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**Testimony in Support of Senate Bill 361
(As amended by Senate committee)**

**Presented to the House Judiciary Committee
By Attorney General Derek Schmidt**

March 9, 2016

Chairman Barker, members of the committee:

Thank you for this opportunity to testify in support of Senate Bill 361 as amended by the Senate committee. I support this bill, and in my view the Senate amendments further strengthened it.

My detailed assessment of the legislation was presented to the Senate. I attach that assessment hereto for your consideration and review.

Thank you for your consideration. I encourage you favorably to recommend Senate Bill 361 as it was approved by the Senate.

I would stand for questions.

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**Testimony in Support of Senate Bill 361
Presented to the Senate Judiciary Committee
By Kansas Attorney General Derek Schmidt**

February 2, 2016

Chairman King, members of the committee:

Thank you for conducting this hearing on Senate Bill 361, which proposes to amend the Kansas Open Records Act to apply it to otherwise public records on the private email accounts of state employees.

The fundamental issue this bill addresses is that communications technology has evolved faster than the law. Consequently, the legal structure that worked when the current provisions of KORA were enacted no longer works today when public employees might use private email accounts to do their public jobs.

Trying to stretch KORA as written to cover that circumstance doesn't work. The current architecture of KORA was not designed to operate in a world of mixed public and private information where the open-government purpose of the statute must exist alongside privacy and free-speech concerns. As I explained in Attorney General Opinion 2015-10 and in my May 6, 2015, letter to the Revisor of Statutes on this subject, stretching KORA in that way is the equivalent of trying to force a square peg into a round hole.

Thus, the better approach is for the Legislature to amend KORA to apply its original purpose of openness in government records to modern communications realities. Against that backdrop, I attach to this testimony the following documents that may be helpful in informing this committee's deliberations and ensuring the record supporting this bill's development is complete:

- Letter from Senator Anthony Hensley requesting an attorney general opinion related to this subject. (Exhibit A).
- Attorney General Opinion 2015-10 issued in response to Senator Hensley's request. (Exhibit B).
- My letter to the Revisor of Statutes dated May 6, 2015, related to this subject. (Exhibit C).
- 2015 Senate Bill 306, which was introduced in response to my letter to the Revisor. (Exhibit D).
- The report of the Judicial Council committee that reviewed Senate Bill 306, including the committee's proposed balloon amendments. (Exhibit E).

The recommendations of the Judicial Council committee are contained in Senate Bill 361. Overall, I support the intent of the recommendations of the Judicial Council committee. However, I want to clarify my understanding of three provisions in Senate Bill 361. I also have great concern with a fourth provision in the bill and recommend amending it as described below.

Specific Understandings About Three Provisions of Senate Bill 361

I would like to clarify my understanding of three provisions in Senate Bill 361. If your committee's understanding of these provisions differs from mine, then I request you clarify the language in the bill to more precisely reflect the legislature's intent.

First, on page 2, lines 3-5, I proposed removing from the definition of "public agency" the current-law reference to "any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court" and instead relocating that exemption for judges and justices to the definition of "public records." The Judicial Council committee recommends against that change, and its report (if I understand it correctly) explains that the majority on the Judicial Council committee thought the change in location somehow would broaden the exemption. In explanation of that concern, the Judicial Council committee cited a 1985 law review article written by Professor Ted Frederickson for the proposition that the current-law exception for judges from the definition of "public agency" does not really exempt judges' records but rather merely relieves judges themselves from having to comply with or process open records requests. I find the Judicial Council committee's analysis somewhat puzzling but not worth a quarrel.

Whatever the merits of that assessment of the Judicial Council committee about the effect of current law, and in any event, the purpose of my proposed relocation of the judges' and justices' exemption was to make clear that the defined term "public agency" does not include flesh-and-blood persons. As I explained in Attorney General Opinion 2015-10 and my May 6, 2015, letter to the Revisor, commingling flesh-and-blood individuals with inanimate entities in the definition of "public agency" presents problems when applying KORA to private emails because flesh-and-blood persons, unlike inanimate public agencies, may possess both public records subject to KORA and private records not subject to KORA. Moreover, flesh-and-blood persons, again unlike inanimate public agencies, have speech rights that are protected by the First Amendment. Because judges and justices obviously are flesh-and-blood individuals, retaining their exemption in the definition of "public agency" might be misinterpreted to imply that "public agency" somehow still includes flesh-and-blood individuals (why did the legislature exempt these particular flesh-and-blood persons if the definition includes no flesh and blood persons?) Of course, if that misinterpretation were to occur, it would undermine one of the purposes of amending KORA and would cause anew one of the problems that Senate Bill 361 is intended to solve. So to be clear, it is my understanding that the retention of this language exempting judges and justices in its current statutory location really is a redundant approach that is not intended to state or imply that "public agency" continues to include any other flesh-and-blood individuals after the enactment of Senate Bill 361.

Second, on page 2, lines 22-24, the current-law language excludes from the definition of "public record" certain records "owned by a private person or entity." This, too, is part of the ambiguity in current law. It is my understanding that, under Senate Bill 361, the records of persons who are employees or officers of a public agency would be governed by the new provisions on page 2, lines 15-17, and such employees or officers would not be a "private person or entity" within the meaning of page 2, lines 22-24. This understanding is important because, otherwise, the different and asymmetrical language used in those two provisions may give rise to confusion or ambiguity. In other words, under the architecture proposed in Senate Bill 361, public records made, maintained or kept by or in the possession of: "public agencies" are governed by K.S.A. 2015 Supp. 45-217(g)(1)(A), as amended by Senate Bill 361; "employees or officers" of public agencies are governed by K.S.A. 2015 Supp. 45-217(g)(1)(B), as amended by Senate Bill 361; and other "private persons" who fall within KORA are governed by K.S.A. 2015 Supp. 45-217(g)(3)(A), as amended by Senate Bill 361.

Third, because Senate Bill 361 does not amend the current-law exception on page 2, lines 25-27, related to "an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state," that specific exception would continue to operate as in the past despite the more-general rule Senate Bill 361 establishes governing the private emails of public officers and employees. In other words, even if Senate Bill 361 is enacted, the new rule it establishes for private emails will not apply to emails on the private accounts of city commissioners, county commissioners or other members of governing bodies of any political or taxing subdivision of the state (or of state legislators under the same current-law subsection) unless those private emails are otherwise in the possession of a public agency because this current-law exception will continue to operate as it has in the past. See, e.g., Attorney General Opinion 2002-1.

Recommended Amendment to SB 361

The fourth issue, which causes me significant concern, is what legal standard KORA should apply for separating private emails subject to KORA from those that are not when the two types are, literally or figuratively, intermingled in the same inbox. I recommended, and continue to think, the constitutionally preferable standard is to apply KORA to any private email that exists **“pursuant to the officer’s or employee’s official duties and which is related to the functions, activities, programs or operations of the public agency.”**

The Committee prefers to apply KORA to any private email that exists **“in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency.”**

I have discussed and debated these options in depth with another of our proponents, Professor Mike Kautsch, and I attach to my testimony the following information that may be helpful to this committee in evaluating our respective perspectives:

- A letter from Professor Kautsch to me dated January 11, 2016 (Exhibit F).
- My response letter to Professor Kautsch dated January 28, 2016 (Exhibit G).

To minimize litigation risk and the associated costs, I recommend amending Senate Bill 361 on page 2, lines 15-17, to replace the existing language of the bill as introduced with my recommendation above. I think the language I recommend will, in practice, accomplish the same outcome as the language in the bill as introduced, but since it has been repeatedly approved by the U.S. Supreme Court as a test consistent with the First Amendment, it is less likely to result in litigation.

I am mindful, however, of a concern that using the language “*the* public agency” rather than “*any* public agency” in my proposed definition might be viewed as unnecessarily restrictive. That is not my intent. Therefore, I would have no concern about altering my proposed amendment to use the term “any” rather than “the” in that context. That amendment is reflected in the attached balloon. (Exhibit H).

Conclusion

I recommend this committee adopt the attached balloon (Exhibit H) to minimize the risk of unnecessary litigation and associated costs. If, however, this committee declines my suggestion and instead adopts the legally riskier language currently in Senate Bill 361, I would nonetheless support the legislation.

Thank you for your consideration. I would stand for questions.

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Senate Chamber



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KANS. SEN. GENERAL

February 11, 2015

Attorney General Derek Schmidt
Memorial Hall – Second Floor
120 S.W. 10th Avenue
Topeka, KS 66612

Dear Attorney General Schmidt:

As a member of the Kansas Senate, I would like to request an Attorney General's Opinion related to whether an e-mail regarding state business sent from a state employee's private e-mail account to other private e-mail accounts qualifies as a "public record."

As reported in the *Wichita Eagle* on January 27, 2015, Governor Brownback's budget director sent an e-mail on December 23, 2014, from his private e-mail account to a group of individuals, including other state employees and lobbyists. This e-mail included a detailed discussion of the budget proposal the Governor released on January 16, 2015.

The e-mail communication from Mr. Sullivan, in addition to the specific details regarding the proposal, included two attachments which detailed the impact of the proposal on the State General Fund. The e-mail concluded by stating, "I appreciate all of you helping us work through this budget planning process."

According to K.S.A. 45-217(g)(1), a "public record" means "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency" K.S.A. 45-217(g)(2) states that a "public record" "shall 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 or 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."

The question as to whether the e-mail discussed above was related to “functions, activities, programs or operations funded by public funds” is a factual determination which you are not authorized to opine on. The factual information is only being provided to demonstrate the legal interpretation I am seeking.

Specifically, I am requesting your opinion as to whether an e-mail sent by a state employee from his or her private e-mail account related to functions, activities, programs or operations funded by public funds or records is within the meaning of “public record” under K.S.A. 45-217(g)(1)?

Thank you for your assistance with this matter. If you have any questions about this request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Hensley". The signature is written in a cursive style with a large initial "A".

Senator Anthony Hensley
Senate Democratic Leader



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April 28, 2015

ATTORNEY GENERAL OPINION NO. 2015- 10

The Honorable Anthony Hensley
State Senator, Nineteenth District
State Capitol, Room 318-E
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: Public Records, Documents and Information—Records Open to the Public—Open Records Act; Certain Records Not Required to be Open

Synopsis: State employees who utilize a private device and do not utilize public resources to send an email from his or her private email account (private email) are not a “public agency” as defined by the Kansas Open Records Act (KORA) in K.S.A. 2014 Supp. 45-217(f). Accordingly, their private emails are not records subject to the provisions of the KORA. Cited herein: K.S.A. 45-216; K.S.A. 2014 Supp. 45-217; K.S.A. 45-218.

Dear Senator Hensley:

As the State Senator for the 19th District, you request our opinion on an issue related to the Kansas Open Records Act (KORA).¹ In your letter dated February 11, 2015, you ask:

[w]hether an e-mail sent by a state employee from his or her private e-mail account related to functions, activities, programs or operations funded by public funds or records is within the meaning of “public record” under K.S.A. 45-217(g)(1)?

