



Kansas Attorney General Derek Schmidt

A GUIDE TO OPEN MEETINGS AND OPEN RECORDS

Presented by the Office of
Attorney General Derek Schmidt

And
The Kansas Sunshine Coalition
for Open Government



Kansas Open Meetings Act K.S.A. 75-4317 *et seq.*



KOMA issues/concerns

- Executive sessions
 - Improper motions for executive sessions
 - Recording motion for executive session in meeting minutes
 - Calling an executive session for one reason then discussing different subject matter in session
 - Extending an executive session without reconvening the open meeting, making a motion and voting
 - Failure to return to open meeting at the stated time/place after executive session
 - Taking binding action in executive session
- Serial communications
- Establishing an agenda for a meeting
- Failure to provide notice of meetings



History of open meetings

- K.S.A. 19-218 – Every board of county commissioners "shall sit with open doors, and all persons conducting in an orderly manner may attend their meetings. . . ."
- First adopted in 1868; last amended in 1923
- KOMA adopted in 1982; provides rules that allow members of the public to observe the nearly 4,000 units of government in Kansas making decisions



Policy, construction, purpose

- K.S.A. 2018 Supp. 75-4317(a) - Meetings shall be open to the public because "a representative government is dependent upon an informed electorate. . . ."
- Law enacted for the "public benefit," so construed broadly in favor of the public to give effect to its specific purpose of openness. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982).
- KOMA interpreted liberally and exceptions applied narrowly to carry out purpose



Who is subject to KOMA?

- Subject to some exceptions, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds
K.S.A. 2018 Supp. 75-4318(a)
- "Subordinate groups" – not defined; if created by a covered entity or the group has become an extension of a covered entity, most likely covered



Who is subject to KOMA?

- State bodies
 - State administrative bodies, boards and commissions
 - State Board of Regents
 - Supreme Court nominating commission
- Local Governments
 - Cities, counties and townships
 - School districts
 - Fire districts
 - District judicial nominating commission



Who is not subject to KOMA?

- An otherwise covered entity when exercising a "quasi-judicial" function - K.S.A. 2018 Supp. 75-4318(g)(1)
- Hearings conducted under the Kansas Administrative Procedures Act (KAPA) - K.S.A. 2018 Supp. 77-523(f); K.S.A. 2018 Supp. 75-4318(g)
- Judiciary
- Private organizations
- Staff meetings of a covered entity



What is a meeting?

- Any gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- By a majority of the membership of a public body or agency subject to the act
- For the purpose of discussing the business or affairs of the public body or agency

K.S.A. 2018 Supp. 75-4317a



Gathering or assembly

- May conduct meetings by telephone or other medium (conference call, video, skype, go to meeting) if comply with all KOMA requirements
- Informal discussions before, after or during a recess of a public meeting may be subject to the KOMA
- Name of the gathering is irrelevant



"Serial communications"

- Interactive communications outside of a noticed meeting may be a meeting under KOMA if:
 - Collectively involve a **majority of the membership** of the public body or agency
 - Share a **common topic** of discussion
 - Are **intended** by any or all participants to reach an **agreement on a matter that requires binding action** to be taken by the public body or agency
- K.S.A. 2018 Supp. 75-4318(f)
- Emails, calling trees, use of an agent (staff member)
 - Tip - DO NOT REPLY ALL, DO NOT FORWARD



Majority of the membership

- Next whole number greater than one-half the total number of members
- Can be different than a quorum



Discussion

- Binding action or voting not necessary
- Meeting includes all gatherings at all stages of the decision making process
- Social gatherings
- Retreats and meetings held in private
- Educational conference/seminar
 - Tip – when traveling to such meetings, avoid discussing business or affairs of the public body



Example

- Five member city council plus a mayor
- One city council position is unfilled
- Mayor spoke with council member #1 about appointment for open city council position
- Council members #2 and #3 called the mayor and provided same comments as council member #1
- Council member #1 told the mayor that "they" were going to put together a resolution opposing the appointment



Example

- Serial communication
 - Mutual or reciprocal exchanges
 - Collectively involved a majority of the membership of the council
 - Intended by any or all of the participants to reach an agreement on a matter that requires binding action by the council
- Serial communications impinged on the public's right to know and undermines the foundation of the KOMA



