

AGENDA

KANSAS LOTTERY GAMING FACILITY REVIEW BOARD 10 a.m., Thursday, December 20, 2007

KANZA ROOM OF MEMORIAL UNION
Emporia State University
1200 Commercial
Emporia, Kansas

- A. CALL TO ORDER
- B. APPROVAL OF THE AGENDA
- C. INTRODUCTIONS OF MEMBERS AND STAFF
- D. OPENING COMMENTS BY CHAIRMAN
- E. REVIEW AND DISCUSSION OF RESPONSIBILITIES UNDER THE KANSAS OPEN MEETINGS ACT
 - Staff Presentation: Patrick Martin, Assistant Attorney General
 - Staff Memorandum: [Attached](#)
- F. REVIEW AND DISCUSSION OF RESPONSIBILITIES UNDER THE KANSAS OPEN RECORDS ACT
 - Staff Presentation: Patrick Martin, Assistant Attorney General
 - Staff Memorandum: [Attached](#)
- G. REVIEW AND DISCUSSION OF THE BOARD'S RESPONSIBILITIES UNDER THE KANSAS EXPANDED LOTTERY ACT
 - Staff Presentation: Stephen Martino, Executive Director
 - Staff Memorandum: [Attached](#)
- H. BOARD ITEMS
 - 1. Discussion, consideration and possible action on the Lottery Gaming Facility Review Board code of conduct
 - Staff Presentation: Stephen Martino and Patrick Martin
 - Code of Conduct: [Attached](#)
 - 2. Discussion, consideration and possible action on requiring Lottery Gaming Facility Review Board members to file Statements of Substantial Interest
 - Staff Presentation: Stephen Martino
 - 3. Discussion, consideration and possible action on hiring expert consultants for Lottery Gaming Facility Review Board
 - Staff Presentation: Stephen Martino
 - Staff Memorandum: [Attached](#)
 - 4. Discussion of Lottery Gaming Facility Review Board process and meeting schedule
 - Staff Presentation: Stephen Martino
 - Expanded Lottery Act calendar of deadlines: [Attached](#)

5. Discussion, consideration and possible action on Lottery Gaming Facility Review Board member education initiative

Staff Presentation: Stephen Martino

I. PUBLIC COMMENTS

J. STAFF REPORTS

1. Executive Director
2. Assistant Attorney General
3. Director of Administration

K. DISCUSSION BY BOARD MEMBERS

L. OTHER MOTIONS

M. ADJOURNMENT

Kansas Open Meetings Act (KOMA)

**Prepared by Paul Morrison, Attorney General
and
Theresa Marcel Bush, Assistant Attorney General**

Revision date: January 2007

I. PURPOSE AND CONSTRUCTION

- A. It is the public policy of Kansas that meetings be open to the public because "a representative government is dependent upon an informed electorate. . . ." K.S.A. 75-4317
- B. The act is interpreted liberally and exceptions narrowly construed to carry out the purpose of the law. *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 669 (1986)

II. BODIES SUBJECT TO THE KOMA

- A. Is the group subject to the KOMA?--two concurrent requirements: K.S.A. 75-4318
 - 1. All legislative and administrative bodies, state agencies, and political and taxing subdivisions.
 - 2. Which receive or expend and are supported in whole or in part by public funds.
- B. Specific Bodies Subject to the KOMA:
 - 1. Political and Taxing Subdivisions include: cities, counties, townships (AG Opin. No. 81-288); school districts, community colleges (AG Opin. No. 81-258); watershed districts (AG Opin. No. 85-161); rural water districts (AG Opin. No. 88-97 and 89-91); drainage districts (AG Opin. No. 90-69); local historic preservation committees administering K.S.A. 75-2724 (AG Opin. No. 99-22).
 - 2. State Agencies and Boards, unless otherwise provided by statute.
- C. Subordinate Groups Subject to the KOMA--All subordinate groups, such as boards, commissions, authorities, councils, committees, subcommittees are covered by act if:
 - 1. The subordinate group meets funding test if the parent or controlling body meets funding test, *State ex rel., Murray v. Palmgren*, 231 Kan. 524 (1982), and
 - 2. Appointed by parent body to weigh options, discuss alternatives, present recommendations or a plan of action.
 - a. It is the nature of the group, not its designation, which determines if it is subject to the KOMA. AG Opin. No. 86-92. *See also* AG Opins. No. 80-21; 77-53; 76-140; 76-122; 73-235; 86-38.
 - 3. Examples--School District Advisory Board (AG Opin. No. 84-81); Fire District Advisory Board (AG Opin. No. 86-84); Mayor's commission

subject to KOMA as it is subordinate to the city's governing body (AG Opin. No. 88-25); appointed grievance committees, created by a city to hear employee grievances (AG Opin. No. 91-31); DUR Board under SRS (AG Opin. No. 93-41); Parental boards under Rec. Commission (AG Opin. No. 93-73); House and senate conference committees (AG Opin. No. 93-113).

- D. Joint boards subject to the KOMA if boards composed of members of different governmental bodies and:
1. Appointed by official action (AG Opin. No. 86-48); or
 2. A majority of a quorum of one or more governing bodies is present AG Opin. No. 84-103. *See also* AG Opin. No. 91-150.
- E. Non-profit corporations may be subject to the KOMA if the non-profit:
1. Receives or expends public funds;
 2. Is subject to control of governmental unit(s); and
 3. Acts as a governmental agency in providing services or has independent authority to make governmental decisions
 - a. Nonprofit Corps Subject to KOMA: Area agencies on aging (AG Opin. No. 79-219); Economic Opportunity Foundation, Inc. (AG Opin. No. 84-10); McPherson Co. Diversified Services, Inc. (AG Opin. No. 79-284); Three Rivers, Inc. (AG Opin. No. 87-143); Cowley County Diversified Services (AG Opin. No. 87-188); HELP, Inc. (AG Opin. No. 88-27)
 - b. Not subject to KOMA: Private nursing homes (AG Opin. No. 79-221); KU and WSU Endowment Associations (AG Opins. No. 80-239, 82-172); Planned Parenthood (AG Opin. No. 81-253); Hutchinson Cosmosphere (AG Opin. No. 82-256); Electric Cooperative (AG Opin. No. 85-175); *Memorial Hospital v. Knutson*, 239 Kan. 663 (1986); Parsons Chamber of Commerce (AG Opin. No. 89-149); K-10 Corridor Development, Inc. (AG Opin. No. 94-42); Koch Commission (AG Opin. No. 94-55); Kansas Venture Capital, Inc. (AG Opin. No. 94-107); Mid-America Commercialization, Inc. (AG Opin. No. 94-99); Consensus Estimating Group -- with staff from state agencies (AG Opin. No. 94-93); Prairie Village Economic Development Commission (AG Opin. No. 99-64), Hesston Area Senior Center (AG Opin. No. 01-02); Sheltered Living, Inc. (AG Opin. No. 2004-34)
- F. Bodies and meetings not subject to KOMA:
1. Staff meetings
 2. Judicial agencies and bodies (AG Opin. No. 82-254)
 3. Bodies exercising quasi-judicial functions -- K.S.A. 75-4318(f)(1).
 - a. Quasi-judicial is defined as "a term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

Black's Law Dictionary 1121 (5th ed. 1979).