In short, we think the answer is “no.”

¹ K.S.A. 45-215 *et seq.*

For purposes of this opinion, we will assume that the email “sent from his or her private account” also was sent from a private device and that neither publicly owned nor publicly controlled equipment, nor other public resources, were used to access the employee’s private email account. Throughout this opinion, we will use the term “private email” to reference this combination of assumed facts.

We believe your question about the scope of application of the KORA to state employee privately held emails is one of first impression in Kansas. The answer depends on several statutory provisions, which we set forth here for ease of reference. K.S.A. 45-216(a) states:

It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.

The KORA states that “[a]ll public records shall be open for inspection by any person, except as otherwise provided by this act,”² K.S.A. 2014 Supp. 45-217(g) sets forth the definition of public record. K.S.A. 2014 Supp. 45-217(g)(1) states, in pertinent part:

“Public record” means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency

K.S.A. 2014 Supp. 45-217 sets forth the definition of public agency. K.S.A. 2014 Supp. 45-217(f)(1) states, in pertinent part:

“Public agency” means the state or any political or taxing subdivision of the state or any office, officer, 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.

We have previously opined that the KORA’s definition of “public record” can include email messages because an email message is “recorded information” that may be “made, maintained, or kept by” an agency or is “in the possession” of an agency.³

To determine the answer to your inquiry, we must analyze the following statutory question: Whether a “state employee” when engaged in the sending of private emails is a “public agency” within the meaning of K.S.A. 2014 Supp. 45-217(f). Only if we

² K.S.A. 45-218(a).

³ Att’y Gen. Op. No. 2002-1 (concluding that email can be a “public record” under the KORA).

determine that the answer to this question is yes do we reach the issue of whether a state employee private email is a record pursuant to K.S.A. 2014 Supp. 45-217(g).

The plain language of the KORA provides for two alternate tests to determine the presence of a “public agency” covered by the KORA. If, and only if, at least one of these tests is satisfied, does there exist a “public agency” within the meaning of the KORA.

First, a “public agency” means “the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, . . .”⁴ The terms “state employee” and “employee” are not included in this list. In addition, the other terms do not apply because your question about the private emails of state employees necessarily presumes the presence of a living person.⁵

Second, a “public agency” means “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.”⁶ To apply this second test to your question, we must consider whether the phrase “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” includes state employees. We think the answer is no. Although a state employee is, presumably, paid by the state and therefore “supported in whole or in part by the public funds appropriated by the state,” we do not think a “state employee” is an “entity” within the meaning of this statutory test. There is no definition of “entity” in the statute, so we look to the common definition and ordinary meaning of the term. An entity is “[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners.”⁷ Thus, the ordinary meaning of “entity” does not include any flesh-and-blood being, such as an employee.

Thus, reading all of the above analyses together leads to the conclusion that state employees who send private emails, as previously defined, are not a “public agency”

⁴ K.S.A. 2014 Supp. 45-217(f)(1).

⁵ We interpret your question necessarily to presume the presence of a flesh-and-blood individual who sends a private email. We reach this conclusion because we cannot conceive a situation in which a public agency other than a living person could maintain and use a “private” email account; by definition, an email generated from, for example, an email account registered to a state agency, office or instrumentality would be “made, maintained or kept” or “in the possession of” that agency, office or instrumentality and thus could not be a “private email.” In addition, you specifically ask about the actions of a “state employee,” who presumably must be a living person as opposed to an agency, office, instrumentality or other such organization or entity. Only the word “officer” refers to a living person but state law distinguishes between officers and employees. See Att’y Gen. Op. No. 1999-11.

⁶ K.S.A. 2014 Supp. 45-217(f)(1).

⁷ Black’s Law Dictionary (10th Ed 2014)(defining “entity”); Merriam-Webster.com/Dictionary/Entity (accessed 4/27/2015).

within the meaning of the KORA.⁸ Accordingly, these private emails of state employees are not public records subject to the provisions of the KORA.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Cheryl L. Whelan

Cheryl L. Whelan
Assistant Attorney General

DS:AA:CLW:sb

⁸ Because of this determination, we are not required to analyze whether the exclusions in K.S.A. 2014 Supp. 45-217(f)(2) apply.



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May 6, 2015

Mr. Gordon Self, Revisor
Office of Revisor of Statutes
State Capitol, Suite 24-E
300 SW 10th Ave.
Topeka, Kansas 66612

Dear Mr. Self:

On April 28, 2015, I issued Attorney General Opinion 2015-10, which concluded, in response to a question from Senator Anthony Hensley, that a “state employee” is not a “public agency” within the meaning of K.S.A. 2014 Supp. 45-217(f)(1).¹ Various legislators apparently reached a similar conclusion as evidenced by proposals earlier this year, both in the House of Representatives and the Senate, to amend the Kansas Open Records Act (KORA) to make private emails² subject to that statute’s requirements. This conclusion should not be surprising because the KORA was enacted 30 years ago, before the advent of modern electronic communications methods, and most of the language at issue is original to the KORA. There is no indication in the legislative history that the drafters of the KORA gave consideration to any of the constitutional issues or limitations associated with applying a government-run regulatory system, like KORA, to information contained in records that are *privately* made, maintained, kept or possessed by citizens (who also happen to be government employees) without any use of government resources and without any requirement for a nexus (other than mere subject matter overlap) to public business.³ Even if the Legislature did weigh any constitutional considerations

¹ We answered Senator Hensley’s question on the narrowest statutory ground that properly disposed of his question. Because we adopted a fair and plausible interpretation of the statute that avoided the need to address the constitutional issues presented in this letter, we had no occasion to discuss these constitutional issues in Attorney General Opinion 2015-10. Like courts, our opinions generally adhere to the canon of constitutional avoidance in construing statutes. *See Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) (“[T]he canon of constitutional avoidance . . . is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”); *see also United States v. Sec. Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) (When multiple constructions of a statute are possible, courts “first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.”)).

² I use the term “private emails” in this letter in the same manner it is defined in Attorney General Opinion 2015-10.

³ These constitutional problems are neither new nor unique to private email communications and would have existed in 1984. Consider, for example, a state employee in 1984 who while at home writes on personally owned paper with

when enacting the KORA in 1984, the U.S. Supreme Court has since further refined our understanding of the First Amendment’s application to public employees’ speech, and pertinent commands of the constitutional case law since 1984 have not been incorporated into the statute.

Because I anticipate legislative interest in attempting to amend the KORA before the end of this legislative session to close this “loophole” in the current statute, I am taking the liberty of providing you additional information that may be helpful in any drafting requests you receive. The policy principle, of course, is simple: recorded information constituting or transacting government business should be subject to the KORA, regardless of whether it is recorded on a public or private email account. However, as the expression goes, the “devil is in the details”—and because the First Amendment is involved, these details are important and difficult.

Our published analysis in Attorney General Opinion 2015-10 was limited to what was necessary to answer the specific legal question Senator Hensley posed. However, the task of drafting legislation that would close this private email loophole in the KORA would present other significant issues outside the scope of Opinion 2015-10. Any statutory amendment would need to be carefully crafted to include a constitutionally satisfactory limitation for its application to privately held records; otherwise, the change would risk inadvertently injecting a constitutional defect into the KORA that could imperil the statute itself. Thus, I offer the following information, research, analysis and recommended language for your consideration and use as you deem appropriate.

CONSTITUTIONAL ISSUES

1. The First Amendment limits the power of the State of Kansas to compel disclosure of its employees’ private speech.

The First Amendment states, in pertinent part, “Congress shall make no law . . . abridging the freedom of speech. . . .”⁴ Open-records statutes serve vital public policy objectives in a self-

a personally owned pen information related to his or her work. For the government to claim authority to regulate that personal paper merely because of its content—regardless of whether it is created to be a personal letter to the employee’s spouse or an entry in a personal journal—by declaring it a “public record,” without any further analysis or limitation on the State’s power, would have presented significant constitutional issues in 1984 as it does today. The KORA does contain one provision that acknowledges the existence of some outer boundary to the statute’s application to records “owned by a private person or entity.” K.S.A. 2014 Supp. 45-217(g)(2). But even if that language were intended in 1984 to satisfy the First Amendment (as opposed to a mere policy preference), it now is outdated as a test for *inclusion* of privately held records because as discussed below the “related to” test in K.S.A. 2014 Supp. 45-217(g)(2) was rejected by the U.S. Supreme Court in 2006 as being impermissibly overbroad; moreover, the meaning of that language as a test for *exclusion* of records is currently being tested in a case of first impression before the Kansas Court of Appeals, although not in the context of private emails. *See Hunter Health Clinic v. Wichita State University*, No. 14-111586-A (Kan. Ct. App.). Against this backdrop of outdated and unsatisfying statutory language, the dramatic expansion of the amount and common use of private “recorded information” made possible by modern private email communications and related technologies amplifies and distinguishes the problem today from that when the KORA was enacted. In 1984, these problems could be (and were) ignored by legislative drafters, thus avoiding consideration of any constitutional issues; now, they are central to the policy discussion, and thus the constitutional issues are squarely presented.

⁴ U.S. Const. amend. I. *See also Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860, 870 (1984) (“The First and Fourteenth Amendments guarantee that no state shall abridge the freedom of speech.”).

governing society.⁵ However, it is well-established that government-compelled disclosures of information are protected by the First Amendment,⁶ and the U.S. Supreme Court has stated specifically that disclosures required under state open-records statutes implicate First Amendment protections.⁷ Even in the service of a noble and important cause, such as open government, the State of Kansas may not violate the First Amendment. Like other citizens, public employees are entitled to First Amendment protection,⁸ and the First Amendment does not permit the State to go fishing about in its citizens' *personal* records in hopes of finding writings or other recorded information that might be properly subject to *public* disclosure.⁹

Therefore, the scope and application of open records statutes, like the KORA, are necessarily limited to whatever access to privately held records, such as private emails, the Legislature has the constitutional authority to grant; a statute that purports to grant access to information in records outside that authority would be constitutionally suspect. To satisfy the First Amendment, any amendment to the KORA to extend it to private emails (or to other privately held "recorded information") must write into the statute express, constitutionally sound limitations on the statute's reach; if the statute is not sufficiently limited on its face, then it could not later be rendered "constitutional by carving out a limited exemption through an amorphous regulatory interpretation."¹⁰ From a First Amendment standpoint, it's simply not good enough that a statute impermissibly burdening a public employee's speech may be well-intended or serve a valuable purpose, and no requirement that a statute be "liberally construed and applied"¹¹ can overcome the omission from the statute of constitutionally sound limiting terms required by the First Amendment.