Penalties/Remedies

- Civil penalty up to \$500 per person for each violation
- Require completion of AG approved training
- Order to cease and desist from further violation
- Comply with the KOMA
- Reasonable expenses, investigative costs and attorney fees
- Remedy - voiding action
 - Must be filed within 21 days of the meeting where the alleged violation occurred



Example

- Seven member county parks and recreation board
- Board chair contacted five board members individually to seek support to serve second term as chair
- Sent one of the five board members a series of Facebook messages – everyone else is supportive or at least comfortable with it



Example

- Was board chair's individual contact with the five board members a KOMA issue?
- Was the chair's contact with one board member on Facebook a KOMA violation?
 - If yes, is the entire board responsible for the KOMA violation or not?



Notice

- *Contrary to popular belief*, KOMA does not require notice of meetings to be published in a newspaper or on a website
- Must request notice of meetings
- No formalities to requesting notice – can be verbal or written
- A request is valid for one fiscal year
- Must notify of expiration before terminating notice
- Presiding officer has duty to provide notice, but duty may be delegated
- Provide date/time/location where public body will meet to person requesting notice a "reasonable time" before meeting
- Group request for notice – provide to designated individual

K.S.A. 2018 Supp. 75-4318(b)



Example

- Six member city council plus mayor
- Mayor and four council members attended a Town Hall meeting
- Mayor and four council members discussed city business including concerns over utility increases, a new parking lot and rumors
- No notice to those who requested notice of all city council meetings
- Violation?



Example

- Yes, a KOMA violation occurred
 - Met the definition of a meeting
 - Failed to provide notice of the date, time and place of the meeting
- Penalty
 - Obtain at least one hour of KOMA training
 - Individually pay the cost of obtaining training
 - Not engage in any further violations



Meeting conduct

- KOMA does not address meeting procedures
- Agenda
 - Not required to create
 - Any agenda must include topics planned for discussion (if known) but may be amended during a meeting unless a statute or rule prohibits an amendment
 - If an agenda exists, must make agenda available to any person requesting the agenda
 - Agenda does not have to be mailed out in advance of meeting – may simply place the agenda in a public place



Meeting conduct

- Use of cameras, photographic lights and recording devices
 - Public may record meeting as long as not disruptive
 - Use subject to reasonable rules to ensure orderly conduct of the meeting
- No public right to speak, but only to listen and observe
- Location of meeting - is it accessible to the public?
- No secret ballots
- Minutes – only required to record motion to go into executive session, but bylaws, ordinances, or policies may require minutes to be kept



Executive sessions

- Permits discussion of certain enumerated matters outside of public view
- An open meeting must be convened first and then **recess** into executive session
- No binding actions may be taken in an executive session, but a consensus is allowed
- If a consensus is achieved, an open and formal vote must be taken in open session



Executive sessions Recess v. adjourn

- Recess means a suspension of an open meeting
- Adjourn means ending an open meeting
- May only recess an open meeting to enter into an executive session if the executive session occurs contemporaneously with the open meeting
- Discretion to designate the location of the executive session as long as location allows the executive session to occur contemporaneously with the open meeting

Attorney General Opinion 2017-20



Example

- Executive session - personnel matters of non-elected personnel
- Public body reached a consensus to terminate the employment of an employee
- Public body did not hold a public vote on the matter when it returned to open meeting
- Violation of the KOMA?



Example

- Yes, a KOMA violation occurred
 - Termination of employment occurred before the public vote
 - Public's right to know effectively was denied
- Penalty
 - Obtain at least one hour of KOMA training
 - Individually pay the cost of obtaining training
 - Not engage in any further violations



Executive Session Who may attend?

