

The following is an email sent to Kansas Attorney General Morrison's office in regard to a County's obligation to share high-resolution aerial photography with rural water districts and cities within the County's tax base.

Sir,

I understand that according to [K.S.A. 45-219](#), fees for records "shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available." My question is, what category does high-resolution aerial photography fall into? If the aerials are not required by the state and are purchased with taxpayer money to benefit only one or two county departments, are they considered records subject to K.S.A. 45-219?

Thank you in advance for your consideration.

Sincerely,

Pete Koenig
GIS Coordinator
Kansas Rural Water Association

The response was from Theresa Bush, Kansas Assistant Attorney General. It reads:

Dear Mr. Koenig [*sic*]:

Attorney General Morrison asked that I respond to your email, received by this office on 7/3/07, asking about the fees that a public agency may charge requesters asking for copies of photographs possessed by that agency. You cite to K.S.A. 45-21 and ask if additional costs may be charged to persons requesting copies of special aerial photographs created for one county department. Copies of all Kansas statutes, including those cited herein, may be viewed on-line at <http://www.kslegislature.org>

The KORA applies to all public records. Public records are defined by KSA 45-217 to mean: "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...." Thus, any document in any format meeting this definition qualifies as a public record subject to the KORA. The KORA makes no special exception for nor is there any specific mention of aerial photographs.

The Kansas Open Records Act (KORA) permits a public agency to recoup the actual costs associated with providing copies of public records. This can include the time of staff needed to respond to the request and other costs directly associated with complying with a record request. The actual costs associated with each record request is necessarily a fact issue, which can only be determined exactly in each case/situation. Generally, the KORA does not allow public agencies to include the costs of creating the record in the first place, because presumably that was done as part of the business of the public agency in question, and tax dollars supported such efforts in the first place. Thus, requiring record requesters to pay overhead costs (such as building improvements, equipment rental, staff time spent creating the records, etc.) is not allowed by the KORA. For example, although a county may spend a great deal of money purchasing a computer system, and then inputting information into that system, the costs of that purchase and process may not be passed along under the KORA.

Record requesters may be charged any fees that actual and directly relate to their request - not to the original creation of the records in question.

However, K.S.A. 45-219(a) states that a public agency is not required to provide copies of specific types of public records; " A public agency shall not be required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices, unless such items or devices were shown or played to a public meeting of the governing body thereof, but the public agency shall not be required to provide such items or devices which are copyrighted by a person other than the public agency." Thus, a public agency may decline to make copies of such records.

Nevertheless, K.S.A. 45-220 does not provide a similar exception to the duty to provide access to public records in such formats. Thus, there may be a duty to allow any requester access to such records (viewing/listening rights) and the persons thus provided access may then in some cases re-tape or re-photograph the materials.

We do not have any formal Attorney General Opinions on a situation wherein a public agency chooses to provide copies of a public record that they are not required to release and whether that decision allows the public agency to charge more than is normally allowed by the KORA. Thus, this is one legal issue that we cannot answer for you. We can only issue new Attorney General Opinions in accordance with the policy and procedures set forth at <http://www.ksag.org/files/shared/opinions.policy.pdf> Thus, we suggest you contact the attorney representing the public agency in question, to obtain their legal advice on this issue. Should they require our legal advice, an opinion request may be submitted to our office in accordance with this policy.

I hope you find this response helpful. Please feel free to again contact this office on any matter of concern.

Sincerely,

Theresa Marcel Bush
Kansas Assistant Attorney General
Office of Kansas Attorney General Paul Morrison
LOGiC Division
120 SW 10th St.
Topeka, Kansas 66612
785-296-2215

I asked Ms. Bush for her permission to post this exchange on the KRWA web site, to which she replied:

Pete:

My response is an open record so you (and anyone else) are [*sic*] free to do with that document as they wish. However, the official statement on the KORA approved by the Attorney General himself is posted on-line at <http://www.ksag.org/content/page/id/63> and I believe this information may be of great help to anyone with KORA questions! The fees that a COUNTY may pay [*sic*] to a private entity in order to acquire photographs (paying a vendor for a service) are [*sic*] not an issue covered by the KORA. Rather, the KORA covers public records as defined by the KORA. Finally, because a public agency is not required to provide copies of public

records that meet the terms described in KSA 45-219(a), there may still be some question as to whether fees for providing copies of such records (i.e. photographs) are in fact subject to the limitations of the KORA. That is the unresolved issue mentioned in my first response to you.

Sincerely,

Theresa Marcel Bush
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