⁵ However, open records laws are creatures of the legislature, not commands of the U.S. Constitution, and therefore may not require more access to constitutionally protected information than the State has authority to compel. *See, e.g., McBurney v. Young*, 133 S. Ct. 1709, 1718, 185 L. Ed. 2d 758 (2013) (The U.S. Supreme "Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. . . . The Constitution itself is [not] a Freedom of Information Act . . . [T]he courts declared the primary rule that there was no general common law right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents.") (internal citations and quotation marks omitted). Thus, it was permissible for the Commonwealth of Virginia to enact a statute prohibiting out-of-state persons from accessing its public records.

⁶ *See, e.g., Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795, 108 S. Ct. 2667, 2677, 101 L. Ed. 2d 669 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.").

⁷ *See generally John Doe No. 1 v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (request under state public records act to disclose names of petition signers subject to First Amendment review).

⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957, 164 L. Ed. 2d 689 (2006) (The Supreme Court "has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

⁹ *See, e.g., United States v. Jones*, 132 S. Ct. 945, 956, 181 L. Ed. 2d 911 (2012) (Sotomayor, J, concurring) (Government regulations that seek to gather information about citizens' private speech and communications habits may be prohibited by the First Amendment because mere "[a]wareness that the Government may be watching chills associational and expressive freedoms.").

¹⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324, 130 S. Ct. 876, 889, 175 L. Ed. 2d 753 (2010).

¹¹ K.S.A. 45-216(a). *See also Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 608, 214 P.3d 676, 678 (2009) ("The court will not speculate on legislative intent and will not read the statute to add something not readily found in it.").

2. Without more, a statutory definition that “public record” includes records containing information “related to functions, activities, programs or operations funded by public funds” would be constitutionally insufficient if applied to private emails or other privately held “recorded information.”
 - A. By definition, the “related to” test is a content-based regulation of speech and likely would fail strict scrutiny analysis as applied to public employees’ private emails.

In distinguishing the private emails of a public employee that may be regulated by the State as “public records” from those that fall outside the authority of the State to regulate, the U.S. Constitution requires more than an assessment of the *content* of the private emails. The U.S. Supreme Court has explained that “the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”¹² Thus, a law burdening a public employee’s speech by requiring that he or she produce (or defend a refusal to produce when confronted with a government demand) *any and all* private email that contains subject matter “related to” his or her work would face the same First Amendment analysis as a content-based ban on the employee’s speech.

With few exceptions that are not relevant here,¹³ the First Amendment subjects to strict scrutiny any government efforts to regulate speech based on its content. “If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”¹⁴ Even assuming that the purposes of the KORA constitute a compelling government interest, the government still would bear the burden¹⁵ to demonstrate that the statute is narrowly tailored and that no less restrictive alternative would serve the compelling interest. Without statutory limitation beyond the mere *content* of a public employee’s private emails to guide which private emails constitute “public records,” the statute plainly would not be narrowly tailored and a less restrictive alternative would be available. In a closely analogous case, the U.S. Supreme Court has expressly rejected the “related to” test for regulating the speech of public employees because “[t]he First Amendment protects some expressions related to the speaker’s job;”¹⁶ the same reasoning would apply here.

¹² *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011) (internal quotation marks and citations omitted).

¹³ *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (certain well-defined and narrowly limited categories of speech unprotected by the First Amendment).

¹⁴ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000) (internal and citations omitted).

¹⁵ The usual presumption of constitutionality would not apply to such a statute. *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (*quoting Ashcroft v. ACLU*, 542 U.S. 656, 660, 124 S. Ct. 2783, 2788, 159 L. Ed. 2d 690 (2004)) (“[T]he Constitution ‘demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.’”).

¹⁶ *Garcetti*, 547 U.S. at 421. The *Garcetti* court illustrated the point with this example: “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. The same is true of many other categories of public employees.” *Id.* (internal quotation marks and citations omitted).

- B. Without more, the “related to” test burdens a substantial amount of protected public-employee speech and thus would risk rendering part of the KORA unconstitutionally overbroad on its face.

The “related to” test for declaring public employee private emails to be “public records,” taken alone, is constitutionally suspect on its face under the First Amendment overbreadth doctrine. The U.S. Supreme Court long has recognized that “[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”¹⁷ Under the First Amendment overbreadth doctrine, which is a form of facial challenge, “a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹⁸ The overbreadth doctrine protects against self-censorship and an unconstitutional chilling effect on protected speech: “The purpose of the overbreadth doctrine is to excise statutes which have a deterrent effect on the exercise of protected speech.”¹⁹ The Kansas Supreme Court has explained:

[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected. . . . A successful overbreadth challenge can thus be made only when 1) the protected activity is a significant part of the law’s target, and 2) there exists no satisfactory method of severing that law’s constitutional from its unconstitutional application.²⁰

Here, if the only statutory test of whether a public employee’s private emails are “public records” subject to the KORA were that the content of any such email “related to” the subject matter of public business, then the KORA on its face would apply to a virtually *unlimited* amount of private and personal information of public employees.

To illustrate the broad sweep of the “related to” test if it were applied to private emails, consider a hypothetical public employee who sends a private email to his or her spouse stating, “I had a bad day at work because we couldn’t get the agency budget to balance again” and then proceeds to describe the problem. Or an employee who records daily activities, including his or her public work activities, in a private email to his or her children who are away at college. Or an employee who sends a private email to his or her union representative disclosing concerns about

¹⁷ *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963) (citations omitted).

¹⁸ *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008) (internal quotation marks omitted).

¹⁹ *Rosenfeld v. New Jersey*, 408 U.S. 901, 908, 92 S. Ct. 2479, 2482, 33 L. Ed. 2d 321 (1972) (footnote omitted) (Powell, J. dissenting); see also *id.* at 907, 2482 (“[The overbreadth doctrine] results often in the wholesale invalidation of the legislature’s handiwork, creating a judicial-legislative confrontation. In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.”) (internal quotation marks omitted) (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 852 (1970)).

²⁰ *State v. Whitesell*, 270 Kan. 259, 270, 13 P.3d 887, 900 (2000) (quoting *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091 (1982)).

the public workplace. Or an employee who writes, under a pseudonym,²¹ a privately emailed article criticizing the agency where he or she works. Or an employee who sends a private email with important public information about a public agency matter to a watchdog or news organization. Or an employee who sends a private email to, or as part of, a political campaign providing commentary or information about state or local government. Or an employee who engages in political debate or discussion, by private email, criticizing state or local government. Or an employee who communicates, through private email, with a minister or other religious adviser about personal stressors, ethical dilemmas or other issues related to his or her work. Or an employee who sends a private email to personal friends characterizing or describing the employee's interactions at the office with coworkers or supervisors. Clearly, the State has no legitimate reason (or constitutional authority) to regulate these sorts of private communications as "public records" merely because they mention or discuss matters "related to" the public employee's work, and the threat the State might do so would impermissibly chill constitutionally protected expression.

In the absence of additional statutory limits beyond the "related to" test, there would "exist no satisfactory method of severing that law's constitutional from its unconstitutional application."²² Nor could this overbreadth be cured by somehow adopting a *practice* of using the KORA solely to reach constitutionally *appropriate* private emails, such as those that actually involve the conduct or transaction of public business; the First Amendment does not permit courts to uphold an overbroad statute that impermissibly burdens a substantial amount of protected speech "merely because the Government promise[s] to use it responsibly."²³ If the KORA were to be extended to apply to private emails, the statute would need to expressly impose a limit, consistent with the First Amendment, on the scope of private emails (or other "recorded information") to be included within its sweep. The "related to" test is not sufficiently limited to satisfy the First Amendment.

3. To extend KORA to private emails, the First Amendment would be satisfied by a "pursuant to official duties" test.

In drawing the line to determine the boundaries of the First Amendment's shield that surrounds public employee speech, the U.S. Supreme Court in 2006 adopted a "pursuant to official duties" test. In interpreting the First Amendment to permit a public employer to discipline an employee for the employee's speech about office-related matters, the Supreme Court held:

We hold that when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.²⁴

²¹ See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42, 115 S. Ct. 1511, 1516, 131 L. Ed. 2d 426 (1995) (noting right to publish pseudonymously is protected by the First Amendment and government-imposed burdens on that right are subject to strict scrutiny).

²² *Whitesell*, 270 Kan. at 270 (quoting *Palmgren*, 231 Kan. at 533).

²³ *United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435 (2010).

²⁴ *Garcetti*, 547 U.S. at 421 (emphasis added).

The same reasoning would apply here. Thus, an amendment to the KORA that requires public employees to produce private emails that were made, maintained, kept or possessed “pursuant to their official duties” would be constitutionally permissible. This test is distinct from the “related to” test, which looks only at the *content* of the private email and not at the *reason* for its existence. Under the “pursuant to official duties” test, a public employee who uses a private email account to bypass KORA when conducting or transacting public business would be acting “pursuant to their official duties” and the private email would be a “public record.” However, if the employee sent a private email to, for example, his or her mother and in that personal communication (sent not as a public employee but as a citizen or as a son or daughter) mentions or discusses matters “related to” his or her agency or office, that email would not be a “public record.” This distinction should satisfy the important public interest in government openness while also remaining within the bounds of the First Amendment as interpreted in current U.S. Supreme Court case law.²⁵

LEGISLATION CONSIDERED EARLIER THIS YEAR IS INADEQUATE

On February 2, 2015, the House of Representatives considered but defeated an amendment that proposed a version of the “pursuant to official duties” test by requiring both that a “public record” be “in furtherance of such public agency’s duties” and also have a “substantial nexus with the public agency’s duties.”²⁶ However, that amendment did not resolve the statutory definition problem identified in Attorney General Opinion 2015-10. Thus, if that amendment had been adopted in the form proposed, it likely would have cured the First Amendment defect that precludes applying the current KORA to private emails but nonetheless would not have successfully applied the KORA to the private emails of state employees who currently are omitted from the statute’s terms.

Senate Bill 201 remains pending in that body, and on March 19, 2015, during floor debate on House Bill 2023, its text was considered but defeated as an amendment.²⁷ That bill/amendment proposed a version of the “pursuant to official duties” test by requiring that the record be “in furtherance of the public agency’s duties” and also retained the current law’s “related to” test. However, it did not address the statutory definition problem identified in Attorney General Opinion 2015-10. In addition, because the amendment by its terms would have applied only to records “made, maintained or kept on a personal electronic device,” its adoption may have created an implication that the KORA would not apply to other privately made, maintained or kept “recorded information.” That amendment also does not appear to include a definition of “personal electronic device.” Thus, if that bill/amendment were adopted in the form proposed, it likely would have cured the First Amendment defect that precludes applying the current KORA

²⁵ One oft-cited legal article has described the purpose of the KORA as allowing public access of the “*business workings* of state and local government” and as strongly “favor[ing] openness in *governmental transactions*.” Theresa Marcel Nuckolls, *Kansas Sunshine Law; How Bright Does It Shine Now? The Kansas Open Meetings and Open Records Acts*, 72 J. Kan. B. Ass’n 28, 29 (May 2003) (emphasis added). Both of those purposes would be wholly satisfied by the “pursuant to official duties” test.

