receive any communications about the terminations of the city attorney, city manager and city clerk or the rehiring of Jayme Mjelde between August 1, 2019, and September 18, 2019. According to your response, "[T]here are no records. Mr. Dodge requests any discussions between Council Members regarding the firing and rehiring of city employees. The records were not created. Therefore, no records exist. No email, texts or other electronic communications occurred between Council Members. . . ."

We will discuss additional facts as necessary to an understanding of our discussion and conclusions.

Mr. Dodge essentially raises two concerns. We will address each one separately.

Did the city's September 19, 2019, letter comply with the KORA?

Mr. Dodge's first concern is that the city's September 19, 2019, response "putting off the records request until they could get a city attorney was a pretext for non-compliance," and "that it potentially was a way for the city to garner enough time to remove evidence of any violations with [sic] the Kansas Open Meetings Act." Mr. Dodge also incorporated in his complaint a statement made by an attorney for the Kansas Association of Broadcasters that "[R]efusing to respond to a KORA request because a certain staff member is not present is clearly a pretext for non-compliance. The law does not depend on the presence

¹² See K.S.A. 2019 Supp. 45-228(a) and (b), which provide in relevant part that, "(a) In investigating alleged violations of [the KORA], the attorney general . . . may . . . (3) examine or cause to be examined 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 KORA] 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 KORA] and shall not be subject to discovery, subpoena or other process. . . ."

of a city attorney or anyone else before a public agency is required to respond to an open records request.” Mr. Dodge does not appear to challenge the timeliness of the city’s initial response.

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.”¹³ The KORA provides a records 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.”¹⁴

Based on our review, the city’s initial response was provided well within three (3) business days as required by the KORA. The city’s response did not grant or state a flat denial of access to the requested records. Instead, the city explained that it did not have a city attorney who would normally review the KORA request, but that once an attorney was in place, “we will contact you and your request will be processed in a timely manner.”

Responding to a KORA request does not typically call for or depend on the presence of an attorney, and the need to consult with an attorney is not an established reason identified in the KORA to delay responding to a request. The KORA does, however, provide that if access to a public record is not immediately granted, “the custodian shall give a detailed explanation of the cause for further delay. . . .” Here, the city’s initial response simply stated that “[C]urrently we are without a City Attorney who would normally review such request.” While a true statement, it hardly conveyed *why* this was necessary. Plainly stated, we think the reason is clear. The City of Frontenac was administratively in a state of chaos. Without warning, the city council abruptly fired its senior administrative personnel. The mayor, objecting to the council’s actions, promptly resigned. The council then had to reorganize and hire interim replacements for the city attorney, administrator, and clerk. It did so at its September 23, 2019, meeting. The now former city officials provided the interim city attorney “with boxes of voluminous records on a large number of open projects, lawsuits, boundary disputes, building projects, highway issues, code issues, and other matters,” but apparently little in the way of guidance on these projects for the interim replacements. City officials met daily to get up to speed on all city matters. The former city clerk and city administrator filed wage claims, contract, unemployment, and wrongful termination claims against the city. Many of these new and existing matters had time deadlines that had to be met.

Notwithstanding this council-created chaos, and in the absence of experienced personnel to guide her, the interim city clerk made good faith efforts to determine how to timely respond to Mr. Dodge’s KORA request. She contacted the staff of KLM for guidance and

¹³ K.S.A. 45-218(d).

¹⁴ *Telegram Pub. Co., Inc. v. Kansas Dept. of Transp.*, 275 Kan. 779, Syl. ¶ 4 791, 69 P.3d 578, 31 Media L. Rep. 2614 (2003).

followed their advice to ensure a timely response within three (3) business days. Thereafter, the newly appointed interim city officials moved quickly to follow up on the city's initial letter by providing a response four (4) business days after the clerk's initial three (3) day letter, and two (2) business days after the appointment of the interim city attorney.

Having reviewed the totality of the facts here, we do not find evidence that the city's response was a pretext for noncompliance or designed to remove evidence of any violations of the KOMA, as Mr. Dodge alleged. Rather, it was simply a reflection of the level of administrative chaos created by the city council's abrupt actions in firing the city's senior administrative personnel. However, it is clear that the lack of detail in the city's initial response about the reason(s) for the delay led Mr. Dodge to believe the city was improperly ignoring his request.