- b. Example: Zoning boards (AG Opin. No. 78-13), city grievance panels (AG Opin. No. 91-31); hearing panels.
- c. Only quasi-judicial deliberations may be closed--binding action must be in open meeting. AG Opins. No. 91-31; 84-50; 79-225.
4. Private Organizations. Example: Private/parochial schools (AG Opin. No. 81-94); Nursing homes (AG Opin. No. 79-221).
5. Hospital board discussions regarding risk management and peer review laws exempted from open meeting discussion. AG Opin. No. 89-42.
6. Meetings of legislature if house or senate rules so provide. K.S.A. 75-4318(a).
7. Precinct committees. AG Opin. No. 94-157

III. MEETING--If a body is subject to the KOMA, the KOMA applies only when the body has a meeting as defined by the statutes.

- A. A Meeting is (1) a gathering, assembly, telephone call or any other means of interactive communication; (2) by a majority of a quorum of the membership of an agency or body; (3) for the purpose of discussing the business or affairs of the body. K.S.A. 75-4317a
- B. Gathering, Assembly, Telephone Call or other means of Interactive Communication
 1. Prerearrangement was required prior to 1994, and the statute did not mention telephone calls. In *State v. Seward Co.*, 254 Kan. 446 (1994), the Kansas Supreme Court held that phone calls between a majority of a quorum of county commissioners discussing business was not subject to the KOMA because the calls were not prerearranged and the members were not in each other's physical presence. The legislature reacted to this case by deleting the requirement of prerearrangement and adding to the definition "telephone call or any other means of interactive communication."
 2. A public body subject to the KOMA may legally conduct meetings by telephone, if it does so in compliance with all of the requirements of the KOMA. Regardless whether a meeting is to be conducted telephonically, in person, by video-conference, or even through third parties, the requirements of the KOMA remain applicable; AG Opin. No. 2005-03.
 3. Informal discussions before, after, or during recesses of a public meeting are held to be subject to the act. *Coggins v. Public Employee Relations Board*, 2 Kan. App. 2d 416, 423, *rev. denied* 225 Kan. 843 (1978)
 4. Title of the gathering--*e.g.* work sessions-- is irrelevant if the three requirements of a meeting are met. AG Opins. No. 80-197; 90-47
 5. Serial communications between a majority of a quorum of a public body, the purpose of which is to discuss a common topic of business or affairs of that body by the members, constitutes a meeting. Such communications may occur through calling trees, e-mail or an agent of the body. *See* AG Opins. No. 98-26, 98-49. *See also* AG Opin. No. 95-13

- C. Majority of a Quorum
1. "Quorum" means a simple majority of the membership of a body; the number greater than one-half of the total (unless otherwise provided by statute). AG Opins. No. 83-6; 91-73; 93-140; 96-32
 2. "A majority" is the number greater than one-half of a quorum; it is the smallest number that can take action on behalf of a body. AG Opin. Nos. 86-110; 93-140. *See also* AG Opins. No. 81-26 and 91-73.
 3. Examples: A quorum of a seven member body is four, and a majority of that quorum is three. A quorum of a five member body is three, and a majority of that quorum is two. (Conventional wisdom is that a majority of a quorum can never be one.)
 4. A county commission may by Home Rule powers raise its quorum to a number greater than a majority of its members. *State ex rel. Stephan v. Board of Sedgwick County Comm'rs*, 244 Kan. 536 (1989). Cities also have home rule authority to increase their quorum by charter ordinance. *See* AG Opins. No. 87-45, 83-74. Bodies without home rule authority cannot alter common law rules determining a quorum and may not alter it without specific authority. *See also* AG Opins. No. 83-174 (change by Airport Authority not authorized); 93-140 (change by Rec. Comm. not authorized); 96-32 (change by state Dental Board not authorized)
 5. In mayor-council form of government, the mayor is not included as a member of the body. AG Opin. No. 86-110.
- D. For the Purpose of Discussing the Business or Affairs of the Body.
1. Binding action or voting is not necessary; discussion is what triggers KOMA. AG Opin. No. 79-200.
 2. "Meeting" includes all gatherings at all stages of the decision-making process. *Coggins v. Public Employees Relations Board*, 2 Kan.App.2d at 423
 3. Social gatherings are not necessarily subject to the KOMA; if there is no discussion of the business of the body, one element of a meeting is "missing."
 4. Retreats and meetings held in private clubs are probably prohibited, especially if site makes it impossible for public to attend without cost. AG Opins. No. 82-133; 80-148
 5. Members attending a conference where items of general interest are discussed (such as convention of League of Municipalities) are not in violation of the KOMA, as long as the specific business of a body is not discussed. AG Opin. No. 82-133.
 6. Marriage between two members of a five member city council of a third class city does not violate the KOMA, but they should not discuss city business outside open meeting. AG Opin. No. 87-45

IV. NOTICE OF MEETINGS--K.S.A. 75-4318

- A. Notice of meetings must be requested before the public body is required to provide it. K.S.A. 75-4318

1. Notice must be given to any person or organization requesting it. AG Opin. No. 86-133. Residence of the requestor is irrelevant. AG Opin. No. 81-137
 2. Notice request expires at the end of fiscal year; request must be renewed. Must first notify of expiration before terminating notice. K.S.A. 75-4318(b)(3)
 3. Presiding officer has duty to provide notice, but that duty may be delegated.
- B. Form of Request and Notice
1. Oral request is valid (but prosecution is difficult if not honored). AG Opins. No. 81-15; 81-22; 86-133.
 2. Notice given can be written or oral, but must be made individually to the person requesting it. Posting or publication in newspaper is insufficient.
 3. A single notice can suffice for regularly scheduled meetings. Must notify of any special meetings. AG Opin. No. 83-173
 4. No fee for notice can be charged. AG Opins. No. 81-137; 82-141
 5. Petitions for notice may be submitted by groups of people, but notice need only be provided to one person on the list. K.S.A. 75-4318(b)(1). AG Opin. No. 86-133
 6. No time limit is imposed for receipt of notice prior to meeting. Notice must be given in a "reasonable time," reasonableness depending on the circumstances. AG Opin. No. 81-15
 7. Contrary to popular belief, the KOMA does not require notice of meetings to be published in a paper.
 8. To establish a violation for failure to provide notice of a meeting there must have been a prior request for notice. A pattern of providing courtesy notice does not create a duty to provide it.
 9. A body cannot opt out of KOMA's requirements.
- C. Agendas
1. The KOMA does not require that an agenda be created.
 - a. If a body chooses to create an agenda, that agenda should include topics planned for discussion. *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 293 (1986)
 - b. Agenda may be amended. *U.S.D. 407 v. Fisk*, 232 Kan. 820 (1983)
 2. If agendas exist, copies must be made available to those who request them. The agenda does not have to be mailed out and can simply be provided by placing the agendas in a public place. K.S.A. 75-4318(d); AG Opins. No. 79-218; 81-15; 86-133
 3. Mandamus was proper remedy for board of county commissioner's alleged violations of Open Meetings Act by failing to include planned discussion topic on agenda for meeting. *Klein v. Johnson County Bd. of County Comm'rs*, 77 P.3d 1009 (Kan.App. 2003) (unpublished opinion).
- D. Minutes
1. Except for recording motions for executive session, the KOMA does not require minutes. (Local bylaws, ordinances, or policies may.)