- Only members of the public body
- Mere observers may not attend
- Staff, agents or other non-public body individuals have no right to attend
- Public body may invite individuals who will:
 - Aid the discussion
 - Provide information on a permissible topic or participate in the discussion



Executive sessions

- Must be a formal motion seconded and carried; **complete** motion recorded in the minutes
- Permanently retain minutes
- Parts of the motion for executive session:
 - Statement of the subject(s) to be discussed (without revealing confidential information)
 - Justification (from the statute)
 - Time/place open meeting will resume

K.S.A. 2018 Supp. 75-4319



Executive sessions Complete motion

- Must be recorded in its entirety
- Motion is not complete if it summarizes the actual motion in a manner that addresses only the three statutory elements but omits other content of the motion as it was made
- Extraneous words ("ums" and "ahs") not required to be in minutes
 - Does not further the public's right to know because they are not substantive in nature

K.S.A. 2018 Supp. 75-4319; AGO 2018-1



Executive sessions Elements of motion

- Statement of the subject(s) to be discussed
 - More than a generic or vague summary, or list of subjects
 - May discuss multiple subjects if they fall within the justification
- Justification (from the statute) – only one per motion
- Discussion limited to subjects and justifications stated in the motion

K.S.A. 2018 Supp. 75-4319; AGO 2018-1



Executive sessions Elements of motion

- Time/place open meeting will resume
- Do not reconvene before time stated in motion
- No KOMA provision to “extend” an executive session – reconvene the open meeting and go through the process again
- Recommendation – plainly state the time instead of requiring attendees to do math

K.S.A. 2018 Supp. 75-4319



Example

- Board of county commissioners enters three executive sessions to discuss personnel matters of non-elected personnel to conduct performance reviews
- First executive session was 60 minutes, second was 30 minutes and third was 20 minutes
- In open meeting after executive session, Board approved salary increase for the County Auditor and voted to not renew contract of the County Manager



Example

- Motion
 - Subject – conduct performance reviews
 - Justification – personnel matters of non-elected personnel
 - Include the time/place open meeting will resume
- Binding Action
 - Consensus may have been reached in executive session; action in open meeting



Executive sessions

Commonly used justifications:

- Personnel matters of non-elected personnel
- Consultation with the public body's attorney
- Employer - Employee negotiations
- Data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship (economic development)
- Matters affecting a student, patient or resident of a public institution
- Preliminary discussions relating to the acquisition of real property
- Security measures

K.S.A. 2018 Supp. 75-4319



Executive sessions

Justification allowed:

Personnel matters of non-elected personnel

- To protect the privacy interests of the employee
- Does not include independent contractors, appointments to boards or committees, or public officers
- May discuss applicants for employment

K.S.A. 2018 Supp. 4319(b)(1)



Example

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



Example

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



Executive sessions

Justification allowed:

Consultation with the body’s attorney

- The attorney must be present
- The communication must be privileged in the attorney-client relationship
- No third parties may be present (breaks privilege)

K.S.A. 2018 Supp. 75-4319(b)(2)



Executive sessions

Justification allowed:

Employer-Employee negotiations

- For the purpose of formal negotiations – not general employee meetings or discussions
 - School boards have special rules
- K.S.A. 2018 Supp. 75-4319(b)(3)



Executive sessions

Justification allowed:

Data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship

- Called the economic development exception, but make sure that the data being reviewed is relating to financial affairs or a trade secret

K.S.A. 2018 Supp. 75-4319(b)(4)



Executive sessions

Justification allowed:

Matters affecting a student, patient or resident of a public institution.

- With this subject, any hearing must be open if requested by the person involved

K.S.A. 2018 Supp. 75-4319(b)(5)



Executive sessions

Justification allowed:

Preliminary discussions relating to the acquisition of real property

- Acquisition only – not sale
- Remember – no binding action in executive sessions

K.S.A. 2018 Supp. 75-4319(b)(6)



Executive sessions

Justification allowed:

Security Measures

- If discussion at open meeting would jeopardize security measures that protect infrastructure and the public; includes intelligence information, tactical plans, resource deployment and vulnerability assessments

K.S.A. 2018 Supp. 75-4319(b)(13)



Kansas Open Records Act

K.S.A. 45-215 *et seq.*



KORA issues/concerns

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



Policy, construction, purpose

- "Public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy" – K.S.A. 45-216(a)
- KORA enacted in 1984; it replaced version enacted in 1957
- KORA provides the procedure for the public to view and make copies of public records
- KORA also defines and categorizes records



Public record defined

- Any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of:
 - Any public agency
 - 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
- Includes written records, photographs, computer data, and email

K.S.A. 2018 Supp. 45-217(g)



Public record defined

- Does not include:
 - Records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds
 - Private person – if someone is an officer or employee of a public agency and is acting pursuant to their official duties, they are not a private person
 - Records 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 not in existence at time of request
- Do not need to create records in order to fulfill a request
K.S.A. 2018 Supp. 45-217(g)



What is a “public agency?”