We agree that Mr. Dodge had cause to be concerned about the city's response. Had the city taken the time to provide more detail on *why* there was a delay, it might have been able to forestall any concerns about noncompliance or other possibly nefarious actions. Although its letter lacked detail, the city sought assistance from the staff at the KLM, and made an attempt to comply with the KORA with its barebones response. However, a public agency cannot comply with the spirit and intention of the KORA if it provides a response that lacks detail, even when confronted with the particular level of council-created chaos that existed here. For this reason, we believe remedial action is required.

Was the city's fee request reasonable?

Mr. Dodge's second concern is that the city's request for advance payment of fees in the amount of \$3,500.00 was unreasonable "and another pretext for non-compliance [sic]."

The KORA permits a public agency to charge a requester reasonable fees that do not exceed the actual costs of providing the records.¹⁵ Actual costs include the cost of staff time to search for and make the records available to the requester. This includes the cost of redaction.¹⁶ Whether a fee is reasonable is a fact specific determination. Fees cannot be used for the purpose of discouraging KORA requests or as obstacles to disclosure of requested records. Fees are not designed to produce revenue, but rather to compensate a public agency for resources required to comply with a request.¹⁷

When determining whether a fee is reasonable, this office considers such factors as the format, location and number of records that might be responsive to the request; how much staff time and effort it would take to search for and reproduce the records; the classification of each employee who would search for and prepare responsive records for production and

¹⁵ K.S.A. 2019 Supp. 45-219(c). The KORA does not require a public agency to provide the records free of charge or provide a waiver of all fees if the disclosure of the records is in the public interest.

¹⁶ *Data Tree, LLC v. Meek*, 279 Kan. 445, 109 P.3d 1226 (2005).

¹⁷ See Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 U.Kan. L. Rev. 205, 229 (1985).

the hourly rate for each employee; the reason for the use of an outside vendor to search for and retrieve responsive records; the amount of time necessary to review and redact records; and the total number of hours it would take to respond to the request. This is by no means an exhaustive list, and other factors may be considered depending on the specific facts presented.

With this in mind, we reviewed the city's September 25, 2019, letter requesting advance payment of fees. Apparently the city believed a "monumental undertaking" would be required to respond to Mr. Dodge's request, and sought advance payment of \$3,500.00. Its letter cited Ordinance 2013-01 as support for its stated charges of \$25.00 per hour per employee who performed the search, and the cost of \$.25 per page for copies. The city further indicated that it would be required to contract with a third-party vendor to access the information, but provided no information about why this was necessary or what costs it was simply passing through to Mr. Dodge. Although not specifically referenced in its September 25, 2019, fee request, it appears the city also included an undisclosed amount to cover any time you spent reviewing and redacting records at the rate of \$225.00 per hour. The city's letter provided virtually no explanation to show how it arrived at the requested fee or how this was equivalent to the actual costs necessary to provide Mr. Dodge the records he requested. It is not clear that the city even conducted a preliminary search for records.

Not surprisingly, the city's fee request prompted an outcry from the media¹⁸ and was a major impetus for Mr. Dodge's complaint.¹⁹ Following this outcry, but before being notified of Mr. Dodge's complaint, the city began work on a revised fee request. The city believed it would take the following efforts to respond to Mr. Dodge's KORA request:

. . . The City would review of [sic] all text messages from 10 cellular telephones, computers and other electronic devises [sic]. Most of the individuals had only one cell phone and it is likely that they conducted private and personal conversations, texts, email and phone calls which did not relate to city business. They also had computers and other electronic devices.

The City would be required to have two staff persons review the information along with the individual and systematically sort through every text message, phone call, email and other communication to determine if the communication was of a personal nature or whether it involved any city business. This review would take place for any cell telephone, computer or other electronic device. The information would need to be captured and converted into printable media. Once that occurred, the City Attorney would need to review all the material to make a determination whether the

¹⁸ See, e.g., Jonathan Riley, *State-level groups urge Frontenac to reconsider public record fees*, THE MORNING SUN, October 1, 2019, at 2:59 p.m., <https://www.morningsun.net/news/20191001/state-level-groups-urge-frontenac-to-reconsider-public-record-fees>, accessed January 31, 2020.