²⁶ House Journal 144-45 (2015 Session) (motion of Representative Ward).

²⁷ Senate Journal 297 (2015 Session) (motion of Senator Hensley).

to private emails but nonetheless would not have successfully applied the KORA to the private emails of state employees who currently are omitted from the statute's terms.

PROPOSED LEGISLATIVE LANGUAGE

In light of the above analysis, we have taken the liberty of preparing draft legislative language that we think would extend the KORA to apply to the private emails of public employees when used to conduct public agency business without running afoul of existing U.S. Supreme Court precedent. A copy is enclosed with this letter. It contains six important elements:

First, it removes the term "officer" from K.S.A. 2014 Supp. 45-217(f)(1), rendering a "public agency" defined by (f)(1) to consist *only* of government or corporate entities, not of living beings.²⁸ This is important because (1) the problem of distinguishing protected private emails from private emails that may be "public records" is unique to the context of flesh-and-blood individuals since government entities, by definition, cannot maintain a private email account; and (2) defining individuals to be a "public agency" renders other parts of the KORA unreasonable or absurd²⁹ and thus subject to legal challenge. The two concepts should be separated into different paragraphs for distinct handling rather than intermingled in the same paragraph.

Second, it inserts "location" into the definition of "public record" in K.S.A. 2014 Supp. 45-217(g)(1). This insertion makes clear that the location of the record (for example, on a private email server) is not, *per se*, an impediment to defining it as a public record.

Third, it inserts a new subparagraph (B) in the definition of "public record" in K.S.A. 2014 Supp. 45-217(g)(1) that expressly applies to living persons who do the work of public agencies. Specifically, this new subsection would apply to "officers" (the term relocated from K.S.A. 2014 Supp. 45-217(f)(1), as described above) and to "employees," who are not currently covered by the statute. This insertion of "employee" remedies the omission identified in Attorney General

²⁸ On its face, neither an "office" nor an "agency" can be a living person. While in some contexts, the term "instrumentality" might include living persons, the context here suggests otherwise. For example, to interpret "instrumentality" here to include living persons would be to attach to such living persons various other duties of a "public agency," which would lead to absurd or unreasonable results as discussed in footnote 29. Moreover, the term "instrumentality" is undefined in the KORA and thus should be given its ordinary meaning; the term is ordinarily defined as a "thing" or an "agency . . . such as a branch of a governing body," none of which implies inclusion of a living person. *See* Black's Law Dictionary (10th ed. 2014) (defining instrumentality). Additionally, interpreting "instrumentality" to be distinct from living "person" is analogous to the manner in which Kansas courts long have interpreted the term in the context of tax law. *See, e.g., Clinton v. State Tax Comm'n*, 146 Kan. 407, 71 P.2d 857, 866 (1937).

²⁹ For example, K.S.A. 2014 Supp. 45-219(c) authorizes a public agency to "prescribe reasonable fees for providing access to or furnishing copies of public records," but it would be absurd and unreasonable to authorize each and every public officer or employee (as an individual "public agency") to set his or her own fee schedule. Additionally, K.S.A. 2014 Supp. 45-220(a) requires that "[e]ach public agency shall adopt procedures to be followed in requesting access to and obtaining copies of public records," but it would be absurd and unreasonable to require each and every public officer or employee to adopt his or her own procedures for handling open records requests. *See generally State v. Tapia*, 295 Kan. 978, 992, 287 P.3d 879, 889 (2012) ("It is a fundamental rule of statutory interpretation that courts are to avoid absurd or unreasonable results.").

Opinion 2015-10 and also is consistent with the phrase “officer or employee of a public agency” that the Legislature has used elsewhere in the KORA.³⁰

Fourth, it constructs within the new subsection (B) constitutionally sound limiting principles that allow for the application of the KORA to the private emails of flesh-and-blood officers and employees who work in state government, or any political or taxing subdivision thereof, without violating their First Amendment rights. It adopts the Supreme Court’s *Garcetti* test for permitting government regulation of state employee speech that is “pursuant to official duties” and *also* includes the familiar “related to” test currently found in K.S.A. 2014 Supp. 45-217(g)(2).³¹ The First Amendment would not be offended by the two tests operating in conjunction; it is offended only by the State’s reliance on the “related to” test alone.

Fifth, consistent with the approach of separating non-living “public agencies” from living “officers and employees,” it relocates the exclusions for judges and part-time officers and employees currently found in K.S.A. 45-217(f)(2)(B) and (C) to subsection (g)(2). In short, this reorganization ensures the current law’s limitation for judges and part-time officers and employees actually applies to officers and employees, which is the intent of the language.

Sixth, it consolidates all existing exceptions to the definition of “public record” into subsection (g)(2) for ease of reference and understanding.

Thank you for your consideration of this information, analysis and recommendation. I hope it is helpful. While I am one who believes the private email “loophole” in the KORA should be fixed, I also am mindful that in the delicate area of government regulation of speech, an ill-considered “fix” risks unintentionally creating more problems than it solves. We now know more than we did in 1984 about what the First Amendment requires, and forbids, when applying open records laws to private records that contain public employee speech, and in my view we should update the KORA to reflect the current state of the law and the realities of modern communications technology.³²

³⁰ Compare the definition of “official custodian” in K.S.A. 2014 Supp. 45-217(e) (any “officer or employee of a public agency”) with the definition of “public agency” in K.S.A. 2014 Supp. 45-217(f)(1) (including only “officer” but not “employee”).

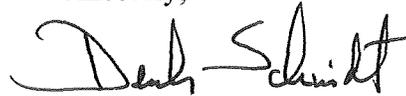
³¹ Please note that in this reference, we also substituted the phrase “of the public agency” for the phrase “funded by public funds.” We made that substitution because, in the context of applying KORA to public employees, the phrase “of the public agency” seems both more appropriate and more inclusive; however, the choice between these two phrases is not imperative to our analysis or recommendation.

³² Rapidly evolving communications technology also has presented significant Fourth Amendment issues regarding public employees’ private emails. The state of the law in that area is in significant flux, and thus we cannot offer a further recommendation at this time and do not recommend waiting for judicial clarity on any potential Fourth Amendment issues before repairing the identified First Amendment concerns in applying the KORA to private emails. *See, e.g., City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 2628, 177 L. Ed. 2d 216 (2010) (recognizing, in the context of government employees’ electronic communications, “the general principle that [i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer”); *id.* at 759 (“The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”); *see also In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 616 (5th Cir. 2013) (citing *Jones*, 132 S. Ct. at 953–54; *Quon*, 130 S. Ct. at 2629–30) (Dennis, J. dissenting) (“The substantial difficulty of this question is reflected in the Supreme Court’s conscientious

Gordon Self
May 6, 2015
Page 10

If I may be of further assistance to you or the Legislature in attempting to fix the current statute's shortcomings, please let me know.

Sincerely,

A handwritten signature in black ink that reads "Derek Schmidt". The signature is written in a cursive style with a large, stylized "D" and "S".

Derek Schmidt
Kansas Attorney General

Enclosure (proposed KORA amendment)

Cc: Honorable Susan Wagle
Honorable Ray Merrick
Honorable Anthony Hensley
Honorable Tom Burroughs
Honorable Jeff King
Honorable John Barker

avoidance of similar questions regarding the Fourth Amendment implications of modern telecommunications technologies.”).

45-217. Definitions

As used in the open records act, unless the context otherwise requires:

(a) "Business day" means any day other than a Saturday, Sunday or day designated as a holiday by the congress of the United States, by the legislature or governor of this state or by the respective political subdivision of this state.

(b) "Clearly unwarranted invasion of personal privacy" means revealing information that would be highly offensive to a reasonable person, including information that may pose a risk to a person or property and is not of legitimate concern to the public.

(c) "Criminal investigation records" means records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701, and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law, but does not include police blotter entries, court records, rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide as defined by K.S.A. 21-3405, prior to its repeal, or K.S.A. 21-5406, and amendments thereto.

(d) "Custodian" means the official custodian or any person designated by the official custodian to carry out the duties of custodian of this act.

(e) "Official custodian" means any officer or employee of a public agency who is responsible for the maintenance of public records, regardless of whether such records are in the officer's or employee's actual personal custody and control.

(f)(1) "Public agency" means the state or any political or taxing subdivision of the state or any office, ~~officer,~~ agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.

(2) "Public agency" shall not include: ~~(A) any entity solely by reason of payment from public funds for property, goods or services of such entity; (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court; or (C) any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week.~~

(g)(1) "Public record" means any recorded information, regardless of form, ~~or characteristics or location,~~ which is made, maintained or kept by or is in the possession of:

~~(A) any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund;~~
~~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 the public agency.~~

(2) "Public record" shall not include:

~~(A) records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds; or~~

~~(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;~~

(C) records of any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court;

(D) records of any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week; or

(E) records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.

~~(3) "Public record" shall not include records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.~~

(h) "Undercover agent" means an employee of a public agency responsible for criminal law enforcement who is engaged in the detection or investigation of violations of criminal law in a capacity where such employee's identity or employment by the public agency is secret.

SENATE BILL No. 306

By Senator Baumgardner

5-14

1 AN ACT concerning the open records act; relating to definitions; public
2 agency and public record; amending K.S.A. 2014 Supp. 45-217 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. 2014 Supp. 45-217 is hereby amended to read as
7 follows: 45-217. As used in the open records act, unless the context
8 otherwise requires:

9 (a) "Business day" means any day other than a Saturday, Sunday or
10 day designated as a holiday by the congress of the United States, by the
11 legislature or governor of this state or by the respective political
12 subdivision of this state.

13 (b) "Clearly unwarranted invasion of personal privacy" means
14 revealing information that would be highly offensive to a reasonable
15 person, including information that may pose a risk to a person or property
16 and is not of legitimate concern to the public.

17 (c) "Criminal investigation records" means records of an
18 investigatory agency or criminal justice agency as defined by K.S.A. 22-
19 4701, and amendments thereto, compiled in the process of preventing,
20 detecting or investigating violations of criminal law, but does not include
21 police blotter entries, court records, rosters of inmates of jails or other
22 correctional or detention facilities or records pertaining to violations of
23 any traffic law other than vehicular homicide as defined by K.S.A. 21-
24 3405, prior to its repeal, or K.S.A. 2014 Supp. 21-5406, and amendments
25 thereto.

26 (d) "Custodian" means the official custodian or any person designated
27 by the official custodian to carry out the duties of custodian of this act.

28 (e) "Official custodian" means any officer or employee of a public
29 agency who is responsible for the maintenance of public records,
30 regardless of whether such records are in the officer's or employee's actual
31 personal custody and control.

32 (f) (1) "Public agency" means the state or any political or taxing
33 subdivision of the state or any office, ~~officer,~~ agency or instrumentality
34 thereof, or any other entity receiving or expending and supported in whole
35 or in part by the public funds appropriated by the state or by public funds
36 of any political or taxing subdivision of the state.