V. OPEN MEETINGS AND EXECUTIVE SESSIONS

A. Open Meetings

1. K.S.A. 75-4318 requires open meetings when a body is subject to the act.
 - a. Any person may attend open meetings. AG Opin. No. 80-43
 - b. The KOMA does not require that the public be allowed to speak or to have an item placed on the agenda (but check local ordinances and policies. K.S.A. 21-4101 prohibits disorderly conduct or disturbing a lawful meeting and provides for criminal prosecution).
2. Secret ballots not allowed, K.S.A. 75-4318(a). The public must be able to ascertain how each member voted. AG Opins. No. 86-176; 79-167; 81-106; 65-167; 93-55
3. Subject to reasonable rules, cameras and recording devices must be allowed at open meetings. K.S.A. 75-4318(e)
4. The KOMA does not dictate the location of the meeting, the size of the room, or other accommodation type considerations. The key to determining whether a meeting is "open" is whether it is accessible to the public. AG Opin. Nos. 86-153; 79-253; 82-133; 80-148
5. Telephone conference calls are allowed if the requirements of the act are met (*i.e.* notice and free access). AG Opins. No. 81-268; 80-173; 80-159

B. Executive Session K.S.A. 75-4319

1. Executive sessions are permitted for specified purposes, but first the body must convene an open meeting before public body can recess into executive session. K.S.A. 75-4319(a); AG Opin. No. 81-22.
2. Binding action may not be taken in executive session. (K.S.A. 75-4319(c); AG Opin. No. 91-31). Reaching a consensus in executive session is permitted. *O'Hair v. U.S.D. No. 300*, 15 Kan.App.2d 52 (1991). A "consensus," however, may constitute binding action and violate KOMA if a body fails to follow up with a formal open vote on a decision which would normally require a vote. *City of Topeka v. Watertower Place Development Group*, 265 Kan. 148 (1998).
3. The decision to hold executive session is discretionary; the KOMA never requires an executive session. (Other laws or policies need to be considered, however.)
4. Procedure--K.S.A. 75-4319(a) requires a specific procedure which must be followed in order to go into executive session:
 - a. Formal motion, seconded, and carried
 - b. Motion must contain statement of (1) Justification for closure; (2) Subject(s) to be discussed; and (3) Time and place open meeting will resume.
 - c. Example: "Madam Chairman, I move we recess into executive session to discuss disciplinary action against a student in order to protect the privacy of the parties involved. We will reconvene the open meeting in the conference room at 8:30 p.m."
 - d. Motion for executive session should contain subject and justification statement, which are not the same thing. AG Opins.

- No. 91-78; 86-33. *But see State v. U.S.D.A. 305*, 13 Kan. App.2d 117 (1988). The subject is the subject listed in K.S.A. 75-4319(b). The justification is an explanation of what is to be discussed (without revealing confidential information.)
- e. Executive session motions must be recorded in minutes. K.S.A. 75-4319(a) KOMA does not require other information to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them. AG Opin. No. 90-47
5. Subjects which may be discussed in an executive session:
- a. Personnel matters of non-elected personnel
1. To discuss an individual, not groups. AG Opins. No. 81-39; 88-25; 80-102. *But see* 13 Kan.App.2d 117 (1988). The purpose of this exception is to protect the privacy interests of individuals. Discussions of consolidation of departments or overall salary structure is not a proper topic.
 2. "Personnel" means employees of the public agency. AG Opin. No. 87-10
 - a. Personnel does not include appointments to boards or committees. AG Opin. No. 87-10
 - b. Personnel does not include independent contractors. AG Opin. No. 87-169
 - c. The KOMA does not give the employee a right to be present in the executive session or to force an open session. (Other laws or contracts may, however.)
 - d. This exception may be used to discuss applicants for employment. AG Opin. No. 96-61
- b. Consultation with the body's attorney
1. This is for attorney/client privilege so all elements of privilege must be present:
 - a. the body's attorney must be present;
 - b. the communication must be privileged, and
 - c. no other third parties may be present. AG Opins. No. 78-202; 80-43; 82-130; 82-176; 82-247; 92-56; Privileged communication is defined at K.S.A. 60-426; *Pickering v. Hollabaugh*, 194 Kan. 804 (1965)
 2. Cannot be used to discuss letter received from attorney if the attorney is not present. AG Opin. No. 86-162
- c. Employer-employee negotiation
1. Public bodies can meet in executive session to discuss conduct or status of negotiations, with or without the authorized representative who is actually doing the bargaining. AG Opin. No. 79-125
 2. Public bodies cannot have executive session under this

- exception when meeting with employees. AG Opin. No. 80-43
 - 3. School Boards--special rules: K.S.A. 72-5423(b). AG Opin. No. 92-51.
 - d. Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship.
 - 1. Economic development groups. AG Opin. No. 88-148
 - 2. Must be for data truly confidential in nature. *See* K.S.A. 60-3320; *Southwestern Bell Telephone Co. v. KCC*, 6 Kan.App.2d 444, 457 (1980), *rev. den.* 230 Kan. 819 (1981); *All West Pet Supply v. Hill's Pet Products*, 840 F.Supp. 1433, 1437 (Kan. 1993.)
 - e. Matters affecting a student, patient, or resident of public institutions
 - 1. Must concern a particular person (not students in general).
 - 2. Hearing must be open if requested by person involved.
 - 3. Inmates as residents of institutions, *see* AG Opin. No. 80-102.
 - f. Preliminary discussions relating to acquisition of real property
 - 1. Acquisition only, not sale of property which must be discussed in open meeting. AG Opin. No. 87-91
 - 2. This exception can be used only when the primary focus of the discussion is real property; negotiating strategy alone is insufficient. AG Opin. No. 89-92.
 - g. Security, if open discussion would jeopardize security, K.S.A. 75-4310(13), as amended by L. 2005, Ch. 126 §4; any confidential records concerning security discussed in executive session are exempt from subpoena, discovery or other action.
6. Who can be present in an executive session-- Only the members of a public body have the right to attend executive session. AG Opin. No. 86-14
- a. Mere observers may not attend. Inclusion of general observers means the meeting should be open to all members of the public. AG Opin. Nos. 82-176; 86-143; 92-56.
 - b. Persons who aid the body in its discussions may be discretionarily admitted. AG Opin. No. 91-31
 - c. Johnson County school district; members of advisory boards have no right to attend. AG Opin. No. 86-143
 - d. County clerk has no right to attend executive sessions. AG Opin. No. 87-170
 - e. Non-clients cannot attend executive sessions for attorney-client privileged communication. AG Opin. No. 82-247

VI. ENFORCEMENT OF THE KOMA

- A. K.S.A. 75-4320 - civil, not criminal, penalties

1. Fines - up to \$500 for each violation as determined by the district court - but only if action brought by attorney general or county or district attorney.
 - a. Statute appears to mean that this is \$500 per body member against the member individually.
 - b. Courts generally do not award significant fines.
 2. Voiding action
 - a. Binding action taken at a meeting not in "substantial compliance" with KOMA may be voided by court.
 - b. Action must be brought by county/district attorney or the attorney general. *Stoldt v. City of Toronto*, 234 Kan. 957 (1984)
 - c. Action to void must be filed within 21 days of the alleged violation/meeting.
 3. Injunction, mandamus, declaratory judgment: Can be brought by any person or by Attorney General or District/County Attorney. *Stoldt*, 234 Kan. at 963.
 4. Injunctive relief, rather than mandamus, is proper remedy to address board of county commissioners' past violations of Open Meetings Act. K.S.A. 60-8016. *Klein v. Johnson County Bd. Of County Comm'rs*, 77 P.3d 1009 (Kan.App. 2003) (unpublished case).
 5. Under the KOMA, a private citizen has the authority to seek injunctive and mandamus relief but no authority to ask the court to void a contract. *Krider v. Board of Trustees of Coffeyville Community College*, 277 Kan. 244, 83 P.3d 177 (2004) *See also Mid-Continent Specialists, Inc. v. Capital Homes, L.C.*, 106 P.3d 483, 279 Kan. 178 (2005).
 6. Technical violations. The court will not void any action and will overlook technical violations of the law if the spirit of the law has been met, there has been a good-faith effort to comply, there was substantial compliance with the KOMA, no one was prejudiced, and the public's right to know had not been effectively denied. *Stevens v. Board of Reno County Comm'rs*, 10 Kan.App.2d at 526.
- B. Procedure
1. County/district attorney and attorney general have concurrent jurisdiction to investigate or bring an action. K.S.A. 75-4320
 - a. Policy of attorney general's office to first refer an alleged violation to the county/district attorney, the local law enforcement officer for the state. The decision to investigate or prosecute is discretionary on the part of the prosecutor. L. 2005, ch. 126 requires county and district attorneys to give the Attorney General a yearly report on KOMA/KORA complaints it received or handled in the past year.
 - b. County/district attorney and attorney general can issue investigative subpoenas. K.S.A. 75-4320b.
 - c. If an individual wishes to bring a possible KOMA violation to the Attorney General's attention, the Attorney General's office traditionally asks that a complaint be submitted in writing, with as

