



Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

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Jan. 20, 2021

To: Rep. Fred Patton, chair, and members of the House Judiciary Committee

From: Doug Anstaett, consultant and lobbyist, Kansas Press Association

Re: Opposition to HB 2049, unless amended

Rep. Patton and members of the Committee:

I am Doug Anstaett, former executive director of the Kansas Press Association now serving as a consultant and lobbyist to the association.

Thank you for the opportunity to discuss our association's opposition to HB 2049. I represent the 200 daily, nondaily and college newspapers that are members of the KPA.

We oppose this bill because it gives special treatment to a state agency while denying the same benefits to those of us who have fought for decades for fairness in the way the costs associated with Kansas Open Records Act requests are handled by state and local agencies of government.

Our efforts to amend KSA 45-219 through the years have been designed to prohibit price gouging by governmental units when approached by a member of the public, a newspaper or broadcast station, a scholar and others seeking access to public records.

The bills often have passed one house only to die of neglect in the other. Our curiosity was piqued when we saw HB 2049 because it has some similarities to our efforts in past years.

Our latest attempt, Senate Bill 434, was introduced last year. It didn't receive a hearing because of the shortened session because of the COVID-19 pandemic.

A few months later, Attorney General Derek Schmidt proposed guidelines for governmental agencies to follow when determining what to charge those who seek access to records. Those guidelines, we believe, meshed quite well with the concepts in SB 434. The AG's guidelines are attached along with my testimony.

Gen. Schmidt's draft guidelines came in the wake of an investigation of an incident involving the city of Frontenac, which had attempted to charge outrageous fees for access to city council emails following the firing of a number of city officials, including the city attorney and city clerk.

Our proposal in SB 434 would grant governmental agencies the discretion to treat requests made in the "public interest" differently from other requests. "Public interest" is defined as (A) Likely to contribute significantly to public understanding of the operations or activities of the government; and (B) not primarily in the commercial interest of the person requesting the records.

While this isn't exactly what HB 2049 is proposing, it is similar enough that we believe it should be expanded beyond just the Legislative Division of Post Audit. After all, the division's mission is "to inform policy makers by providing accurate, unbiased information through our audit reports."

Our mission as information providers is much the same; to provide accurate, unbiased information to the public, we also need affordable access to public records.

We oppose this bill because it treats one agency of government differently on public records costs than it treats everyone else.

If it could be amended to include the language in SB 434 from the 2020 session, we likely would withdraw our opposition. It is attached as well to my testimony.

The Kansas attorney general believes guidelines are needed to keep public agencies from charging ridiculous rates for access to public records.

We agree.

Thank you.

Guidance Document – Kansas Open Records Act (KORA) Fees for Cost of Staff Time
Policy No. 1

Approved:

Last Revised:

Index filed with the Secretary of State:

Copies sent to JCARR:

- I. Purpose
 - a. The purpose of this document is to provide guidance on the Office of the Attorney General’s current approach to exercising its discretion to determine what constitutes reasonable fees for staff time pursuant to the Kansas Open Records Act, as well as to provide a nonexclusive list of factors to be considered by the Office of the Attorney General in making the determination of reasonable fees for staff time when reviewing enforcement actions/complaints.

- II. Authority
 - a. The Kansas Open Records Act (KORA, K.S.A. 45-215 *et seq.*) states that it is 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. K.S.A. 45-216, and amendments thereto.

 - b. K.S.A. 2019 Supp. 45-219(c) provides, “[e]xcept as provided in subsection (f) or where fees for inspection or for copies of a public record are prescribed by statute, each 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), and amendments thereto.

 - c. K.S.A. 2019 Supp. 45-219(c) also specifies that fees for access to or copies of public records, including the cost of staff time, of public agencies within:
 - i. the legislative branch of the state government shall be established in accordance with K.S.A. 46-1207a, and amendments thereto; K.S.A. 45-219(c)(3), and amendments thereto;
 - ii. the judicial branch of the state government shall be established in accordance with rules of the supreme court; K.S.A. 45-219(c)(4), and amendments thereto; and
 - iii. within the executive branch of the state government shall be established by the agency head, subject to appeal to the secretary

of administration whose decision shall be final. K.S.A. 45-219(c)(5), and amendments thereto.