1 (2) "Public agency" shall not include:

2 ~~(A) any entity solely by reason of payment from public funds for~~
 3 ~~property, goods or services of such entity; (B) any municipal judge, judge~~
 4 ~~of the district court, judge of the court of appeals or justice of the supreme~~
 5 ~~court; or (C) any officer or employee of the state or political or taxing~~
 6 ~~subdivision of the state if the state or political or taxing subdivision does~~
 7 ~~not provide the officer or employee with an office which is open to the~~
 8 ~~public at least 35 hours a week.~~

9 (g) (1) "Public record" means any recorded information, regardless of
 10 form ~~or~~, characteristics *or location*, which is made, maintained or kept by
 11 or is in the possession of:

12 (A) Any public agency including, but not limited to, an agreement in
 13 settlement of litigation involving the Kansas public employees retirement
 14 system and the investment of moneys of the fund; *or*

15 (B) *any officer or employee of a public agency pursuant to the*
 16 *officer's or employee's official duties and which is related to the functions,*
 17 *activities, programs or operations of the public agency.*

18 (2) "Public record" shall not include:

19 (A) Records which are owned by a private person or entity and are
 20 not related to functions, activities, programs or operations funded by
 21 public funds ~~or~~;

22 (B) records which are made, maintained or kept by an individual who
 23 is a member of the legislature or of the governing body of any political or
 24 taxing subdivision of the state.;

25 (C) *records of any municipal judge, judge of the district court, judge*
 26 *of the court of appeals or justice of the supreme court;*

27 (D) *records of any officer or employee of the state or political or*
 28 *taxing subdivision of the state if the state or political or taxing subdivision*
 29 *does not provide the officer or employee with an office which is open to*
 30 *the public at least 35 hours a week; or*

31 ~~(3)(E) "Public record" shall not include~~ records of employers related
 32 to the employer's individually identifiable contributions made on behalf of
 33 employees for workers compensation, social security, unemployment
 34 insurance or retirement. The provisions of this subsection shall not apply
 35 to records of employers of lump-sum payments for contributions as
 36 described in this subsection paid for any group, division or section of an
 37 agency.

38 (h) "Undercover agent" means an employee of a public agency
 39 responsible for criminal law enforcement who is engaged in the detection
 40 or investigation of violations of criminal law in a capacity where such
 41 employee's identity or employment by the public agency is secret.

42 Sec. 2. K.S.A. 2014 Supp. 45-217 is hereby repealed.

43 Sec. 3. This act shall take effect and be in force from and after its

- 1 publication in the statute book.

**REPORT OF THE JUDICIAL COUNCIL OPEN RECORDS ADVISORY COMMITTEE
ON 2015 SB 306/307 RELATING TO PUBLIC RECORDS AND PRIVATE EMAIL****DECEMBER 4, 2015**

In June 2015, Senator Jeff King asked the Judicial Council to review SB 306/307 relating to the application of the Kansas Open Records Act to emails concerning public business sent by public officials from private email accounts. As part of its review, he asked that the Council look at approaches taken by other states to balance privacy concerns against the need for public disclosure. The Council agreed to undertake the study and formed a new Committee for the task.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Open Records Advisory Committee are:

Senator Molly Baumgardner, Louisburg, Chair; State Senator from the 37th District and Associate Professor of Journalism and Media Communications at Johnson County Community College

Nicole Proulx Aiken, Topeka; Deputy General Counsel for the League of Kansas Municipalities

Athena Andaya, Topeka; Deputy Attorney General

Doug Anstaett, Topeka; Executive Director of the Kansas Press Association

Representative John Barker, Abilene; State Representative from the 70th District, House Judiciary Chair, and Judicial Council member

Kent Cornish, Topeka; President/Executive Director of the Kansas Association of Broadcasters

Rich Eckert, Topeka; Shawnee County Counselor

Frankie Forbes, Overland Park; practicing attorney

Senator Anthony Hensley, Topeka; State Senator from the 19th District

Prof. Mike Kautsch, Lawrence; Professor, Kansas University School of Law

Gayle Larkin, Topeka; Admissions Attorney, Office of the Disciplinary Administrator

Melissa Wangemann, Topeka; General Counsel and Director of Legislative Services for the Kansas Association of Counties

Representative Jim Ward, Wichita; State Representative from the 86th District and practicing attorney

BACKGROUND

In April 2015, the Attorney General issued an opinion concluding that, under current law, emails sent by state employees who use private email accounts and private devices and do not use public resources are not a public agency so those emails are not subject to the Kansas Open Records Act. AG Opinion 2015-10. The Attorney General then sent a letter to Revisor Gordon Self recommending how the legislature might best close that loophole.

Several alternative bills and amendments were introduced late in the 2015 session to close the loophole, including SB 306 and 307, which are identical bills based on the Attorney General's recommendation. Neither of the bills received a hearing, but both remain alive in the Senate Judiciary Committee.

APPROACH

The Open Records Advisory Committee met four times during the late summer and fall of 2015. The Committee considered a number of background materials, including the following:

- Study request letter from Senator King. (Attachment #1)

Legislation:

- 2015 SB 306 (Attachment #2) - because SB 307 is identical to SB 306, it is not included.
- 2015 HB 2300 - an alternative proposal regarding public records and personal electronic devices.
- 2015 HB 2256 - enacted in 2015 to give the attorney general additional power to investigate open records violations.

Kansas materials:

- Materials provided by the Attorney General, including AG opinion 2015-10 (Attachment #3) and a letter from Attorney General Schmidt to Gordon Self, Revisor of Statutes, discussing constitutional issues (Attachment #4).
- AG opinion 2002-1.
- KORA Guidelines published by the Attorney General.
- The Kansas Open Records Act, K.S.A. 45-215 *et seq.*
- The Kansas Government Records Preservation Act, K.S.A. 45-401 *et seq.*
- K.S.A. 21-5920 (tampering with a public record is a class A misdemeanor).
- Kansas State Email Guidelines published by the Kansas Historical Society.
- Executive Order 14-06 adopting a mobile device policy for the executive branch.
- Excerpts from Ted Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205 (Winter 1985).
- Assorted recent Kansas news articles on the topic of public officials' use of private email to conduct public business.

Federal materials:

- NARA Bulletin 2014-06 providing guidance to federal agencies on maintaining emails that constitute federal records.
- NARA Bulletin 2015-02 providing guidance to federal agencies regarding management of electronic messages.

Information about other states:

- Research on other states' definitions of public records provided by Prof. Kautsch. (Attachment #5)
- Joey Senat, *Whose Business Is It: Is Public Business Conducted on Officials' Personal Electronic Devices Subject to State Open Records Laws?*, 19 Comm. Law & Policy 293 (Summer 2014).
- Steve Zansberg, *Cloud-Based Public Records Pose New Challenges for Access*, 31 Communications Lawyer 12 (Winter 2015).
- Mo. Stat. Rev. § 610.025 regarding electronic transmission of messages relating to public business.

All of the materials listed above are available for review in the Judicial Council office.

The Committee also invited Rodney Blunt, Deputy Chief Information Security Officer for the state, to speak to the Committee about technology-related issues.

DISCUSSION

Definition of Public Record

Early on, the Committee reached consensus that public employees and officers should not be able to avoid open records laws simply by conducting public business or official duties on a private account or device. The Committee agreed that whether a particular email or other record is subject to the open records law should be dependent on whether it is a public record and not solely on its location. The more difficult task was deciding on a definition of public record that would reflect the Committee's consensus.

KORA currently defines public record, in relevant part, as "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency" K.S.A. 45-217(g)(1). Public agency includes the state, any political or taxing subdivision of the state, any office, officer, agency or instrumentality of the state or a political or taxing subdivision, or any other entity receiving or expending and supported in whole or in part by public funds. K.S.A. 45-217(f)(1). The definition of public agency does not, however, include public employees.

SB 306/307 would amend the definition of public record, in relevant part, as follows: "Public record' means any recorded information, regardless of form or 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 the public agency.” The bill would also strike “officer” from the definition of “public agency.”

In addition to the definition of “public record” proposed by SB 306/307, the Committee reviewed definitions of the term from a number of other states. It found that many states define public records with reference to content rather than location and, of those states, most define public records as being “in connection with the transaction of public business” or use similar language. Attachment #5 contains a list of different states’ approaches to defining the term, “public record.”

The Committee found that the current KORA definition of public record is at least partly location dependent, and to be technology neutral, it would be preferable if public record were defined with reference to content rather than location. Kansas law on records preservation also defines records in terms of their content. K.S.A. 45-402(d) defines “government records” as any document, data or information “regardless of physical form or characteristics, storage media or condition of use, made or received by an agency in pursuance of law or in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency.”

A majority of the Committee agreed that public record should be defined as “any recorded information, regardless of form or 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 in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency.”

This proposed definition varies somewhat from the definition contained in SB 306/307, which was recommended by the Attorney General based on his interpretation of U.S. Supreme Court case law dealing with public employee free speech rights. The Attorney General’s recommendation adopted language approved by the U.S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), which the AG believes is carefully crafted to include a constitutionally satisfactory limitation for its application to privately held records of any officer or employee of a public agency and, therefore, would pass constitutional muster. See Attachment # 4 for a fuller description of the Attorney General’s position. The Attorney General has not expressed an opinion on the constitutionality of the definition proposed by the majority of the Committee. However, it is the Office of the Attorney General’s position that the safer course of action is to use language that has survived scrutiny by the U.S. Supreme Court.

A majority of the Committee, however, believes that its proposed definition of public record is preferable for a number of reasons. First, some Committee members questioned whether *Garcetti*, which involved a public employee who was disciplined for what he argued was protected speech, was applicable in the context of open records law. Second, a majority believes that the Committee’s proposed language is preferable because it is important to link the definition of public record under KORA to the definition of government record under the Kansas records preservation act. Third, similar definitions have been used in a number of other states without legal challenge, and case law from those states may prove helpful to the courts in interpreting the new language. Finally, the Committee’s

proposed language, which uses the disjunctive “or” test, will result in a broader category of documents that will be subject to KORA.

Other Amendments Contained in SB 306/307

The Committee also reviewed other amendments to the KORA definitions of “public agency” and “public record” contained in SB 306/307. For example, SB 306/307 would strike “officer” from the term “public agency.” The AG recommended this change in order to separate flesh and blood individuals like officers and employees who have first amendment free speech rights from government entities such as public agencies that do not. See page 8 of Attachment #4.

Several Committee members had concerns about striking the term “officer” from the definition of “public agency” because it might exempt officers from numerous other KORA provisions setting out agency responsibilities. Also, the change could unsettle years of existing Kansas case law and AG opinions interpreting the definition of public agency. While the Committee ultimately agreed to leave the amendment as it stands in SB 306/307, the Committee does believe that the Revisor’s office should conduct a review of KORA, including all of the statutory references to both “officer” and “public agency,” to ensure that the change does not create unintended consequences.