- much supporting documentation (*i.e.* minutes) as possible.
2. Burden of Proof: Plaintiff has the initial burden to show a prima facie case. Burden then shifts to the defendant to justify its actions. K.S.A. 75-4320a(b)
 3. Plaintiff may receive court costs if violation established. Defendant may receive costs only if action was frivolous. K.S.A. 75-4320a(c) and (d)
 4. No requirement of specific intent to violate the law. "Knowing" violation occurs when there is purposeful commission of the prohibited acts. *Palmgren*, 231 Kan. at 536-37
 5. Venue is proper in the county where the action occurred. K.S.A. 75-4320a(a)
 6. Courts are to give KOMA cases precedence. K.S.A. 75-4320a(e)
- C. Other Consequences
1. Violation of the KOMA can be grounds for ouster from office pursuant to K.S.A. 60-1205; AG Opin. No. 80-168. This is a separate action which must be filed by a public prosecutor
 2. Alleged violation of the KOMA can be grounds for recall. *Unger v. Horn*, 240 Kan. 740 (1987); K.S.A. 25-4301 *et seq.* But *see* K.S.A. 25-4302 grounds for recall; 2003 Amendment calls into question whether *Unger Rule* has been legislatively changed.
 3. Ouster or recall not automatic - these actions must be pursued separately.

Kansas Open Records Act (KORA)

Prepared by Paul Morrison, Attorney General
and
Theresa Marcel Bush, Assistant Attorney General

Revision date: January 2007

I. PURPOSE OF KORA

- A. It is the public policy of Kansas that "public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy." K.S.A. 45-216(a). *See also Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, Syl. ¶ 3 (2000).
- B. "The burden of proving an exemption from disclosure is on the agency not disclosing the information." *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 170 (1991).

II. RECORDS SUBJECT TO KORA

- A. The Act applies to public records (not to private records): Public records are defined 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(f). *Harris Ent. v. Moore*, 241 Kan. 59, 60, 62, 63 (1987); public agency is defined at K.S.A 45-217(e). A.G. Opin. No. 90-14 (record in possession of public agency).
 - 1. The KORA covers more than just paper copies or written information.
 - a. Any recorded information regardless of form or characteristics" means that "public records are not restricted to written records." *Burroughs v. Thomas*, 23 Kan.App.2d 769, Syl. ¶ 1 (1997). This case held that autopsy photos are public records.
 - b. Computer data is a "record." *State ex rel. Stephan v. Harder*, 230 Kan. 573 (1982) (considering prior records statute). A.G. Opins. No. 87-137, 88-152, 89-106, and 94-104.
 - c. Disclosure of KORA information on the internet is allowed under Kansas statutes. *State v. Stevens*, 26 Kan.App.2d 606 (1999).
 - 2. Records not yet in existence are not subject to KORA; a prospective or standing request for "records as they become available" is not enforceable. A.G. Opin. No. 98-51.
 - 3. The KORA does not require that a record be created in order to respond to requests or in order to answer questions asking for "information." *But see* K.S.A. 45-221(d), which requires separation of open from closed information contained in public records; this may have the practical impact of requiring creation of a new document.

III. PUBLIC AGENCIES SUBJECT TO KORA

- A. Public Agency: the state or any political or taxing subdivision, or any office, officer, or agency thereof, or any other entity, receiving or expending and supported in whole or part by public funds. K.S.A. 45-217(e).
- B. No entity is included under KORA solely because it receives public funds in exchange for goods or services. K.S.A. 45-217(e)(2)(A). Receipt of public funds alone will not subject a vendor to the KORA. *See* A.G. Opin. No. 2004-34. *But see* K.S.A. 45-240.
- C. Although most private entities are not subject to the KORA, some nonprofit corporations might be included.
 1. Kansas cases and opinions.
 - a. Nonprofit entities Subject to KORA:
Nonprofit providing mental health services is subject because there is specific statutory authorization for contracts with such nonprofits and in such a capacity it is performing a traditional governmental function. A.G. Opin. No. 94-111.
Nonprofit city hospital because authorized by statute and created by city. A.G. Opin. No. 88-61.
 - b. Nonprofit Entities Not Subject to KORA unless they:
 - i. Meet the terms of K.S.A. 45-240, which makes the KORA applicable to financial documents of non-profit entities receiving public funds of \$350 or more a year, unless otherwise exempted.
[Exemptions: (a) those non-profits that file a financial report with some public entity or agency; (b) those non-profits that are health care providers, (c) individual persons and (d) for profit corporations or partnerships.]
[Public funds means money received from the United States, the state of Kansas, or any taxing subdivision thereof, or any officer, board, commission or agency thereof.]
 - ii. Meet the tests that make a non-profit a public agency.
Examples of nonprofits that are not subject to the KORA:
 - In *Memorial Hospital Assn., Inc., v. Knutson*, 239 Kan. 663 (1986), a nonprofit operating a county hospital was determined not to be subject to the Kansas Open Meetings Act, KOMA. The association leased the hospital for \$1.00 per year and received \$228,000 from the county mill levy, budgeted by the county hospital board of trustees. The Court described this as limited receipt of public funds.

- The NCAA is not subject to KORA because member schools pay dues in exchange for services provided by the NCAA. A.G. Opin. No. 97-64.
 - WSU Endowment Assn. A.G. Opin. No. 82-172 (pre KORA).
 - Sheltered Living, Inc., A.G. Opin. No. 2004-34 (privately formed non-profit providing services to special population, heavily regulated, funding from various public entities; however, no direct government entity oversight or control).
2. Cases from other states generally turn on (1) the extent of public funding, (2) whether there is a specific service provided for the funds, (3) whether the entity was created by a governmental entity or statute, and (4) whether it is providing a traditionally governmental service.
- D. Judges are not defined as a "public agency" subject to the KORA. K.S.A. 45-217(e)(2)(B).
1. A judge's telephone records do not become public merely because another branch of government's data processing facilities maintains the records for the judicial branch. A.G. Opin. No. 96-77.
 2. The KORA, by its express terms, does apply to court records. The KORA allows judicial branch to make its own rules, however, by Supreme Court rule. K.S.A. 45-221(a)(1).
 3. District courts probably have authority to close some records under certain circumstances. Court records under former record act discussed at *Stephens v. Van Arsdale*, 227 Kan. 676 (1980).
- E. Records made, maintained or kept by a legislator or member of a governing body are not public records. K.S.A. 45-217(f)(2).
- F. Records owned by private persons which are not related to a governmental function are not included. K.S.A. 45-217(f)(2).
- G. Does not include "any officer or employee" if not provided with "an office which is open to the public at least 35 hours per week." K.S.A. 45-217(e)(2)(C).
1. "This exclusion applies only to the part time officials personally and not the governmental entity they serve." Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 219-20 (Winter, 1985).
 2. Offices which do not have regular office hours are required to establish reasonable hours when persons may inspect and copy documents, but such offices may require 24 hours advance notice. K.S.A. 45-220(d). For this provision to have any meaning, the 35 hour per week exclusion of K.S.A. 45-217(e)(2)(C) must not apply to the office, but rather only to individuals, officers or employees, working in such offices.

