

# Legally ( Relevant



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## Checking In on the Kansas Open Records Act

**A** recent enforcement action by the Kansas Attorney General has brought back into focus aspects of the Kansas Open Records Act (KORA).

The current KORA law was enacted in 1984 and applies to all public agencies in Kansas, including cities and RWDs. The stated purpose of KORA is to make public records open to the public. There are exceptions, some of which are discretionary (the public agency can make the record public but is not required to), and some exceptions are mandatory (the public agency is not to make the record public). Not only are there rules for which records are to be made public, there are deadlines to comply with,

restrictions on what costs if any in making those records available can be passed along to requesters, and other rules. KORA compliance can be complex.

For most larger public agencies, KORA requests occur frequently, and staff are familiar with how to handle these requests in compliance with the law. However, for many smaller agencies, requests may be infrequent and unfamiliar. Fortunately, there are many excellent resources available to guide agencies on their responsibilities concerning KORA. The Attorney General has a number of such resources, including live training sessions, published guides, FAQs, and training materials that can be accessed online. See [www.ag.ks.gov](http://www.ag.ks.gov). Still, there may be some instances where the agency may feel it necessary to consult its attorney, or even involve its attorney in responding to a request for records. It is such an instance that brings us back to the Attorney General's recent enforcement action.

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## The Frontenac Case

In September 2019, the City of Frontenac's city council voted 6-2 to fire the city attorney, city administrator and city clerk. The mayor resigned, terming the firings "outrageous". A news reporter then sent a written KORA request to the city requesting all emails and texts, business and personal, between council members that concerned the firings. The request asked to be notified if fees to be charged by the city for complying with the request were expected to exceed \$100.

A week later the city responded with a letter stating that it had done a preliminary assessment of the request, that it would charge \$25/hr. per employee for staff time in researching and copying the records, \$.25 per photocopy made, and \$225/hr. for attorney time in responding to the request.

The letter concluded by requesting an advance payment of \$3,500.

The city next received a letter from the Kansas Press Association threatening legal action based in part on the city's fee request. In response the city began work on a revised fee estimate, drastically reducing the advance payment down from \$3,500 to \$520, but failed to send that revised fee request to the reporter before the reporter sent a KORA violation complaint to the Attorney General.

## The Attorney General Enforcement Action

The AG opened an investigation based on the reporter's complaint. The city cooperated in the investigation. The result, a written Finding of Violation, Case No. 2020-OG-0001, filed on February 11, 2020, concluded that the city had violated KORA and imposed sanctions on the city per the order.

In summary, the AG determined that the city had violated the KORA in several respects as it demanded payment in order to provide the requested records. These include failure to specify in that initial estimate



how these costs had been determined, and most importantly how they represented the city's "actual cost" of providing copies of the records requested as required by law. The AG acknowledged that the city had been working on a revised cost estimate, but as it had failed to send that revised estimate to the reporter the AG characterized that effort as being 'too little, too late'.

The real crux of this dispute would seem to be the attorney's fees that the city apparently estimated to be almost \$3,000 at \$225/hr. There is no discussion in the AG's order as to whether the attorney's services were actually needed to provide the access, and the order makes a point of saying that attorneys may charge public agencies for their services. Nothing suggests that the attorney's rate to the city is unreasonable, but the order concludes that passing those costs along at the rate of \$225/hr. to a records requester under KORA is per se unreasonable without a 'substantial' cut in that rate. In other words, the public agency may well employ an attorney's services in connection with a KORA records request, and it may have to pay \$225/hr. for those services, but it will need to absorb a portion of those costs that cannot be passed along to the requester. How much is a 'reasonable' expense for attorney's fees that can be passed along? The order doesn't say.

## Other Lessons Learned

KORA requires that a public agency must "act upon" (respond to) a record request as soon as possible, but in any event within three business days. Some requests that involve a substantial number of records or substantial amount of research will take longer to perform but a response still needs to be made within the required time, explaining the delay. RWDs and cities need to be prepared to give priority to requests, and be prepared with a policy that sets protocols on how requests will be handled, when fees will be charged, and the amounts and basis of those fees.

It is also worth noting that the reporter's request to Frontenac asked for all "personal and work texts and emails" regarding the firing of city employees. Regardless of the account or device used to produce communications by public agency officials concerning public business, such communications between officers and employees are "public records" that are subject to the public's right to inspect and copy. The lesson here to officers and employees is clear: just because you're using your personal phone or computer and not one provided by your city or RWD does not mean that communications concerning public business can be kept private. Ownership of the device and/or account is irrelevant – it is the content of the communication that matters. Certain information in that communication may be redacted, such as the name of a private individual who had made a complaint about a public employee, in order to maintain that individual's privacy, but the record of itself is open to the public. However, the Attorney General did note that a different rule would apply to a member of the "governing body" of the

city, in that the personal devices of these persons would not be subject to search. Thus, board members of a district or city council members own phones or computers are not included as being searchable for these records. If personal records are found on city or RWD computers, after being sent via email or otherwise recorded, they are subject to disclosure. In addition, if board members or councilpersons are given city phones or computers, the communications likely would not be the exclusive property of that person, and would have to be disclosed. It is only information that is solely held on personal devices for members of the governing body that would be excepted from disclosure.

### Conclusion

There are about 4,000 public agencies in Kansas, including RWDs and cities, that are subject to the KORA. For many of these, KORA requests are routine. For others, requests can be challenging. Many good resources are available. Be prepared for requests by learning about KORA, and set up protocols in advance for how to respond to requests.



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