SB 306/307 would also relocate the exclusions for judges and part-time officers and employees currently found in K.S.A. 45-217(f)(2)(B) and (C) to subsection (g)(2). Under current law, judges and part-time officers and employees are excluded from the definition of “public agency,” while under SB 306/307, they would be excluded from the definition of “public record.” Again, the AG recommended this change to separate living individuals (officers and employees) from non-living entities (public agencies). See page 9 of Attachment #4.

Committee members were concerned that the effect of relocating the exclusions for judges and part-time officers and employees might be to exempt the records of these individuals altogether, which was not the original intent of these provisions. The exclusions were originally intended to prevent judges and part-time officers and employees from being personally responsible for responding to KORA requests or keeping reasonable office hours for doing so; they were not intended to exclude these individuals’ records from KORA. See Ted Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 218-220 (Winter 1985).

Accordingly, the Committee agreed to recommend leaving the exclusion for judges at its original location in K.S.A. 45-217(f)(2)(B). The Committee reached a different decision, however, as to the exclusion for part-time officers and employees.

The exclusion for part-time officers and employees, also known as the 35-hour rule, excludes from the definition of public agency an officer or employee who works for a government entity that does not provide an office which is open to the public at least 35 hours a week. See K.S.A. 45-217(f)(2)(C). Again, this exclusion was apparently intended to apply only to the part-time officers and employees personally and not to the governmental entity they serve. See Ted Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 219-220 (Winter 1985).

Several Committee members noted that the 35-hour rule is difficult to understand and difficult to train others to understand. Based on feedback from city and county clerks, the Committee found that the rule does not seem to be serving any current purpose since, as a practical matter, some representative of the governmental entity must still respond to the open records request. Also, since the term “officer” is stricken from the definition of “public agency” under SB 306/307 (and the term “employee” was never included in the definition of “public agency”), it seems redundant to have a second exclusion for part-time officers and employees contained in that statute. Accordingly, the Committee recommends repealing the 35-hour rule by striking it from the statute altogether.

Privacy Concerns

The Committee acknowledged the privacy concerns related to accessing email and electronic messages that constitute public records. For example, if a public officer or employee sends an email that constitutes a public record from a private account or device, who may access that account or device to retrieve the content? Do the entire contents of the account or device become open to public scrutiny? This concern is of special importance to a public officer or employee who is also a doctor, lawyer or other professional subject to confidentiality requirements.

To aid its consideration of this issue, the Committee sought more information about the current process used by the state to retrieve emails or electronic messages that might constitute public records. The Committee invited Rodney Blunt, Deputy Chief Information Security Officer for the state, to speak on this issue.

Mr. Blunt explained to the Committee that emails sent to or from state agency accounts are stored on state servers, where they can be searched and monitored as needed. How long emails are retained on the servers depends on the content of the email and on each agency’s retention schedule, which varies from agency to agency. If a KORA request is made for emails stored on state servers, the agency determines whether the records being requested are subject to the open records act or fall under an exemption to disclosure, and it is up to the requester to go to court if they disagree with the agency’s decision.

According to Mr. Blunt, emails sent to or from external private accounts (such as Yahoo or Gmail) are not stored on state servers even if they are sent from a government PC or device. The state has no ability to access a private email account absent a court order. An agency might ask an employee to turn over private emails relating to public business, but the agency would not have the power to compel the employee to do so without a court order. Mr. Blunt stated that some agencies, as a matter of policy, prohibit employees from accessing private email accounts via a government PC and may block employees from doing so.

Mr. Blunt also explained how cell phone text messages are different from email in that they are retained by the service provider for a set length of time and not on a state server. When a state agency provides a mobile device to an officer or employee, it can exert some security controls over that device, though the level of security and cost varies. At a minimum, employees can be required to use a passcode before being allowed to connect remotely with state networks. Agencies that want more

security can create a separate “container” on a mobile device for public business, and all information in that container is maintained on the state server.

A common question Mr. Blunt receives relates to state subsidies for employees who provide their own mobile device. Employees frequently ask whether the state will have access to search their entire device, and the answer is no, unless the employee voluntarily allows access. However, to receive the subsidy, employees may be required to sign a waiver stating that they will allow an inspection of the device for sensitive information when they leave state employment and that, if they don’t allow the inspection, the state may remotely wipe the entire device.

Based on the information provided by Mr. Blunt, the Committee concluded that expanding the definition of public record to clearly include emails or text messages about public business will not unduly affect public employees’ or officers’ privacy rights. The state may already access and monitor any email sent from a state account, but it has no ability or right to access a private account. Federal law provides privacy protections for electronic communications. See, generally, the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 *et seq.* At most, a public employee or officer might be asked to turn over emails from a private account that constitute public records, but no one else could access that employee or officer’s private email account without a court order. If a court order were issued pursuant to an enforcement action under K.S.A. 45-222, the court could conduct an *in camera* review to determine which emails constitute public records that are subject to KORA. See K.S.A. 45-222(b).

Furthermore, there are existing KORA exceptions that would prevent information of a private or privileged nature from being made public. As defined under KORA, “public record” 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.” K.S.A. 45-217(g)(2). Also, KORA does not require disclosure of records that are “privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure” or of public records containing “information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” K.S.A. 45-221(a)(2) and (a)(30).

As to the concern expressed by some legislators about the privacy of their personal email accounts, the Committee noted that records of legislators are already exempt under KORA. See K.S.A. 45-217(g)(2).

Small Government Entities and Training

In drafting amendments to the KORA definition of public record, the Committee considered how small government entities at the city and county level might be affected. Based on input from cities and counties, the Committee found that small government entities are already accustomed to responding to KORA requests; however, they will need to train their officers and employees about how to handle email and text messages that may constitute public records.

The Committee believes that training public officers and employees at every level of government about the requirements of KORA and the records retention requirements of the Kansas records preservation act is essential to ensure consistent interpretation and compliance across the state. The Committee noted that a bill enacted this year, 2015 HB 2256, authorizes the Attorney General, subject to appropriations, to provide and coordinate KORA training throughout the state, including an online training program, and to consult and coordinate with appropriate organizations to provide training.

Penalty/Remedy

The Committee also reviewed the existing penalties and remedies for violations of KORA. The Committee reviewed 2015 HB 2256, which gave the Attorney General increased powers to investigate open records act violations and created a graduated system of enforcement, beginning with a consent order, a finding of violation and, finally, court action. The new law also gave the Attorney General authority to impose a fine that did not exist prior to the passage of this law. The Committee also reviewed K.S.A. 45-223, which authorizes the imposition of a civil penalty of not more than \$500 against an agency that knowingly violates KORA or intentionally fails to furnish information as required by KORA.

The Committee was particularly interested in the possible penalties and remedies for the situation of a public employee who refused to turn over private emails that constituted public records. The Committee noted that both HB 2256 and K.S.A. 45-223 apply only to state agencies and not individual employees.

The Committee noted that K.S.A. 21-5920 makes tampering with a public record a class A misdemeanor. This statute could be applied to an agency employee who destroyed a public record. The only other apparent option against an individual employee who refused to turn over public records would be for a court to hold the employee in contempt.

After reviewing the above provisions, the Committee agreed that current penalty and remedy provisions are adequate, and it made no recommendation as to any new penalty or remedy provision.

Other Possible Amendments

The Committee discussed several options for possible amendments to current law. One possibility would be to prohibit the use of private email accounts for conducting public business. Another would be to require that any email dealing with public business be forwarded to the agency. Both of these options could prove expensive, especially for small government entities such as townships and drainage districts that don't currently provide government email accounts to their officers or employees.

The Committee specifically reviewed a Missouri statute that requires any member of a governmental body who transmits a message relating to public business by electronic means to also "concurrently transmit that message to either the member's public office computer or the custodian of

records in the same format.” See Mo. Stat. Rev. § 610.025. While the Committee agreed that adopting a similar provision in Kansas might be a good idea, the Committee did not have sufficient time to research the topic further, especially as to how such a requirement might apply to text messages, or to draft a provision that would mesh with KORA. However, the Committee believes this is a topic that deserves future attention by the legislature.

Even absent a statutory provision prohibiting the use of private email accounts for conducting public business or requiring emails about public business to be forwarded to the agency, these are procedures that individual agencies might consider implementing as part of their personnel policies.

RECOMMENDATION

A majority of the Committee recommends the balloon amendments to SB 306/307 attached on the next page. The main purpose of the balloon amendments is to amend the definition of “public record” to ensure that public officers and employees who conduct public business or official duties on a private account or device would remain subject to KORA.

SENATE BILL No. 306

By Senator Baumgardner

5-14

Kansas Judicial Council
Open Records Advisory Committee
November 13, 2015
Proposed Amendments

1 AN ACT concerning the open records act; relating to definitions; public
2 agency and public record; amending K.S.A. 2014 Supp. 45-217 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. 2014 Supp. 45-217 is hereby amended to read as
7 follows: 45-217. As used in the open records act, unless the context
8 otherwise requires:

9 (a) "Business day" means any day other than a Saturday, Sunday or
10 day designated as a holiday by the congress of the United States, by the
11 legislature or governor of this state or by the respective political
12 subdivision of this state.

13 (b) "Clearly unwarranted invasion of personal privacy" means
14 revealing information that would be highly offensive to a reasonable
15 person, including information that may pose a risk to a person or property
16 and is not of legitimate concern to the public.

17 (c) "Criminal investigation records" means records of an
18 investigatory agency or criminal justice agency as defined by K.S.A. 22-
19 4701, and amendments thereto, compiled in the process of preventing,
20 detecting or investigating violations of criminal law, but does not include
21 police blotter entries, court records, rosters of inmates of jails or other
22 correctional or detention facilities or records pertaining to violations of
23 any traffic law other than vehicular homicide as defined by K.S.A. 21-
24 3405, prior to its repeal, or K.S.A. 2014 Supp. 21-5406, and amendments
25 thereto.

26 (d) "Custodian" means the official custodian or any person designated
27 by the official custodian to carry out the duties of custodian of this act.

28 (e) "Official custodian" means any officer or employee of a public
29 agency who is responsible for the maintenance of public records,
30 regardless of whether such records are in the officer's or employee's actual
31 personal custody and control.

32 (f) (1) "Public agency" means the state or any political or taxing
33 subdivision of the state or any office, ~~officer~~, agency or instrumentality
34 thereof, or any other entity receiving or expending and supported in whole
35 or in part by the public funds appropriated by the state or by public funds
36 of any political or taxing subdivision of the state.