- The state
- Any political or taxing subdivision of the state, or any office, agency or instrumentality thereof, or
- Any other entity receiving or expending or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision
- Instrumentality – not defined in KORA; if created by a covered entity or the group has become an extension of a covered entity, most likely covered
K.S.A. 2018 Supp. 45-217(f)(1)



What is not a “public agency?”

- Private companies solely because they receive payment from public funds in exchange for property, goods or services
- Municipal or state judge/justice

K.S.A. 2018 Supp. 45-217(f)(2)



Applying KORA to a request

- KORA is, in part, a procedural statute
- Best illustrated by reviewing the sequence of actions that should take place



KORA requirements for public agencies

- Appoint a Freedom of Information (FOI) officer to assist with KORA requests
- Display, distribute or otherwise make available a brochure describing requester rights, public agency responsibilities and procedures for inspecting or obtaining copies of public records
- Include the name/title of records custodian, fees and office hours available for anyone to make a request

K.S.A. 45-226 and K.S.A. 45-227



Who may make a request?

- Any person may make a request
- The person need not be a resident
 - *Compare McBumey v. Young*, US Sup. Ct., April 2013 (Not a violation of privileges and immunities clause to limit access to public records to citizens of Commonwealth of Virginia)
- The person need not provide a reason for their request



Form of the request

- The public agency may require:
 - The request to be in writing
 - Only the requester's name and address
 - Proof of identification
 - Written certification that the requester will not use names and addresses obtained from the records to solicit sales or services
- The person need not provide a reason for their request



Rights of the requester

- Unless closed by law, the public has the right to review all public records
- Any person may make abstracts or request copies of records
- If copies cannot be made where the record is located, arrangements must be made to allow copying
- If portions of a record are closed, the remainder must be made available to the requester



Limitations on requester's rights

- Requester may not remove a public record without the written consent of the custodian
- Public agency not required to make copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations unless shown at a public meeting
- Copyrighted materials may not be reproduced without the permission from the copyright holder, but must be available for viewing or listening.



Limitations on requester's rights

- Kansas asset seizure and forfeiture repository - Except for requests for summary data, requests for records submitted to the repository maintained by the KBI shall be directed to the law enforcement agency (LEA) from which the records originated
- Law enforcement officer prior employment records
 - Files are records of the LEA or governmental agency that made, maintained or kept such files
 - Such records are not subject to a KORA request directed to the hiring agency



Responding to the request

- The request must be "acted upon" as soon as possible, but not later than the end of the 3rd business day following date request is received - K.S.A. 45-218(d)
- The three acceptable responses:
 1. The record is provided (in the form requested, if possible)
 2. The request is under review and the records, if permitted, will follow
 3. The request is denied, with a detailed explanation for the denial

Telegram Publishing Co., Inc. v. Kansas Department of Transportation, 275 Kan. 779, ¶ 4 (2003)



Example

Sunday	Monday	Tuesday	Wed	Thurs	Friday	Saturday
July 1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	21	Aug 1	2	3	4



Example

- KORA request submitted
- Records clerk directed to not fulfill the request until advised to do so
- Requester followed up by email and phone multiple times with no response
- One page of records released 53 days after initial request
- Violation of the KORA?