¹⁹ It does not appear that Mr. Dodge ever contacted the city directly to challenge the requested fee.

information is a public record and whether it was subject to disclosure under KORA.

. . . The City charges \$25.00 per hour, per city staff for work performed on a KORA request, and \$.25 per copy. The City researched the issue and initially believed it could charge for the City Attorney at the attorney market rate. The initial figure was revised as the City later understood that it must charge that time at \$25 per hour as well. The City Attorney must review the information prior to releasing it. A conservative estimate for the request was as follows:

20 hours of staff time at \$25 per hour	500
Copying Costs	20
Total	520

This information was not sent to Mr. Dodge after the complaint was received. Instead all efforts were directed on responding to [his] complaint [sic]. . . .

Certainly this is more information than the city provided to Mr. Dodge in its initial fee request. Such details might have helped to explain or support its initial fee request. While the city internally considered and then reconsidered the efforts it would take to respond to Mr. Dodge's KORA request, it never actually provided him a breakdown of or explanation for the estimated costs.

In light of the forgoing, we conclude that the city's fee request of \$3,500.00 was not reasonable, and violated the KORA.

In mitigation, we note the city was in the process of revising its fee request downward when this office notified it of Mr. Dodge's complaint. Unfortunately, once it received notice of the complaint, the city focused its efforts on responding to our investigative inquiries, and never sent Mr. Dodge the revised fee estimate.²⁰ The city did provide this office with some clarity on the efforts necessary to search for responsive records. However, those efforts came too late to support its initial fee request.

Because the city violated the KORA, remedial action is required.

We want to make one matter completely clear. We find an hourly rate of \$225.00 per hour to be *per se* unreasonable in connection with attorney review time. This is not to say that such a fee rate cannot be charged by outside legal counsel to a governmental entity; instead, we are clarifying that it is improper under the KORA for the governmental entity to then pass those costs onto the requester without a significant reduction in the hourly

²⁰ Because the city did not provide the revised fee request to Mr. Dodge, we decline to consider whether it was reasonable within the meaning of the KORA.

fee rate. We need not address the upper limits of a reasonable hourly fee for the purposes of this complaint determination.

November 25, 2019, follow up letter to the city

Because the city took the time to provide a final response to Mr. Dodge, we believe it is important to clarify the provision the city relied on. While this matter is clearly outside the scope of Mr. Dodge's complaint, it is mentioned in the city's response. Therefore, we believe it is important to educate the city and the public on the use of this provision.

Shortly before the city sent its formal response to our investigative inquiry, it sent a letter to Mr. Dodge. Because it is not lengthy, we set it out here:

. . . Dear Mr. Dodge:

We are responding to your KORA request of September 18, 2019. At that time, you requested the following:

Inspect or obtain copies of public records that include personal and work texts and emails between August 1, 2019 and September 18, 2019 between all Frontenac City Council Members in regard to (sic) firing City of Frontenac employees Tim Fielder, Brad Reams, and Terri Kutz in regards to a vote to fire city employees Tim Fielder, Brad Reams, and Terri Kutz, and in regards to rehiring Jayme Mjelde (sic).

Please be advised that under KSA 45-217(g)(3)(B) 'public record' shall not include: 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.

Accordingly, the City of Frontenac will follow the statute. . . .

Under the KORA, "[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; 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. . . ." ²¹ However, the definition of a "public record" excludes records that are made, maintained or kept by an individual who is a member of the governing body or a political or taxing subdivision of the state. ²² Thus, if a record is not made, maintained or kept by the city, but rather is exclusively made, maintained or kept only by individual city council members, it is not a public record that

²¹ K.S.A. 2019 Supp. 45-217(g)(1).

