# Legally Relevant

## Open Records and Open Meetings in the Electronic Age

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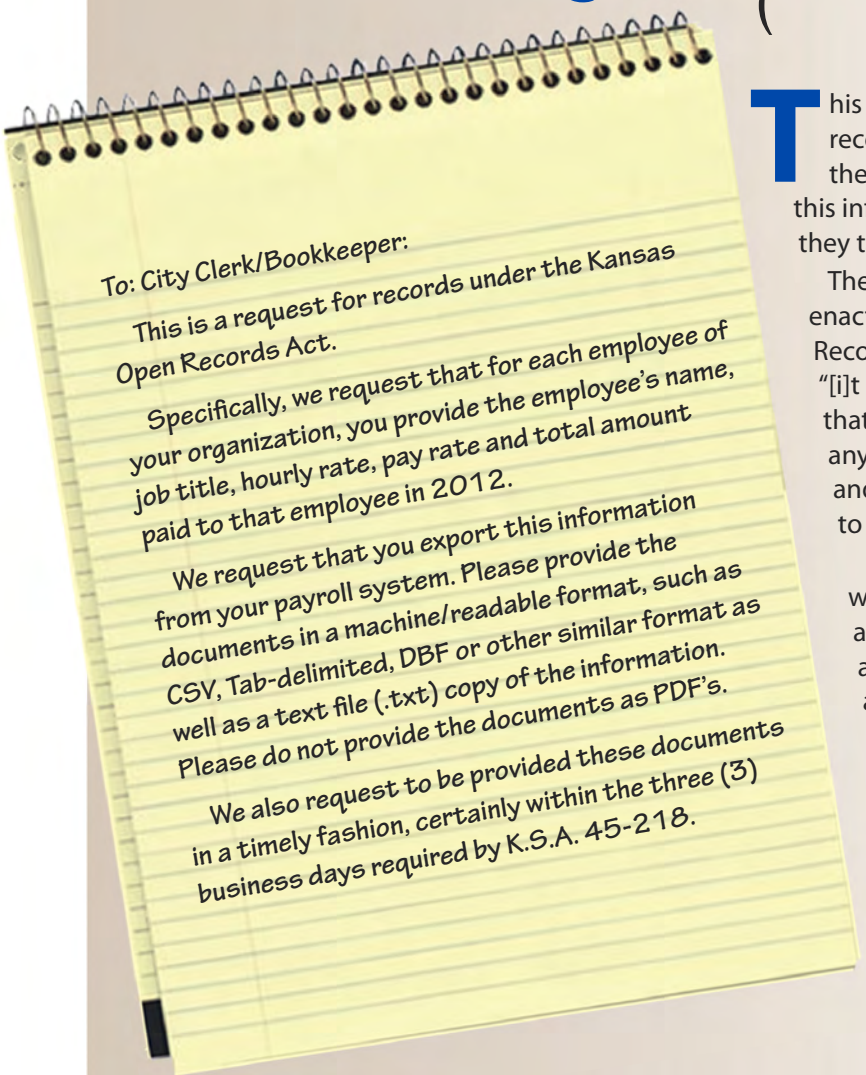


This is an abbreviated version of a request recently received by a small city in Kansas. The first question the city Clerk had was "Do we have to provide all this information?" The second question was "What are they talking about?"

The Kansas Open Records Act ("KORA") was first enacted in 1983, with roots that go back to the Public Records Inspection Act in 1957. KORA provides that "[i]t 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 a policy."

As to the first question asked by the Clerk, "Do we have to provide all this information?" The answer is "yes." This is one of the most frequently asked questions, and the source of no small amount of irritation. However, city and rural water/sewer district employees are employees of a municipality or subdivision of the state. There is no information more fundamental to open government than the expenditures of public money. The public has a right to know the salaries being paid to public employees, and this information is an open record and obtainable under the KORA. Att'y Gen. Op. No. 2010-3.

State and federal law require that certain records are confidential and are not to be made open to the public (for example, information concerning a medical condition or health care provided to identifiable employees). Certain other records may be, but are not required to be, open to the public. State law lists fifty different categories of records not required to be disclosed, including things such as personnel performance ratings, engineering estimates made relative to public improvements, and confidential records relating to security measures that protect water production, transmission or distribution facilities. These "discretionary exceptions" to the KORA expressly do not apply to "the names, positions, salaries or actual compensation . . . of officers and employees of public agencies once they are employed . . ." K.S.A. 45- 221(a)(4).

The other question about the records request made above is: Must the city provide the information in the format requested by the requestor? The answer to this question is not as clear cut. State law requires that public agencies must establish reasonable times when "persons may inspect and obtain copies of the agency's records". K.S.A. 45-220(d). In that context, what does "inspect or obtain copies" mean?