IV. RIGHT OF PUBLIC TO INSPECT AND MAKE OR OBTAIN COPIES OF RECORDS. K.S.A. 45-219.

- A. Unless closed pursuant to specific legal authority, all records are open for inspection. K.S.A. 45-218(a).
- B. Any person may make abstracts or obtain copies of a public record. K.S.A. 45-219.
- C. If copies cannot be made in the place where the records are kept the custodian shall allow arrangements to be made for use of other copying facilities. K.S.A. 45-219(b).
- D. Members of the public cannot remove a record without written permission of the custodian. K.S.A. 45-218(a).
- E. A public agency is not required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations, unless the items were shown or played at a public meeting, but not if copyrighted by someone other than the public agency. K.S.A. 45-219(a). However, under K.S.A. 45-220, access to the record must be provided unless there is an exception from disclosure based upon the content or nature of the item.
- F. Computerized information can meet the definition of a public record and must be provided in the form requested if the public agency has the capability of producing it in that form. The agency is not required to acquire or design a special program to produce information in a desired form, but has discretion to allow an individual who requests such information to design or provide a computer program to obtain the information in the desired form. A.G. Opins. No. 88-152 (voter registration lists); 89-106; 87-137.
- G. Agency may prescribe reasonable fees:
 - 1. Fees for copies shall not exceed the actual cost, including the cost of staff time.
 - a. 20 cents per page charged by a school district was not unreasonable as it reflected actual costs. A.G. Opin. No. 87-4. Other jurisdictions have generally not upheld copying costs in excess of \$.25 per page.
 - b. K.S.A. 45-219(c)(5) applies to fees for access to or copies of public records of a public agency within the executive branch of the state government. Any person requesting records may appeal the reasonableness of the fees charged for providing access to or furnishing copies of such state agency records to the secretary of administration whose decision shall be final. A fee for copies of public records possessed by such a state agency which is equal to or less than \$.25 per page shall be deemed a reasonable fee.
 - c. Fees, *i.e.* staff time, for retrieval of information are contemplated by KORA since the statute provides for fees for "staff time required to make the information available." K.S.A. 45-219(c)(1). *See, Frederickson, Letting the Sunshine In, 33 Kan. L.Rev. 225-27 (Winter 1985).*

2. If records are maintained on computers, fees may include the cost of any computer services, including staff time. A.G. Opin No. 93-126. Proration of costs of computerizing is probably precluded, as such costs are normally required even without record requests.
3. When public records are repackaged in a computerized form in order to facilitate public access to the records, additional fees for computerization may be charged, so long as the basic records are available elsewhere at cost. A.G. Opin No. 95-64.
4. Fees for providing access of copies of public records are to recoup the actual costs associated with providing access or copies. Such fees are not meant to pay for costs that would be incurred by a public agency even without a record request. *E.g.* Overhead, capital improvements, utility bills, rent/building payments, etc.
5. Fees may include the cost of staff time spent in redacting open from closed information. *Data Tree, L.L.C. v. Meek*, 109 P.3d 1226, ___ Kan.App.2d ___ (2005).

V. PROCEDURES FOR OBTAINING ACCESS OR COPIES OF RECORDS. K.S.A. 45-220.

- A. Each public agency is to appoint a freedom of information officer to assist the public with KORA requests and disputes. K.S.A. 45-226. That officer is to provide information on KORA including a brochure stating the public's basic rights under KORA. K.S.A. 45-227.
- B. Each public agency is to adopt procedures to be followed. Use the same procedure for all requests. K.S.A. 45-220(a).
- C. Each agency must provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records. K.S.A. 45-220(e).
- D. Members of the public can inspect during regular office hours and any established additional hours. K.S.A. 45-218(b).
- E. If the agency does not have regular office hours it shall establish reasonable hours when persons may inspect records. An agency without regular office hours may require 24 hour notice of desire to inspect. Notice shall not be required to be in writing. K.S.A. 45-220(d).
- F. The public agency may require proof of identity. K.S.A. 45-220(b).
- G. The public agency may require the request to be written, but not on a specific form. K.S.A. 45-220(b).
- H. The public agency may require written certification that the requester will not use names and addresses obtained from the records to solicit sales to those persons whose names are contained in the list. K.S.A. 45-220(c)(2). *See also* K.S.A. 45-230. Other than to ask for the name/identity of the requestor, and this certification, the public agency should not require other information from requesters before complying with the KORA request.
- I. K.S.A. 45-217 and 45-220 permit the official custodian to designate other persons to carry out custodial duties. A.G. Opin. No. 90-89.

- J. The public agency must respond to the request as soon as possible, but not later than the end of the third business day following the date the request was received. K.S.A. 45-218(d).
 - 1. If access is not granted immediately, the public agency must give a detailed explanation for the delay. K.S.A. 45-218(d).
 - 2. If the request is denied, a written statement of the legal grounds for the denial shall be given upon request. K.S.A. 45-218(d). Some degree of specificity is required. "The burden of establishing the applicability of an exemption from disclosure under the Kansas Open Records Act requires the party claiming the exemption to provide more than conclusory language, generalized allegations, or mere arguments of counsel. A sufficiently detailed record must be provided to show the reasons why an exemption applies to the materials requested." *Southwest Anesthesia Associates v. Southwest Medical Center*, 23 Kan.App.2d 950, Syl. ¶ 2 (1997).
- K. Access may be denied if the request places an unreasonable burden in producing the record or is intended to disrupt the agency. K.S.A. 45-218(e). CAUTION - this provision should be used only in extreme circumstances. Refusal under this section must be sustained by a preponderance of evidence.
- L. The public agency may require payment of allowed fees in advance. K.S.A. 45-218(f).

VI. PROHIBITED USES OF CERTAIN RECORDS

- A. A list of names and addresses shall not be obtained from public records for the purpose of selling or offering for sale any property or service to the persons listed. K.S.A. 45-220(c)(2), K.S.A. 45-230.
 - 1. This provision does not prohibit commercial use generally, it just applies to use of the names to sell or offer to sell property or a service to those persons/entities on the list. A.G. Opin. No. 98-51. A group of local ministers may use lists from public records to provide information about area churches. A.G. Opin. No. 2000-35.
 - 2. This provision does not prohibit use of lists of names obtained from public records to solicit the purchase of property from the persons listed. A.G. Opins. No. 96-68 (water meters); 98-55 (promissory note underlying contract for deed).
 - 3. This provision pertains to the names and addresses of businesses listed in the public records, as well as individuals. A.G. Opin. No. 87-73.
 - 4. Any person (including the records custodian) who violates this law and gives, or receives records for such purpose can be penalized with the same civil fines and penalties in K.S.A. 45-223.
 - a. The agency may require a person who requests such records to provide written certification that she or he will not use the record for that prohibited commercial purpose. A.G. Opin. No. 87-137; K.S.A. 45-220(c).

- b. If requestor makes this certification the custodian is relieved of liability if custodian provides records in good faith reliance on certification. A.G. Opin. No. 94-132.
- 5. Cannot circumvent this provision indirectly; a third party who obtains this information from a "requestor" violates the law if it is used for commercial purposes.
 - a. A newsletter service which provides lists of names and addresses obtained from public records for its subscribers to solicit, is the type of activity prohibited under the KORA. A.G. Opin. No. 86-1.
 - b. Use of information obtained from public records to publish land ownership maps (A.G. Opin. No. 86-39) and "ownership product" documents (A.G. Opin. No. 89-47) does not violate the law.