²² K.S.A. 2019 Supp. 45-217(g)(3)(B).

is subject to disclosure. If a public record is maintained on city-owned computers or servers, or in city offices, it is subject to disclosure.

The purpose of this section is to excuse individual members of governing bodies from the burden of producing records that they maintain personally in the performance of official duties.²³ However, “the records of the governing bodies they serve are still considered public records and thus must be made available. The person seeking the records of the governing body must get them from the central office rather than from the individual,” assuming that any records exist.²⁴

Individual city council members are not required to produce any records they keep or maintain. However, the city must still search its computers, servers and files to determine if there are any responsive records.

We note that as a part of our investigative inquiry, we asked the city to explain what efforts would be required to search for responsive records, as well as to actually search for and produce to us the records that were responsive to Mr. Dodge’s request. Following an actual search for records, the city discovered that, in fact, it had no responsive records. The city tasked each city council member with conducting a search of all cell phones, electronic devices and computers each member owned. Following this search, each council member reported that he or she “did not send or receive any communications by personal text, work texts, or by email between August 1, 2019 and September 18, 2019” about the firings of the city attorney, administrator or clerk, and the rehiring of Ms. Mjelde.²⁵

The city cannot provide records that do not exist. Somewhat surprisingly, while the city advised this office of the results of its search, it never communicated this information to Mr. Dodge. Instead, it simply relied on the provisions of K.S.A. 2019 Supp. 45-217(g)(3)(B). Had the city taken the extra step of advising Mr. Dodge that it conducted a search and no records existed, this might have been the first step on the path to restoring confidence in the city’s KORA processes. It would have also shown its good faith efforts to comply with the letter of the law, as well as the spirit and intention of the KORA. Somewhat regrettably, the city did not take the opportunity to do so.

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the city violated the KORA with respect to the reasonableness of its fee request. Because it is clear that the city must reset its path with respect to the KORA, we are issuing a Finding of Violation pursuant to the provisions of K.S.A. 2019 Supp. 45-251(a)(2). A copy of the Finding of

²³ Attorney General Opinion 2002-001, <http://ksag.washburnlaw.edu/opinions/2002/2002-001.htm>, accessed January 31, 2020.

²⁴ *Id.*

²⁵ Each council member also signed an Affidavit to this effect.

Letter to Stephen B. Angermayer
February 11, 2020
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Violation is enclosed with this letter. This Finding of Violation will be reported in our Annual Report.²⁶

Although we have determined to issue a Finding of Violation and require the city take certain actions, after due consideration of all the available facts, we decline to impose a civil penalty at this time. We are ultimately persuaded that the failures and missteps identified here were not a subterfuge to defeat the purposes of the KORA, but rather the result of council-created chaos, as well as a lack of understanding of and training on the KORA's requirements on the part of newly appointed city officials. While it appears the new and interim city officials attempted to quickly educate themselves on the KORA, those efforts were too late. A lack of understanding of and training on the KORA's requirements is a red flag that corrective action is necessary.

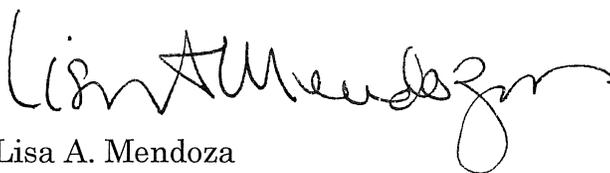
We note that this office periodically offers training on the KORA. You may find more information about upcoming training on our website: <https://ag.ks.gov/open-government/upcoming-training>. The Kansas League of Municipalities also offers KORA training.

One final note. We take this opportunity to remind the city council that it is ultimately responsible for ensuring compliance with the KORA. The events detailed here are a red flag that the council must heed to ensure similar situations do not occur in the future. Each city council member carries a shared burden to remain vigilant to ensure the city's compliance with the KORA.

Please feel free to contact me at (785) 296-2215 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

²⁶ K.S.A. 75-753(b) ("The attorney general shall compile . . . information relating to investigations of violations of the open records act and the open meetings act conducted by the office of the attorney general. The attorney general shall publish a yearly abstract of such information listing by name the public agencies which are the subject of such complaints or investigations.").