- d. The attorney general is authorized by K.S.A. 45-215 *et seq.*, and amendments thereto, to enforce the KORA. In exercising enforcement discretion, the attorney general is from time to time called upon to determine whether fees charged by a public agency for the cost of staff time are “reasonable” within the meaning of K.S.A. 2019 Supp. 45-219(c), and amendments thereto.
 - e. The attorney general may issue a guidance document that states the agency’s current approach to, or interpretation of law; or that states the general statements of policy that describe how and when the agency will exercise discretionary functions. K.S.A. 2019 Supp. 77-438, and amendments thereto.
- III. Nothing in this guidance document should be construed as a requirement by the attorney general that a public agency charge a fee for staff time required to fulfill a records request. Public agencies are not required to charge any fee to fulfill a records request.
- IV. If charging a fee for staff time, a public agency should at all times charge the lowest possible fee and, in any event, should never charge a fee that exceeds the actual cost of the staff time expended. The attorney general considers fees for the cost of staff time that do not exceed the following amounts to be presumptively reasonable pursuant to K.S.A. 2019 Supp. 45-219(c), and amendments thereto, for all public agencies:
- a. For fees for access to or copies of public records of public agencies within the executive, legislative or judicial branches of state government, the amounts established by those entities as provided by K.S.A. 45-219(c)(3)-(5), and amendments thereto, respectively.
 - b. For fees for access to or copies of public records of all other public agencies, or by public agencies in the executive, legislative or judicial branches of state government if not otherwise established as provided by K.S.A. 45-219(c)(3)-(5), and amendments thereto, as appropriate, then an amount equal to or less than the following:
 - i. Clerical time charged at \$18 per hour;
 - ii. General attorney time charged at \$35 per hour;
 - iii. Supervisory attorney time charged at \$50 per hour (Supervisory attorney is an attorney empowered to conduct the final review of records for production);

- iv. Information Technology (IT) services charged at \$38 per hour;
 - v. Time for other classifications of employees charged based upon actual costs; and

- V. The amounts for the cost of staff time set forth in Paragraph IV will be considered presumptively reasonable, but that presumption may be overcome by the facts of an individual matter. In unusual situations, lesser amounts may be unreasonable or greater amounts may be reasonable. Additional factors to determine the reasonableness of fees for the costs of staff time include, but are not limited to, the following:
 - a. Format of the records (e.g., paper, electronic, microfilm);
 - b. Location(s) of and number of locations necessary to search for the records;
 - c. Access fees for records located in offsite storage;
 - d. The arrangement of the public agency filing system (chronologically, numerically, alphabetically);
 - e. The public agency's staffing resources;
 - f. Need to use an outside vendor to search for/retrieve the records;
 - g. The amount of time necessary to conduct a search for records;
 - h. The amount of time necessary to review and redact records;
 - i. Access and public agency personnel requirements for records maintained on databases;
 - j. Whether the presumptive cost for staff time exceeds the actual cost;
 - k. Whether the public agency provides without charge any or all of the staff time necessary to fulfill a records request; and
 - l. Whether the public agency employed best practices as described in paragraph VII.

- VI. A public agency may charge and require advance payment of a fee for providing access to or furnishing copies of public records. K.S.A. 45-218, and amendments thereto; K.S.A. 2019 Supp. 45-219(a), and amendments thereto. Such amount of advance payment may include a reasonable estimate of the actual cost of staff time, as described by this guidance document, to provide access to or furnish copies of public records *only if* the public agency, at the time of the request for advance payment, explains in reasonable detail to the requestor the calculations by which it arrived at the dollar amount of the request for advance payment.

- VII. The attorney general recommends the use of best practices to minimize the cost of staff time needed to respond to records requests. The attorney general considers public agency best practices to include, but not be limited to, the following:

- a. Working in good faith with, or attempting to work with, the requestor of records to narrow a broad request, make more specific a general request, or refocus a request to more easily align with the filing system of the public agency in order to reduce or minimize the cost of staff time necessary to fulfill the request;
- b. Providing, at no charge, one (1) record request per requestor in a twelve (12) month period that can be provided with less than one (1) hour of staff time;
- c. Using in good faith the lowest-cost category of staff reasonably necessary to provide access to or furnish copies of public records; and
- d. Charging a lesser rate or cost consistent with an existing policy, procedure or rate for calculating cost of staff time that differs from this guidance document in order to minimize cost for the requestor.

Derek Schmidt
Kansas Attorney General

SENATE BILL No. 434

By Committee on Assessment and Taxation

2-13

1 AN ACT concerning the Kansas open records act; relating to copies of
2 records; staff time; fees; amending K.S.A. 2019 Supp. 45-219 and
3 repealing the existing section.

4
5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2019 Supp. 45-219 is hereby amended to read as
7 follows: 45-219. (a) (1) Any person may make abstracts or obtain copies of
8 any public record to which such person has access under this act.