Example

- Yes, a KORA violation occurred
 - Public agency possessed records responsive to the request
 - Failed to respond to request within 3 business days
 - Discretionary exemption to disclosure existed
- Penalty
 - At least one hour of KORA training for all staff responsible for KORA compliance
 - Civil penalty - \$100.00
 - Not engage in any further violations



Penalties

- Civil penalty up to \$500 for each violation
- Require completion of AG approved training
- Order to cease and desist from further violation
- Comply with the KORA
- Reasonable expenses, investigative costs and attorney fees



Allowable fees and charges

- Public agency may only recover actual costs to provide the requested records
- These costs include staff time to retrieve, review and redact information from a record
- Fees may be estimated and collected before the records are provided

K.S.A. 45-218(f) and K.S.A. 2018 Supp. 45-219



Categorizing records

- Presumption of openness
- Requested public records must be released unless an exemption to disclosure applies
- Burden rests on public agency to prove the requested records are exempt from disclosure
- Exemptions to disclosure – discretionary or mandatory closure



Redaction

- If a record contains material that is not subject to disclosure, the agency "shall separate or delete such material" and make the record available
- Public agency can charge for staff time to redact

K.S.A. 2018 Supp. 45-221(d)



Policy reasons records may be closed

- Personal privacy
- Safety/security
- Internal communications while policies are developed or administrative procedures are underway



Discretionary closure – personal privacy

- Medical, psychiatric, psychological or alcoholism/drug dependency treatment records pertaining to identifiable patients – K.S.A. 2018 Supp. 45-221(a)(3)
- Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants EXCEPT exemption shall not apply to:
 - Names of employees
 - Positions/Titles
 - Salaries or actual employment contracts, including employment related contracts or agreements
 - Length of service
 - K.S.A. 2018 Supp. 45-221(a)(4)



Example

- KORA request for a blank copy of the evaluation tool used by a city council to evaluate the job performance of the city manager
- City declined to produce record
 - Created specifically to evaluate city manager
 - Personnel record
 - Only used and discussed in executive session to negotiate a contract with city manager
- Violation of the KORA?



Example

- Yes, a KORA violation occurred
 - Generic evaluative tool publicly available on the internet is not exempt from disclosure
 - Assume that the city council used a completed form to negotiate with the city manager
 - A blank copy of the form is not exempt from disclosure even if a completed copy of the form was discussed during executive session



Example

- Penalty
 - At least one hour of KORA training for all city staff responsible for KORA compliance
 - Civil penalty - \$250.00
 - Provide a copy of the record to the requester
 - Not engage in any further violations



Discretionary closure – personal privacy

- Clearly unwarranted invasion of personal privacy
- Definition - 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.
- Examples – Mother's maiden name, DOB, street address, phone number
- K.S.A. 2018 Supp. 45-221(a)(30)



Discretionary closure – personal privacy

- Records that would disclose the name, home address, email address, phone/cell number, or other contact information for concealed carry licensees, applicants or persons enrolled in or who completed weapons training – K.S.A. 2018 Supp. 45-221(a)(53)
- Records "shall not be disclosed unless otherwise required by law"
- Records relating to persons issued licenses, applicants or persons denied a license shall be confidential and cannot be disclosed pursuant to KORA; disclosure a class A misdemeanor – K.S.A. 2018 Supp. 75-7c06(b)
- Records of person whose license suspended or revoked subject to public inspection under KORA – K.S.A. 2018 Supp. 75-7c06(c)



Discretionary closure – safety / security

- Records that would reveal the identity of an undercover agent or any informant reporting a specific violation of law – K.S.A. 2018 Supp. 45-221(a)(5)
- Records concerning emergency or security information or procedures of a public agency if disclosure would jeopardize the security of the public agency – K.S.A. 2018 Supp. 45-221(a)(12)



Discretionary closure – safety / security

- Plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications if disclosure would jeopardize the security of the public agency, building or facility
K.S.A. 2018 Supp. 45-221(a)(12)



Discretionary closure – safety / security

- Disclosure of records would pose a substantial likelihood of revealing security measures that protect:
 - Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services
 - Private property or persons if the records are submitted to the agency
 K.S.A. 2018 Supp. 45-221(a)(45)



Discretionary closure – safety / security

- Security - measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government by intimidation or coercion or to affect the operation of government by disruption of public services, influence government policy or affect the operation of government
- Security measures include intelligence information, tactical plans, resource deployment and vulnerability assessments