VII. RECORDS THAT ARE MANDATORILY CLOSED

- A. Some public records are mandatorily closed by federal law, state statute, or Supreme Court Rule. These types of public records must be closed. The record custodian has no discretion or choice about whether to provide copies or access. Examples include but are not limited to:
 - 1. Child in need of care records and reports, including certain juvenile intake and assessment reports. K.S.A. 38-1507.
 - 2. Juvenile court records if under 14 and ordered closed by judge, K.S.A. 38-1607; juvenile law enforcement records, municipal court records if under 14, 38-1608(a); victims of sex offense by juvenile, 38-1608(c); "[a]ll records, reports and information obtained as a part of the juvenile intake and assessment process for juvenile offenders shall be confidential and shall not be disclosed except as provided in this section or by rules and regulations established by the commissioner of juvenile justice." K.S.A. 38-1608(e).
 - 3. Individually identifiable drug abuse treatment records. K.S.A. 65-4608; K.S.A. 45-221(a)(3).
 - 4. Financial information of an identifiable taxpayer filed with the county appraiser, or any financial information of a personal nature required or requested by a public agency or officer, including a name, job description or title revealing the salary or other compensation of officers, employees or applicants for employment with a firm, corporation or agency, except a public agency. K.S.A. 45-221(b).
 - 5. Criminal history record information in possession of law enforcement agency. K.S.A. 22-4701 *et seq.*; K.S.A. 22-4707; K.A.R. 10-12-2. (Conviction information is in some circumstances open, nonconviction information is closed.) *See* A.G. Opin. No. 98-38.
 - 6. Ballots. K.S.A. 25-2422. However, election petitions are open. A.G. Opin. No. 97-22.
 - 7. Unexecuted search or arrest warrants. K.S.A. 21-3827. Affidavits and sworn testimony given to obtain such a warrant is closed except as to the defendant or as otherwise ordered by the court, K.S.A. 22-2502(c); A.G. Opin. No. 87-100. (It is a crime to disclose an unexecuted warrant, but

this does not apply to personnel of a law enforcement agency disclosing a search warrant: (1) For the purpose of encouraging the person named in the warrant to voluntarily surrender; or (2) issued in a case involving the abduction of a child unless such disclosure is specifically prohibited by the court issuing such warrant).

8. Presentence reports. K.S.A. 21-4605(b).
 9. Grand jury proceeding records. K.S.A. 22-3012. (Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecuting attorney for use in the performance of his duties).
 10. Adult Authority presentence report, the parole report, the pre-postrelease supervision report and the supervision history. K.S.A. 22-3711.
 11. Mentally ill persons' commitment and treatment records. K.S.A. 59-212; K.S.A. 59-2931; K.S.A. 59-2941; 59-2979.
 12. All information, records and reports received or developed by an ombudsman or volunteer concerning long-term care facility residents' information. K.S.A. 75-4310.
 13. Peer review records. K.S.A. 65-4915(b).
 14. Adoption records. K.S.A. 59-212; K.S.A. 59-214; K.S.A. 59-2122; K.S.A. 65-2423; K.S.A. 59-2979; and K.S.A. 65-5601 to 65-5605.
 15. Income tax reports and returns. K.S.A. 79-3234(b).
 16. Racing Commission KBI background checks. K.S.A. 74-8804(o).
 17. Kansas Department of Health and Environment vital statistics - marriage, birth and death certificates. K.S.A. 65-2422 (restrictions are only on information in hands of vital statistics).
 18. Kansas Civil Rights Commission may not disclose investigation information without consent. K.S.A. 44-1005.
 19. Crime Victim Compensation Board, all records and information given to the Board is confidential. K.S.A. 74-7308(e).
 20. Social security numbers under some circumstances. *See* 5 U.S.C. § 552a note.
 21. Certain student information or educational records. 20 U.S.C. § 1232g.
 22. Convictions for violating a maximum posted speed limit of 55 miles per hour or more but not exceeding 70 miles per hour, by not more than 10 miles per hour in excess of such maximum speed limit. K.S.A. 8-1560d.
 23. Reports of contagious disease. K.S.A. 65-118.
- B. There are many federal, state or court laws/rules that may protect or close certain information in public records. The record custodians possessing such records should be familiar with the laws that apply to the records in their possession. If the record custodian denies a request for access or copies, K.S.A. 45-218(d) requires the custodian to provide a written citation to the law(s) being relied upon, if that information is requested.

VIII. RECORDS THAT MAY BE DISCRETIONARILY CLOSED--K.S.A. 45-221

- A. K.S.A. 45-221(a) lists types of public records that are not required to be disclosed. The public agency has discretion and may decide whether to make these types of records available. A.G. Opin. No. 89-107. However, the burden of showing that a record fits within an exception rests with the party intending to prevent disclosure. *Southwest Anesthesia Serv. v. Southwest Med. Ctr.*, 23 Kan.App.2d 950 (1997).
- B. Some of the records which may be discretionarily closed include:
1. Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies. K.S.A. 45-221(a)(4). A.G. Opin. No. 91-127. The personnel exception is designed to protect information that is normally kept in personnel records files, such as documentation of discipline, references and resumes, ADA and FMLA issues, as well as specific personal information such as home address and social security number. K.S.A. 45-221(a)(4) lists three categories of records which may be exempt from the disclosure requirement: "personnel records, performance ratings or individually identifiable records," all of which must pertain to the public agency's employees or applicants for employment. A.G. Opin. No. 99-55.
 - a. However, the "names, positions, salaries and lengths of service" of public officers and employees must be made public. K.S.A. 45-221(a)(4); A.G. Opins. No. 88-61; 91-50 (salary deduction not open); 92-132 (pension plan part of salaries); 2000-8 (names of members appointed to states boards must be disclosed).
 - b. K.S.A. 45-221(a)(4) opens actual compensation employment contracts or employment-related contracts or agreements.
 - c. Home addresses of public employees may be closed. A.G. Opin. No. 97-52. *See also United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) (disclosure of home addresses can be a clearly unwarranted invasion of personal privacy.)
 - d. The exemptions in K.S.A. 45-221(a)(4) and (15) do not apply to nonemployees or to independent contractors. Independent contractors are not "personnel," so records concerning them may not be closed under this exception. *Southwest Anesthesia Serv. v. Southwest Med. Ctr.*, 23 Kan.App.2d 950 (1997).
 - e. Most terms in employment contracts are open, except to the extent that a term contains personal or other information specifically closed by other laws. A.G. Opin. No. 99-55.
 2. Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual, K.S.A. 45-221(a)(6), unless the recommendation is for someone to fill an elected or appointed office.
 3. Criminal investigation records. Defined at K.S.A. 45-217(c).
 - a. While criminal investigation records may be discretionarily closed, this is the one category of records for which criteria for judicial

review of the decision is established in the statute. The factors to be considered in opening the records basically weigh public interest in disclosure vs. harm of disclosure. K.S.A. 45-221(a)(10)(A)-(F). K.S.A. 45-221(a)(10) requires custodians of criminal investigation records to, upon request, identify which factor(s) in (A) - (F) are applicable to the record(s) being closed under this exception.