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Obviously, a great deal has happened in the way we create and maintain records since 1983, not to mention since 1957. At that time payroll records for small towns and districts were likely kept on a handwritten payroll ledger. To "inspect" that record would have meant the clerk pulling out the file and opening the book to the proper page, possibly pulling out pages so they could be photocopied.

Likely that is not the case anymore, as most such records are kept electronically. "Inspection" of that record may mean looking at a screen, or a printed copy of selected pages from the electronic file where that information is kept.

But does "copy" also mean that the requestor has the right to insist that the agency transmit that record electronically; or beyond that, request that not only it be transmitted electronically but that it be formatted in a particular electronic format? Are there hazards to the city or district in complying with such a request?

There is nothing in the KORA that requires an agency to provide copies of its records in a format specified by the requestor. In the case of the city receiving the request described at the beginning of this article, it lacked the capability to provide the requested records in the format requested, certainly not without hiring outside technical assistance, and certainly not within the three days specified by KORA for providing of the requested information. The Attorney General has advised that costs for a vendor to provide computerized records to a requestor may be charged to that requestor (Att'y Gen. Op. No. 2009-14). KORA offers some additional guidance in such situations, providing that copies should be made at the place where the records are kept, but if impractical to do so, the agency can make arrangements for use of other facilities and charge the reasonable costs of complying with the request to the person making the request. K.S.A. 45-219(b). Specifically regarding computerized records, the law

### When is an electronic exchange a "meeting" under the Open Meetings Act?

The Kansas Open Meetings Act ("KOMA") provides that, with certain exceptions, meetings of the governing bodies of public agencies, including cities and districts, be open to the public. Just as technology has radically changed the way records are kept, technology has likewise changed the way in which information and opinions are exchanged. State law has long held that members of a governing body need not be together in person to constitute a meeting, as telephone conference calls, and even calling trees, can constitute a meeting for purposes of the KOMA. However, "reply all" e-mail exchanges, list serves and instant messaging have often largely replaced the telephone as the means of communication in the Twenty-first Century. So what does KOMA require regarding these kinds of exchanges?

The KOMA requires that "interactive communications in a series," presumably meaning e-mails and other electronic forms of communication, such as text messages, be open when the following three elements are met: (1) they collectively involve a majority of the membership of the body or agency, (2) they share a common topic of discussion concerning the business or affairs of the body or agency, and (3) are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency." K.S.A. 75-4318.

The Attorney General has advised that simply sending a message to other board members would not constitute interactive communication within the meaning of KOMA. (Att'y Gen. Op. No. 98-26). In order for the communication to be "interactive," there must be a mutual or reciprocal exchange between members of a body or agency subject to KOMA. (Att'y Gen. Op. No. 2009-22). As such, "interactive communication" does not occur when a member of a body responds to a non-member and shares his response with other members, but an "interactive communication" would occur if the discussion continues among a majority of the members and the other elements mentioned above are met.

With the ease that electronic messages allow a sender to forward messages, add recipients and "reply all," an innocuous email between two members of the body may quickly trigger the requirements of KOMA if a majority of members are added to the discussion. Given that many of us occasionally hit the "reply all" button unknowingly, electronic discussions concerning the business or affairs of the body or agency chains pose a risk of a KOMA violation. Likewise, an e-mail chain discussing topics unrelated to the business or affairs of a body or agency may trigger the requirements of KOMA if any one member of the body changes the topic of conversation and intends to reach an agreement on a matter that would require binding action to be taken by the body or agency.

provides that these fees shall include "only the cost of any computer services, including staff time required." One other provision to note: KORA does not require an agency to electronically make copies of public records by allowing anyone to connect an electronic device provided by that person to any electronic device of the agency. K.S.A. 45-219(g).

There are hazards in supplying computer data in electronic formats. Many computer programs not only store the basic data you see on your computer screen, but also additional, unseen data for the program to use, which is called "metadata." Sometimes this information is useless or unreadable to the person requesting the data. However, unless you are very familiar with the computer program so that you know that there is no metadata in the information sent, it is possible that you may be sending them more than just the information requested. While it may be unlikely that metadata will be sent that could contain confidential information, prudence may dictate sending information in a text format, or by hard copy, to avoid this possibility. In addition, sending raw data subjects that data to manipulation. As such, if the data is sent in any electronic format, an electronic copy should be stored in order to determine if a manipulation has later occurred.

## *Conclusion*

KORA and KOMA contain important principles of openness and fairness in government. Compliance was much easier when records were mostly paper and meetings were in person or by phone. New technologies present new challenges, and local governments need to understand how to meet their legal duties.