Discretionary closure – safety/security

- Home address of registered voter may be concealed from public inspection on voter registration list and original voter registration application form
- Request must be made in writing to county election officer
- Request shall specify a clearly unwarranted invasion of personal privacy or a threat to the voter's safety
- Upon receipt, county election officer will take appropriate steps to ensure residence address is not publicly disclosed
K.S.A. 2018 Supp. 25-2309(i)



Discretionary closure – safety/security

Criminal investigation records

- Protects innocent persons whose names might be involved in an investigation as suspects or informants
- Protects integrity of an on-going case and investigative techniques
- Built in standard of review
- Definition
 - Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera
 - Records of investigatory agency or criminal justice agency compiled in the process of preventing, detecting or investigating violations of criminal law

K.S.A. 2018 Supp. 45-221(a)(10)



Discretionary closure – safety/security

Criminal investigation records

- Following categories of people may request to listen or view, and law enforcement agency shall allow listening or viewing **within 20 days after making the request**:
 - Subject of recording
 - **Any** parent/legal guardian of subject under 18 years of age
 - Heir at law of decedent who is subject of recording
 - Attorney for a **person described above**

K.S.A. 2018 Supp. 45-254 as amended by L. 2018, ch. 87, § 8.



Discretionary closure – safety/security

Criminal investigation records

- **Heir at law**
 - Executor or administrator of the decedent
 - Spouse of decedent
 - If no living spouse, adult child of decedent
 - If no living spouse or adult child, a parent of decedent
- Law enforcement agency may charge a reasonable fee

K.S.A. 2018 Supp. 45-254 as amended by L. 2018, ch. 87, § 8.



Discretionary closure – safety/security

Criminal investigation records

- What is a criminal investigation record?
 - Standard arrest reports – K.S.A. 2018 Supp. 22-4701(b); AGO 98-38
 - Mugs shots – AGO 87-25
 - Log of breath test machine results – AGO 87-63
 - Records pertaining to vehicular homicides
 - Coroner reports filed with the clerk of the district court which are designated as a criminal investigation record – K.S.A. 22a-232
 - Records of death investigations may be closed even if the death turns out to be from natural causes as long as there was initially a criminal investigation



Discretionary closure – safety/security

Criminal Investigation Records

- What is not a criminal investigation record?
 - Police blotter entries
 - Wanted posters
 - Court records of public proceedings or published opinions
 - Inmate rosters for jails/correctional/detention facilities
 - Violations of any traffic law other than vehicular homicide
 - Front page of Standard Offense Report but redact the name/identifying information of the victims of sex offenses and portions that constitute clearly unwarranted invasion of privacy
 - Custody time



Discretionary closure – safety/security

Criminal Investigation Records

- (A) Is in the public interest; *must be in the public interest – mere curiosity is NOT enough*
- (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.



Discretionary closure – safety / security

Other criminal investigation records issues:

- Victims and defendants – no special status in terms of obtaining these records under KORA; may be other laws/cases that apply to release of information to defendant in the criminal context
- Criminal investigation records don't necessarily become "open" if criminal charges are never filed – discretionary closure still exists



Discretionary closure – internal communications or procedures

- Records privileged under rules of evidence, unless consent – K.S.A. 2018 Supp. 45-221(a)(2)
- Records of an investigation conducted under civil litigation or administrative adjudication, if disclosure interferes with the procedure – K.S.A. 2018 Supp. 45-221(a)(11)
- Correspondence between a public agency and a private individual, unless intended to give notice of a public agency action, policy or determination – K.S.A. 2018 Supp. 45-221(a)(14)



Discretionary closure – internal communications or procedures

- Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed **except** where such records are publicly cited/identified in an open meeting or in an agenda of an open meeting – K.S.A. 2018 Supp. 45-221(a)(20)
- Attorney work product - K.S.A. 2018 Supp. 45-221(a)(25)



Discretionary closure – internal communications or procedures

- Appraisals/engineering/feasibility estimates/evaluations by or for a public agency relating to acquisition *or disposal* of property, prior to the award of formal contracts – K.S.A. 2018 Supp. 45-221(a)(13)
- Specifications for competitive bidding, until officially approved by the public agency - K.S.A. 2018 Supp. 45-221(a)(27)
- Sealed bids and related documents until a bid is accepted or all bids rejected – K.S.A. 2018 Supp. 45-221(a)(28)