- b. "Public interest" . . . means an interest in a matter affecting a right or expectancy of the community at large. Mere curiosity about the circumstances surrounding an investigation is not sufficient." *Harris Enterprises, Inc. v. Moore*, 241 Kan. 599 (1987). The legislative intent behind the criminal investigation records exception to the Kansas Open Records Act is to protect innocent persons whose names might be involved in an investigation, either as possible suspects or as informants. *Seck v. City of Overland Park*, 29 Kan. App. 2d 256 (2000).
 - c. Court records and docket sheets may not be closed as criminal investigation records. K.S.A. 45-217(b); A.G. Opin. No. 87-145.
 - d. Police blotter, roster of jail inmates and the front page of a standard offense report are required to be open to the public; mug shots and standard arrest report are not required to be open to the public. A.G. Opin. No. 87-25, 98-38. If a police department does not maintain a blotter, they are under a common law duty to disclose basic information about arrests reasonably contemporaneously with the arrest. A.G. Opin. No. 98-38.
 - e. A log of breath test machine results is a criminal investigation record. A.G. Opin. No. 87-63.
 - f. Coroner reports are subject to disclosure unless they have been filed with the clerk of the district court and designated as a criminal investigation record. A.G. Opin. No. 86-5 and K.S.A. 22a-232. Autopsies as part of coroner's reports are open unless the coroner's report is filed as a criminal investigation record. *Burroughs v. Thomas*, 23 Kan.App.2d 769 (1997).
 - g. Other records of investigations of a death may be closed even if the death turns out to be from natural causes so long as there was initially a criminal investigation. *Seck v. City of Overland Park*, 29 Kan. App. 2d 256 (2000).
4. Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law. K.S.A. 45-221(a)(5).
 5. Notes, preliminary drafts, research data in the process of analysis, memoranda or other records in which opinions are expressed or policies or actions are proposed. This exception does not apply when such records are cited or identified in a public meeting. K.S.A. 45-221(a)(20). A.G. Opin. No. 90-14. *See also*, K.S.A. 45-221(a)(21) and (22); records of public agency having legislative powers. A.G. Opin. No. 90-92.

- a. These three provisions "are intended to protect an agency's internal predecisional deliberations from early disclosure." Frederickson, *Letting the Sunshine In*, 33 Kan. L.Rev. 205, 249 (Winter 1985).
 - b. Although reports prepared by a consultant for an agency are probably protected by this exception, other documents disclosed outside of government probably cannot be withheld based upon this exception. *See Dept. of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001).
6. Library patron and circulation records which pertain to identifiable individuals. K.S.A. 45-221(a)(23). Library archive and museum materials contributed by private parties may be closed if closure was a condition of donation. K.S.A. 45-221(a)(7).
 7. Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy. K.S.A. 45-221(a)(30). A.G. Opins. No. 92-149 (victim of sex offense); 99-55, 98-38, 87-25 (social security number).
 - a. This is a very limited exception, and often turns upon the circumstances of each individual situation.
 - b. K.S.A. 45-217(b) defines "clearly unwarranted invasion of personal privacy" to mean "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 a legitimate concern to the public."
 - c. Cases from other states are not consistent, but generally employ a balancing test of public interest vs. private harm, allowing closure only when there is a demonstrable harm.
 - d. Social Security numbers, mothers' maiden names and dates of birth contained in public records held by a county register of deeds can be closed to a business information provider. *Data Tree, L.L.C. v. Meeks*, 109 P.3d 1226, ___ Kan.App.2d ___ (2005).
 - e. L. 2006, Ch. 213 allows victims of domestic violence, sexual assault, trafficking or stalking to obtain a "fake" address from the Secretary of State's office for use when responding to record requests.
 8. Records concerning prospective location of a business or industry where no previous disclosure has been made. K.S.A. 45-221(a)(31).
 9. Exceptions related to bids:
 - a. Specifications for competitive bidding until the specifications are approved. K.S.A. 45-221(a)(27).
 - b. Sealed bids until a bid is accepted or all rejected. K.S.A. 45-221(a)(28).
 10. Engineering and architectural estimates for public improvements. K.S.A. 45-221(a)(33). (To prevent bidders from learning agency's estimates of cost of a project.)
 11. Financial information submitted by contractor in qualification statements. K.S.A. 45-221(a)(34). *See also* K.S.A. 45-221(c)(2) and K.S.A. 60-432, trade secrets.

12. Records concerning emergency or security information or procedures. K.S.A. 45-221(a)(12) and (45); also not subject to subpoena or discovery.
13. Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure. K.S.A. 45-221(a)(2). (Includes attorney client privilege. Possibly includes trade secrets, K.S.A. 60-432.)
 - a. Attorney billing records are not closed, per se, as either attorney client privilege or work product privilege, and therefore generally must be disclosed if in the possession of a public agency. All narrative statements in attorney billing statements are not *per se* privileged. Rather, parties claiming the privilege will have to show its application to particular narrative statements in billing records. Parties objecting to discovery on the basis of the attorney-client privilege bear the burden of establishing that the privilege applies. To carry the burden, they must describe the documents or information to be protected, state precise reasons for the objection to discovery, and provide sufficient information to enable the court to determine whether each element of the asserted privilege is satisfied. A blanket claim as to the applicability of a privilege does not satisfy the burden of proof. Some detail may be closed, but the burden is on the public agency to justify it. *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407 (2000).
 - b. An investigation by an attorney for a client for the purpose of providing legal advice may be closed as attorney client privileged. A.G. Opin. No. 99-48.
14. Attorney work product. K.S.A. 45-221(a)(25).
15. Medical, psychiatric, psychological, alcohol or drug treatment records which pertain to identifiable individuals. K.S.A. 45-221(a)(3).
16. Investigatory records of agencies involved in civil or administrative adjudication, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent. K.S.A. 45-221(a)(11).
 - a. An agency's civil investigatory file becomes open at the completion of the case. A.G. Opin. No. 97-76.
 - b. Records pertaining to an internal investigation of an agency's employee, disclosure of which would not interfere with a prospective administrative adjudication or civil litigation nor disclose the identity of a confidential informant, may nevertheless still be discretionarily closed if they fit the definition of a personnel record. A.G. Opin. No. 91-127.
 - c. Correspondence between a public agency and a private individual, other than correspondence intended to give notice of an agency action, policy or determination. K.S.A. 45-221(a)(14). A complaint to a professional licensing board may be closed, the letter in response to the complaint is open. A.G. Opin. No. 97-76.

17. Peer review/risk management records concerning certain health care professionals and facilities. K.S.A. 45-221(a)(35).
 18. Software, except that certain information about software must be disclosed. K.S.A. 45-221(a)(16).
- C. Unless otherwise required by law, a taxpayer's financial information required or requested by a county appraiser to determine property value for ad valorem taxation shall not be disclosed. K.S.A. 45-221(b). A.G. Opin. No. 89-118.
- D. Statistical information not descriptive of any identifiable person is subject to disclosure. K.S.A. 45-221(e).

IX. OTHER LIMITS ON CLOSURE

- A. Contractual provision attempting to close certain terms is void as against public policy, provided no other closure exemptions apply. A.G. Opin. No. 91-116; 93-55.
1. A settlement agreement can not be closed by the parties, except to the extent that the KORA would allow closure, *i.e.*, some parts may constitute a personnel record, some might be clearly unwarranted invasion of privacy.
 2. There have been several district court cases involving agreements to close settlement agreements involving public agencies. Not only have the courts held the agreements to be open, they awarded attorneys fees to the plaintiff in at least one case.
- B. If a public record contains material not subject to disclosure, that portion of the record must be deleted and the record made available. K.S.A. 45-220(d). *See also, Tew v. Topeka Police & Fire Civ. Serv. Comm'n*, 237 Kan. 96 (1985); *State ex rel. Stephan v. Harder*, 230 Kan. 573 (1982); K.S.A. 45-221(d).
- C. If a record is reviewed and discussed during an open meeting, a record that may ordinarily be discretionarily closed, generally becomes open. A.G. Opin. No. 92-132.