1 (2) "Public agency" shall not include:

2 (A) ~~any entity solely by reason of payment from public funds for~~
3 ~~property, goods or services of such entity;~~ (B) ~~any municipal judge, judge~~
4 ~~of the district court, judge of the court of appeals or justice of the supreme~~
5 ~~court; or (C) any officer or employee of the state or political or taxing~~
6 ~~subdivision of the state if the state or political or taxing subdivision does~~
7 ~~not provide the officer or employee with an office which is open to the~~
8 ~~public at least 35 hours a week.~~

:

(A) Any

; or (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court

9 (g) (1) "Public record" means any recorded information, regardless of
10 form or, characteristics or location, which is made, maintained or kept by
11 or is in the possession of:

12 (A) Any public agency ~~including, but not limited to, an agreement in~~
13 ~~settlement of litigation involving the Kansas public employees retirement~~
14 ~~system and the investment of moneys of the fund; or~~

in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency

15 (B) ~~any officer or employee of a public agency [pursuant to the~~
16 ~~officer's or employee's official duties and which is related to the functions,~~
17 ~~activities, programs or operations of the public agency].~~

"Public record" shall include, but not be limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.
(3)

18 (2) "Public record" shall not include:

19 (A) Records which are owned by a private person or entity and are
20 not related to functions, activities, programs or operations funded by
21 public funds or;

22 (B) records which are made, maintained or kept by an individual who
23 is a member of the legislature or of the governing body of any political or
24 taxing subdivision of the state;

or

25 (C) ~~records of any municipal judge, judge of the district court, judge~~
26 ~~of the court of appeals or justice of the supreme court;~~

27 (D) ~~records of any officer or employee of the state or political or~~
28 ~~taxing subdivision of the state if the state or political or taxing subdivision~~
29 ~~does not provide the officer or employee with an office which is open to~~
30 ~~the public at least 35 hours a week; or]~~

31 (3) ~~(B)~~ "Public record" shall not include records of employers related
32 to the employer's individually identifiable contributions made on behalf of
33 employees for workers compensation, social security, unemployment
34 insurance or retirement. The provisions of this subsection shall not apply
35 to records of employers of lump-sum payments for contributions as
36 described in this subsection paid for any group, division or section of an
37 agency.

38 (h) "Undercover agent" means an employee of a public agency
39 responsible for criminal law enforcement who is engaged in the detection
40 or investigation of violations of criminal law in a capacity where such
41 employee's identity or employment by the public agency is secret.

42 Sec. 2. K.S.A. 2014 Supp. 45-217 is hereby repealed.

43 Sec. 3. This act shall take effect and be in force from and after its

SB 306

3

1 publication in the statute book.



January 11, 2016

Derek Schmidt
Kansas Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

Dear Derek:

Your presence at the KORA training session last week was taken as a most welcome sign of the importance you place on Sunshine Law enforcement. I appreciated seeing you there and visiting, albeit briefly, about various matters, including the Judicial Council Open Records Advisory Committee's recommended definition of "public records." As one who served on the Committee, I was interested to learn that you are considering whether the recommended definition could be indefensible under the First Amendment.

Your May 6, 2015, letter to the Revisor made clear why you favor drawing a definition of "public records" from language in *Garcetti*. For whatever it may be worth, though, my sense is that the Committee majority found the *Garcetti*-based definition to be unduly limiting and tilted toward closure rather than disclosure of public records. The limiting nature of the *Garcetti*-based definition was seen, to a significant extent, in the part that says a record is public if it is made or kept by a public officer or employee "pursuant to the officer's or employee's official duties..." (Emphasis added.) Because the phrase "pursuant to" commonly is defined to mean "in conformity with" or "in accordance with," the concern was that a *Garcetti*-based definition might be construed to mean that a record is not public if it was made or kept by a public officer or employee in contravention of his or her duties, even though the record is about public business. An example of such a record might be a falsified financial document made or kept by a public employee. In such a circumstance, a court perhaps could find that the record is not public because it was not made or kept in conformity with the employee's assigned responsibilities or, in the words of the *Garcetti* Court, "as part of what he...was employed to do." *Garcetti v. Cabellos*, 547 U.S. 410, 421 (2006). Another limiting aspect of the definition was seen in its application only to information related to "the public agency" of the officer or employee, rather than any public agency.

An additional concern about the *Garcetti*-based definition was its derivation from a dispute about freedom of speech and disciplinary actions against a public employee, rather than from the legal tradition related to freedom of information and the public interest in access to public records. My sense is that the Committee majority was uncomfortable with the idea that a definition of "public records" would be defended with reference to a precedent about a public employee's claim that he was a victim of government retaliation. The Committee majority favored the recommended definition instead, because it is rooted in the body of law traditionally associated with open government. Moreover, the Committee majority saw a significant advantage in the definition, because it is generally consistent with the definition of "government records" in K.S.A. 45-402(d) of the Government Records Preservation Act.

So far as I could tell, the Committee majority saw no reason to fear that a definition of "public records" worded in a traditional way and not based on *Garcetti* would be vulnerable to a

serious First Amendment attack. In an effort to assess the potential for such attack, I have been searching for court cases in which states' traditionally worded definitions of "public records" have been challenged as an abridgment of First Amendment freedom. So far, my search has indicated that a dispute over a definition of "public records" is far more likely to center on privacy than freedom of expression. Moreover, laws with a traditional definition of "public records" can be successfully defended even if challenged on First Amendment grounds. One example is *Doe #1 v Reed*, 561 US 186 (2010), in which the U.S. Supreme Court rejected a challenge to disclosure of referendum petitions under Washington state's Public Records Act (PRA). In Wash. Rev. Code 42.56.010(3), the PRA defines a "public record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency." The Washington Supreme Court, in *Nissen v. Pierce County*, 357 P.3d 45 (Wash. 2015), has construed the term "agency" to extend to public employees. Relying on precedents that date back at least to 1944, the *Nissen* court equated action by a public agency's employee with action by the agency itself. Thus, the court held, text messages sent or received by an agency employee acting in an official capacity are public records, "even if the employee uses a private cell phone." *Nissen*, 357 P.3d 45, 49.

Ultimately, the Committee majority concluded, after surveying other states' laws, that a traditionally worded definition of "public records" is the best way to denote records that memorialize how a public agency is conducting the public's business and are therefore public. The U.S. Supreme Court expressed this basic concept of a public record with reference to the federal Freedom of Information Act when it said that the FOIA's "core purpose" is to enable citizens to gather information about "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

More specific characterizations of public records by the Court appear in such cases as *Wilson v. United States*, 221 U.S. 361 (1911). In *Wilson*, the Court upheld a contempt citation imposed against a custodian of records for refusing to produce them in response to a subpoena. The Court referred to public records as documents "made or kept in the administration of public office." *Wilson*, 221 U.S. 361, 380. The Court also said documents are public records if they are "required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." *Id.* In still another case, *Public Affairs Associates, Inc., v. Rickover*, 369 U.S. 111, 113 (1962), the Court characterized a public record as information developed "in relation to" official duties.

It has occurred to me that the Committee majority might have embraced a proposal to define records as public if they are made or kept "in relation to," rather than "pursuant to," the official duties of a public officer or employee. In any event, my sense is that the definition recommended by the Committee was viewed by the majority as being fully in accord with the existing body of accepted law that affirms the public's interest in public records and upholds the public's right of access to them.

It was a pleasure to see you last week. I hope the foregoing thoughts might be of some use as you consider the Committee's recommended definition.

With very best wishes,



Mike Kautsch
Professor



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January 28, 2016

Mike Kautsch
Professor of Law
University of Kansas School of Law
Green Hall, 1535 W. 15th Street
Lawrence, KS 66045-7608

Dear Mike:

Thank you for your letter dated January 11, 2016. I enjoyed seeing you at the KORA training session last month in Kansas City, and I always enjoy attending those trainings throughout the state as part of our commitment to open government training. I look forward to seeing you again as the attorney general's office implements its expanded statutory training responsibilities under the KORA and KOMA.

I am grateful for your taking time to explain to me your understanding of the Judicial Council committee's ("the Committee") reasoning in rejecting the "pursuant to official duties" standard for determining whether an email from a private account is a "public record" that may be subject to production pursuant to a request under the Kansas Open Records Act (KORA). The Committee's recommendation is now contained in Senate Bill 361, and the Committee's preferred language appears on page 2, lines 15-17 of that bill as introduced.

I am in agreement about the objective for any amendment to the KORA related to private emails: Public employees should not be able to evade KORA by conducting their work communications on private accounts or using private devices. Thus, the issue for us to resolve is what statutory language is most likely to accomplish that objective without running afoul of the First Amendment. While I appreciate your letter's assurance that "the Committee majority saw no reason to fear that a definition of 'public records' worded [as in Senate Bill 361] and not based on *Garcetti* would be vulnerable to a serious First Amendment attack," I hope you will understand that I remain concerned. Perhaps my sensitivity to these issues arises because in the event a state employee were to sue the state or one of its agencies alleging that the application of KORA to the employee's private emails violates the employee's First Amendment speech rights, it would be my office (not the Committee) obliged to provide a defense (and bear the accompanying cost thereof) against such a lawsuit.

Our disagreement about language is this: I have recommended to amend K.S.A. 2014 Supp. 45-217(g)(1) and its appropriate subsections to read:

“Public record” means any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of ... 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 the public agency.*” (emphasis added to show contrast)

The Committee prefers to amend that statute to read:

“Public record” means any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of ... any officer or employee of a public agency *in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency.*” (emphasis added to show contrast)

Essentially, our point of disagreement comes down to which line of U.S. Supreme Court cases should be followed by this legislation: The *Garcetti* line of cases or the separate line involving the four other U.S. Supreme Court cases you mentioned: *Reed*, *DOJ v. Reporters Committee*, *Wilson* and *Rickover*. I have carefully reviewed the case law you provided and, having done so, remain convinced that the preferable way to accomplish our shared objective is to amend Kansas law to follow the *Garcetti* line of cases. In this letter, I will expand on my reasoning in hope of persuading you of its merit.

Why *Garcetti* is controlling precedent here

As you know, I set forth in my May 6, 2015, letter to the Revisor my concern that the current version of the Kansas Open Records Act is so broad that any attempt to apply it to the private emails of public employees would be constitutionally overbroad and would impermissibly infringe on public employees’ First Amendment speech rights. The threat that Big Brother might be watching anything a public employee writes in a private email account that might in any way “relate to” his or her work would impermissibly chill constitutionally protected speech of public employees. As the Supreme Court explained in *Garcetti*:

“... a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” *Garcetti*, 547 U.S. at 411.

Thus, the First Amendment requires that any effort by the state, as an employer, to compel the disclosure of its employees’ speech must be drawn narrowly. In my letter to the Revisor, I

offered several examples of the manner in which the broad sweep of KORA as currently written would, in my view, offend the First Amendment. The whole point of any legislation that amends KORA to apply it to private emails is to avoid overbreadth that would impermissibly chill state employees' constitutionally protected speech and thus risk rendering the statute unconstitutional.