Mandatory closure of records

- There are records that are required to be closed by federal or state statute that are not found in KORA
- KORA will look to other statutes first
- Records custodian must be familiar with those records and what must be separated into the open and closed portions of a record



Mandatory closure of records Juror list

- Addresses of prospective jurors are not longer included in list filed in the office of the clerk of the court
- List of name of prospective jurors is a public record

K.S.A. 2018 Supp. 22-3408



Mandatory closure of records Miscellaneous records

- No document available for public inspection or copying shall contain an individual's social security number if document contains individual's personal information
 - Personal information includes, but is not limited to, name, address, phone number or e-mail address
 - Entire SS# must be redacted
 - Unauthorized disclosure
 - An agency shall give notice in most expedient time possible and without unreasonable delay consistent with the legitimate needs of law enforcement and any measures necessary to determine the scope of the unauthorized disclosure
 - Offer credit monitoring at no cost for one year
- K.S.A. 2018 Supp. 75-3520 as amended by L. 2018, ch. 87, § 9



Mandatory closure of records Recording of certain interrogations

- Electronic recording of custodial interrogation at a place of detention when interrogation concerns a homicide or felony sex offense
 - Law enforcement agencies must adopt a detailed written policy by July 1, 2018
 - Policy must be available for public inspection during regular business hours
 - Recordings are confidential and not subject to the KORA
- K.S.A. 2018 Supp. 22-4620



Mandatory closure of records Search and arrest warrants

Disclosure of warrants executed before July 1, 2014

- Affidavits or sworn testimony given to support probable cause to obtain warrant are closed without a written court order
 - Exception - the defendant or defendant's counsel may have a copy
- K.S.A. 2018 Supp. 22-2302(b) (arrests)
K.S.A. 2018 Supp. 22-2502(d) (searches)



Mandatory closure of records Search and arrest warrants

Disclosure of warrants executed on or after July 1, 2014

- Affidavits or sworn testimony given to support probable cause to obtain warrant are closed until warrant is executed
- After execution, affidavit or sworn testimony shall be made available to:
 - Defendant or defendant's counsel upon request, and
 - Any person when requested



Mandatory closure of records Search and arrest warrants

Disclosure of warrants executed on or after July 1, 2014

- Must file request with *Clerk of the Court*
- Clerk must "promptly notify" defendant or defendant's counsel, the prosecutor, and the magistrate that such request was filed
- Prosecutor shall promptly notify any victim
 - Victim includes victim of any alleged crime that resulted in issuance of warrant OR
 - Victim's family if victim is deceased
 - Family defined in K.S.A. 74-7335



Mandatory closure of records Search and arrest warrants

Grounds for magistrate to redact or seal affidavit(s) or sworn testimony

- Jeopardize physical, mental or emotional safety / well being of victim, witness, confidential source or undercover agent or cause destruction of evidence
- Reveal information from wiretap or unexpired warrant for a tracking device
- Interfere with any prospective law enforcement action, criminal investigation or prosecution
- Reveal identity of any confidential source or undercover agent
- Reveal confidential investigative techniques or procedures not known to general public
- Endanger life / physical safety of any person



Mandatory closure of records Search and arrest warrants

Grounds for magistrate to redact or seal affidavit(s) or sworn testimony

- Reveal identifying information of victim of any sexual offense
- Reveal name of minor
- Reveal DOB, phone numbers, DL#, ID#,SSN, EIN, taxpayer ID #, VIN or financial account information
- Constitute clearly unwarranted invasion of personal privacy
 - Revealing information that is highly offensive to a reasonable person AND
 - Is totally unrelated to the alleged crime that may pose a risk to a person or property and is not of legitimate concern to the public



Mandatory closure of records Search and arrest warrants

Disclosure of warrants executed on or after July 1, 2014

- Judge orders disclosure with redactions – affidavit/sworn testimony part of court record that is accessible to the public
- Judge seals – affidavit/sworn testimony part of court record that is not accessible to the public
- Any request for disclosure of affidavit/sworn testimony is part of court record and is accessible to the public