9 (2) If copies are requested, the public agency may require a written
10 request and advance payment of the prescribed fee *for staff time required*
11 *to provide access to or furnish copies of public records.*

12 (3) A public agency ~~shall not be~~ *is not* required to provide copies of
13 *public records maintained on computer facilities*, radio or recording tapes
14 or discs, video tapes or films, pictures, slides, graphics, illustrations or
15 similar audio or visual items or devices, unless: (A) *The agency has the*
16 *means to make copies; or (B) such items or devices were shown or played*
17 *to a public meeting of the governing body thereof, but the. A public agency*
18 ~~shall not be~~ *is not* required to provide such items or devices ~~which~~ *that* are
19 copyrighted by a person other than the public agency.

20 (b) Copies of public records shall be made while the records are in
21 the possession, custody and control of the custodian or a person designated
22 by the custodian and shall be made under the supervision of such
23 custodian or person. When practical, copies shall be made in the place
24 where the records are kept. If it is impractical to do so, the custodian shall
25 allow arrangements to be made for use of other facilities. If it is necessary
26 to use other facilities for copying, the cost thereof shall be paid by the
27 person desiring a copy of the records. In addition, the public agency may
28 charge the same fee for the services rendered in supervising the copying as
29 for furnishing copies under subsection (c) and may establish a reasonable
30 schedule of times for making copies at other facilities.

31 (c) Except as provided by subsection (f), or where fees for inspection
32 or for copies of a public record are prescribed by statute, each public
33 agency may prescribe reasonable fees for providing access to or furnishing
34 copies of public records, subject to the following:

35 (1) In the case of fees for copies of records, the fees shall not exceed
36 the actual cost of ~~furnishing copies~~ *copying*, including the cost of staff

1 time required to make the information available.

2 (2) In the case of fees for providing access to records maintained on
3 computer facilities, the fees shall include only the cost of any computer
4 services, including staff time required.

5 (3) Fees for access to or copies of public records of public agencies
6 within the legislative branch of the state government shall be established in
7 accordance with K.S.A. 46-1207a, and amendments thereto.

8 (4) Fees for access to or copies of public records of public agencies
9 within the judicial branch of the state government shall be established in
10 accordance with rules of the supreme court.

11 (5) Fees for access to or copies of public records of a public agency
12 within the executive branch of the state government shall be established by
13 the agency head. Any person requesting records may appeal the
14 reasonableness of the fees charged for providing access to or furnishing
15 copies of such records to the secretary of administration whose decision
16 shall be final. A fee for copies of public records ~~which~~ *that* is equal to or
17 less than \$.25 per page shall be deemed a reasonable fee.

18 (6) *In the case of fees for staff time required to make records*
19 *available, the rate shall not exceed the lowest hourly rate of the person*
20 *who is qualified to provide the requested records.*

21 (7) *Notwithstanding any other provision of law, a fee shall not be*
22 *charged for a search to determine whether the requested records exist.*

23 (8) *The custodian may exercise discretion to waive or reduce any fee*
24 *described in this section if the waiver or reduction of the fee would be in*
25 *the public interest because disclosure of the requested records is: (A)*
26 *Likely to contribute significantly to public understanding of the operations*
27 *or activities of the government; and (B) not primarily in the commercial*
28 *interest of the person requesting the records.*

29 (d) Except as otherwise authorized pursuant to K.S.A. 75-4215, and
30 amendments thereto, each public agency within the executive branch of
31 the state government shall remit all moneys received by or for it from fees
32 charged pursuant to this section to the state treasurer in accordance with
33 K.S.A. 75-4215, and amendments thereto. Unless otherwise specifically
34 provided by law, the state treasurer shall deposit the entire amount thereof
35 in the state treasury and credit the same to the state general fund or an
36 appropriate fee fund as determined by the agency head.

37 (e) Each public agency of a political or taxing subdivision shall remit
38 all moneys received by or for it from fees charged pursuant to this act to
39 the treasurer of such political or taxing subdivision at least monthly. Upon
40 receipt of any such moneys, such treasurer shall deposit the entire amount
41 thereof in the treasury of the political or taxing subdivision and credit the
42 same to the general fund thereof, unless otherwise specifically provided by
43 law.

1 (f) Any person who is a certified shorthand reporter may charge fees
2 for transcripts of such person's notes of judicial or administrative
3 proceedings in accordance with rates established pursuant to rules of the
4 Kansas supreme court.

5 (g) Nothing in the open records act shall require a public agency to
6 electronically make copies of public records by allowing a person to obtain
7 copies of a public record by inserting, connecting or otherwise attaching
8 an electronic device provided by such person to the computer or other
9 electronic device of the public agency.

10 Sec. 2. K.S.A. 2019 Supp. 45-219 is hereby repealed.

11 Sec. 3. This act shall take effect and be in force from and after its
12 publication in the statute book.