Your letter suggests that the Committee may have disfavored the *Garcetti* test because the Committee was "uncomfortable with the idea that a definition of 'public records' would be defended with reference to a precedent about a public employee's claim that he was a victim of government retaliation." But I would suggest that is precisely why *Garcetti* is the more apt precedent here. Any legal challenge to an application of KORA to the private emails of public employees is likely to arise in the form of a public employee objecting to a demand by his or her public employer to produce certain emails (or to grant the employer access to the private email account in order for the employer to determine what is and is not subject to production) so that the employer might comply with a KORA request. Thus, any enforcement of KORA in this context necessarily implicates the government "employer's ability to leverage the employment relationship" to obtain the employee's private emails, which is precisely what *Garcetti* and its progeny address.

None of the Supreme Court cases you mentioned in your letter sheds light on how the First Amendment applies in the context of a public employer-employee relationship. *Reed*, 561 U.S. 186, involved one group of private citizens trying to obtain through a state open records law what was unquestionably a public record held by a government agency, and the content of that record had been created by another group of private citizens and then submitted to the government for official purposes; the case did not involve any public employer-employee relationship and said nothing about public employee speech. In *DOJ v. Reporters Committee*, 489 U.S. 749, the Court was called upon to interpret the federal Freedom of Information Act; the case says nothing about how the First Amendment is to be applied. *Wilson*, 221 U.S. 361, which was decided 105 years ago, applied the Fourth, Fifth and Sixth Amendments to records produced pursuant to a grand jury subpoena; it did not interpret the First Amendment and it did not involve a public employer-employee relationship. *Rickover*, 369 U.S. 111, did involve a public employer-employee relationship, but it is unenlightening because the Supreme Court disposed of the case on procedural grounds and never reached any of the substantive questions. Thus, none of these cases speaks to a situation in which a government employer demands from one of its employees access to that employee's speech contained in the employee's private emails or offers enlightenment on how the First Amendment might apply in such a circumstance. *Garcetti*, by contrast, does.

Garcetti's "pursuant to official duties" test is broad

For the reasons above, I think the *Garcetti* line of cases is controlling here. I would disagree, however, with the concern expressed in your letter that some may think "the *Garcetti*-based definition to be unduly limiting and tilted toward closure rather than disclosure of public records." To the contrary, I think post-*Garcetti* case law makes clear that the "pursuant to official

duties” test is broad in application. I did not expand on this point in my letter to the Revisor, but because of the concern now expressed I will do so here.

The U.S. Supreme Court decided *Garcetti* in 2006. In 2014, it unanimously reaffirmed the *Garcetti* test in *Lane v. Franks*. In that case, the Supreme Court more expressly than in *Garcetti* explained that a public employer’s practices (including, I would infer, any implemented pursuant to a state law, such as KORA) that would tend to chill their employees from speaking (or writing, I would infer) about matters that relate to their public duties are impermissible under the First Amendment. As the Court explained:

“There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. *The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.*” *Lane v. Franks*, 134 S. Ct. 2369, 2377, (2014)(citations and quotation marks omitted)(emphasis added).

By approving a “pursuant to official duties” test and rejecting a “related to” official matters test, the *Garcetti* Court essentially taught that in evaluating a public employer’s regulation of its employees’ speech the First Amendment requires a *purpose*-based test, not a *content*-based test in determining what employee speech may be regulated by the public employer. The *Lane* Court reaffirmed that distinction:

“...the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is *whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.*” *Lane*, 134 S. Ct. at 2379(emphasis added).

Lane reaffirmed that the “pursuant to” test satisfies the First Amendment in the context of a public employer regulating public employee speech: In *Garcetti*, “we held that when a public employee speaks ‘pursuant to’ his official duties, he is not speaking ‘as a citizen,’ and First Amendment protection is unavailable.” *Lane*, 134 S. Ct. at 2383 (Thomas, J, concurring).

The Tenth Circuit Court of Appeals has explained that the *Garcetti* “pursuant to official duties” test is broad:

“...speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform. The ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting ‘in his or her professional capacity.’ See *Garcetti*, 126 S.Ct. at 1960. Consequently, if an employee engages in speech during the course of performing an official duty and the speech *reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official*

duties.” Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007)(emphasis added).

But the Tenth Circuit also reaffirmed that not “all speech about the subject matter of an employee’s work [is] necessarily made pursuant to the employee’s official duties.” *Brammer-Hoelter*, 492 F.3d at 1204. In separating speech made “pursuant to official duties” from that which is not, courts “must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship.” *Brammer-Hoelter*, 492 F.3d at 1204.

More recently, the 10th Circuit has explained more comprehensively the approach to applying the “pursuant to official duties” test:

“There are no bright line rules to make this determination [whether speech at issue is pursuant to official duties]. Instead, the court “take[s] a practical view of all the facts and circumstances surrounding the speech and the employment relationship.” *Brammer-Hoelter*, 492 F.3d at 1204. Additionally, this court’s precedents have “taken a broad view of the meaning of speech that is pursuant to an employee’s official duties.” *Thomas v. City of Blanchard*, 548 F.3d 1317, 1324 (10th Cir.2008) (quotation omitted). This court has further emphasized that no one factor is dispositive. The guiding principle is that speech is made pursuant to official duties if it involves “the type of activities that [the employee] was paid to do.” *Green*, 472 F.3d at 801. Stated another way, “if an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee’s performance of the official duty, the speech is made pursuant to the employee’s official duties.” *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010)

Thus, the “pursuant to official duties” test, as applied in the case law, is broad. Its breadth would cover, I think, the situation you raised as a concern in your letter. For example, a public employee who falsified a financial document somehow connected to his or her work surely would be covered because “there are no bright line rules” but “[t]he guiding principle is that speech is made pursuant to official duties if it involves the type of activities that the employee was paid to do,” *Chavez-Rodriguez*, 596 F.3d at 713 (punctuation omitted), and merely doing those activities falsely would not seem to evade this definition. That conclusion is buttressed because “...speech may be made pursuant to an employee’s official duties even if it deals with activities that the employee is not expressly required to perform.” *Brammer-Hoelter*, 492 F.3d at 1203. Similarly, it seems to me reading the “pursuant to official duties” language along with the phrase “any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of” might address your concern about the scope of agency records covered.

Conclusion

Under the *Garcetti* test if it were incorporated into Kansas law, a public employee’s private email would have been created “pursuant to official duties,” and thus subject to KORA, if the “employee engages in [creating the email] during the course of performing an official duty and

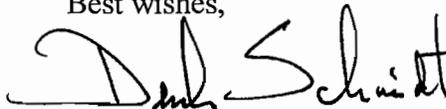
the [email] reasonably contributes to or facilitates the employee's performance of the official duty." *Chavez-Rodriguez*, 596 F.3d at 713. I have mulled the words at length, and I fail to see how, as a matter of the English language, that test differs materially in application from the test proposed by the Committee. Of course, one might interpret the Committee's wording as broader because it could be applied to emails that are merely "in connection with" public matters or that "bear[] upon" public or official activities, but reading the Committee's words so broadly really renders them nothing more than a synonym for the "related to" test, which is the defect in the current law and which has been expressly rejected by the U.S. Supreme Court. As described above, the case law makes clear it is not merely the *subject matter/content* of a public employee's speech that renders it subject to regulation, it is the *purpose* of the speech.

To the extent there is concern, as your letter suggests, that under the "pursuant to official duties" test a public employee might be able to send an email "in contravention of his or her duties" that would not be subject to KORA, that really is a quarrel with the manner in which the U.S. Supreme Court has interpreted the First Amendment to apply in the public employee speech context. I would respectfully suggest that is beyond the power of the Kansas Legislature to alter.

In light of the broad definition the courts have given the "pursuant to official duties" test, I do not think it differs much *as a practical matter* from the "in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency" test the Committee has recommended. The real difference is that the U.S. Supreme Court has stated repeatedly that the "pursuant to official duties" test satisfies the First Amendment, while it has made no such statement about the Committee's formulation of words. Moreover, the lower courts have further interpreted the "pursuant to official duties" test, while to my knowledge the Committee's novel wording has no such body of law to guide its interpretation. Given that choice, and although I respect the Committee's deliberations and the legal prowess of its members, I would continue to recommend using the test that has been approved by the U.S. Supreme Court rather than crafting a newly worded test and hoping it proves constitutionally satisfactory.

I trust you will review my legal analysis, which is supported by the substantial weight of the law, and see that my only interest is in preventing needless and expensive litigation by the use of untested language. As I stated in the beginning, we agree that recorded information constituting or transacting government business should be subject to the KORA, regardless of whether it is recorded on a public or private email account. Therefore, I look forward to advancing a bill that will achieve that objective and still be so likely to survive a Constitutional challenge that potential challenges are dissuaded before they are brought.

Best wishes,

A handwritten signature in black ink that reads "Derek Schmidt". The signature is written in a cursive, flowing style.

Derek Schmidt
Kansas Attorney General

1 (2) "Public agency" shall not include:

2 (A) Any entity solely by reason of payment from public funds for
3 property, goods or services of such entity; *or* (B) any municipal judge,
4 judge of the district court, judge of the court of appeals or justice of the
5 supreme court; ~~or (C) any officer or employee of the state or political or
6 taxing subdivision of the state if the state or political or taxing subdivision
7 does not provide the officer or employee with an office which is open to
8 the public at least 35 hours a week.~~

9 (g) (1) "Public record" means any recorded information, regardless of
10 form ~~or~~, characteristics *or location*, which is made, maintained or kept by
11 or is in the possession of:

12 (A) Any public agency ~~including, but not limited to, an agreement in
13 settlement of litigation involving the Kansas public employees retirement
pursuant to the officer's~~ ~~system and the investment of moneys of the fund; *or*~~

or employee's official 5 (B) ~~any officer or employee of a public agency in connection with the
6 transaction of public or official business or bearing upon the public or
7 official activities and functions~~ of any public agency.

duties and which is 8 (2) "Public record" shall include, but not be limited to, an agreement
related to the functions, 9 in settlement of litigation involving the Kansas public employees
activities, programs or 0 retirement system and the investment of moneys of the fund.
operations

21 (3) "Public record" shall not include:

22 (A) Records which are owned by a private person or entity and are
23 not related to functions, activities, programs or operations funded by
24 public funds ~~or~~;

25 (B) records which are made, maintained or kept by an individual who
26 is a member of the legislature or of the governing body of any political or
27 taxing subdivision of the state;

28 ~~(3) "Public record" shall not include; *or*~~

29 (C) records of employers related to the employer's individually
30 identifiable contributions made on behalf of employees for workers
31 compensation, social security, unemployment insurance or retirement. The
32 provisions of this subsection shall not apply to records of employers of
33 lump-sum payments for contributions as described in this subsection paid
34 for any group, division or section of an agency.

35 (h) "Undercover agent" means an employee of a public agency
36 responsible for criminal law enforcement who is engaged in the detection
37 or investigation of violations of criminal law in a capacity where such
38 employee's identity or employment by the public agency is secret.

39 Sec. 2. K.S.A. 2015 Supp. 45-217 is hereby repealed.

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