X. SUNSET OF CLOSURE EXEMPTIONS

- A. The 2000 Legislature enacted a sunset provision by which it was to review and reenact closure "exemptions" within 5 years or they expire. K.S.A. 45-229. In 2005 the sunset was extended to 2010.
- B. Closure laws must be reviewed and renewed every five years; otherwise they expire. K.S.A. 45-229(b)-(h).

XI. ENFORCEMENT OF THE KORA

- A. Investigations
1. Investigative subpoenas may be issued by the Attorney General and District/County Attorneys. K.S.A. 45-228.
 2. Attorney General and County/District Attorneys will accept complaints from public. A.G. normally refers complaints against local government to the County/District Attorney.
 3. Ordinarily, the Attorney General's office requests that complaints be timely made and be put in writing. This is done in order to verify facts,

keep a record of the statements made, and in general assist with any investigation that becomes necessary.

B. Litigation

1. Any person, the Attorney General, or a County/District attorney, may file suit in district court.
 - a. Suit must be brought in the county where the records are located. If the records are located out of state, there is no cause of action under KORA. *Altevogt v. Youth Friends*, 29 Kan.App.2d 473 (2001). *See also Wichita Eagle v. Simms*, 50 P.3d 66, 274 Kan. 194 (2002).
2. District court may order injunction or mandamus.
3. The court "shall" award attorney fees against defendant if it finds denial of access was not in good faith or against plaintiff if the action was not in good faith. K.S.A. 45-222. Reasonable attorney fees may be assessed, even upon appeal, as part of costs. *See Telegram Pub. Co. Inc., v. KDOT*, 275 Kan. 779 (2003).
4. Fines of up to \$500 for "each violation" against public agency if the agency "knowingly violates any of the provisions of this act or that [it] intentionally fails to furnish information as required by this act. . . ." Such cases seeking a fine may only be brought by the Attorney General, District or County Attorney. K.S.A. 45-223.
5. Such actions to be given precedence by the court.

XII. KANSAS PUBLIC RECORDS PRESERVATION ACT. K.S.A. 45-401 *et seq.*

The KORA does not speak to preservation of public records. "Nothing in this act shall be construed to require the retention of a public record nor to authorize the discard of a public record." K.S.A. 45-216(b). However, other laws may require that a public record be kept for a period of time.

- A. State agencies and counties are subject to the Preservation Act and are prohibited from destroying public records except as permitted by minimum records retention schedule as set forth by State Records Board. K.S.A. 45-403; 45-404(b).
- B. State Records Board, while technically attached to the Kansas Department of Administration, in practice functions through State Historical Society, Div. of Archives. K.S.A. 75-3501 *et seq.*
- C. Records Board has published a Local Government Records Manual which sets forth the schedule of minimum retention periods for counties. Information, including a copy of the schedule, may be accessed at <http://www.kshs.org/government/records/localgovt/index.htm>. The Records Board is currently revising the Local Government Records Manual, and is seeking input from counties. They may be contacted at 913-272-8681, ext. 270. County commissions may petition Records Board for departures from local government general schedule. K.S.A. 45-405(c).
- D. Records Board has published State Records Retention Manual, which contains general schedule for state agencies. Information, including a copy of the schedule, may be accessed at <http://www.kshs.org/government/records/stategovt/index.htm>. State agencies are required to appoint a records officer to act as liaison to Records Board. K.A.R. 53-4-1. State agencies' records officers prepare and submit to the

Records Board proposed specific retention schedules, which are approved by the Board.

- E. Electronic Records are also subject to retention. *See* www.kshs.org/government/records/electronic/index.htm
- F. Altering, destroying, defacing, removing or concealing any public record without legal authority is a class A misdemeanor. K.S.A. 21-3821.
- G. Counties, with approval of state archivist, may transfer noncurrent records to a county historical society, library, college, etc. K.S.A. 45-405(d). Any transferred records must not be of a confidential or restricted nature.
- H. Cities are not subject to the records retention board's schedule. However, the state archivist can advise on retention issues and there are statutory requirements for retention of certain city records. *See* K.S.A. 12-120.

Kansas Expanded Lottery Act (Senate Bill 66) Sec. 4.

(a) There is hereby created the lottery gaming facility review board. The board shall consist of:

- (1) Three members appointed by the governor;
- (2) two members appointed by the president of the senate; and
- (3) two members appointed by the speaker of the house of representatives.

(b) To be eligible for appointment to the board, a person shall submit to the appointing authority evidence of significant business experience, particularly in business development and location of new businesses to maximize revenue.

(c) A person shall not be eligible for appointment to the board if the person:

- (1) Is a resident of or owns property in a gaming zone;
- (2) has an interest in any business domiciled in or conducting a significant portion of its business in a gaming zone; or
- (3) has, or has had during the preceding two years, either directly or indirectly, a financial interest in or is, or has been during the preceding two years, employed by or a consultant to a prospective lottery gaming facility manager or any ancillary lottery gaming facility operations proposed by a prospective lottery gaming facility manager.

(d) Not more than four members of the board shall be members of the same political party.

(e) The governor shall designate one member of the board to serve as chairperson of the board.

(f) The vote of at least four members of the board shall be required to take action.

(g) Subject to the limitations of appropriations therefor, members of the board shall receive such compensation as determined by the governor. Members of the board attending meetings of the board or subcommittee meetings thereof approved by the board shall be paid subsistence allowances, mileage and other expenses as provided in K.S.A. 75-3223, and amendments thereto.

(h) The board is hereby attached to the Kansas racing and gaming commission as a part thereof. All budgeting, purchasing and related management functions of the board shall be administered by the executive director of the Kansas racing and gaming commission and the executive director shall provide office and meeting space and such clerical and other staff assistance as may be necessary to assist the board in carrying out its powers, duties and functions under this act. The board may employ any experts, consultants or other professionals at the expense of a prospective lottery gaming facility manager to provide assistance in evaluating a lottery gaming facility management contract submitted to the board.

THE KANSAS EXPANDED LOTTERY ACT: HOW WILL IT WORK?

The Kansas Expanded Lottery Act allows communities to vote on whether they want casinos in four gaming zones and/or slot machines at three existing pari-mutuel racetracks. The Act establishes the Kansas Lottery Commission as the owner and operator of the casinos and slot machines. It also establishes the Kansas Racing and Gaming Commission as the agency responsible for regulating gaming.

This memorandum provides an overview of the Kansas Expanded Lottery Act, including how the casinos will be selected and the roles the Lottery Commission and the Racing and Gaming Commission will have in helping preserve the integrity of expanded gaming in Kansas.

OVERVIEW OF CASINOS

Is Kansas the only state that owns and operates casinos?

No. At this time West Virginia owns and operates casinos. South Dakota and Oregon also own and operate video lottery machines across their states.

Where can casinos be located?

The Lottery Commission will be able to operate one casino in four different gaming zones around the state. The gaming zones are located in Wyandotte County (Northeast), Crawford and Cherokee counties (Southeast), Sedgwick and Sumner counties (South Central) and Ford County (Southwest). (Sec. 3 (a))

Will voters have to choose whether to allow a casino in their community?

Yes. A casino can only be located in a county that has passed a proposition approving the operation of a lottery gaming facility in the county. (Sec. 6) Crawford County and Sumner County have already voted in favor of allowing casinos and slot machines at pari-mutuel racing facilities. Cherokee County will conduct its vote on June 5. Wyandotte County and Ford County will vote on June 26. Sedgwick County will conduct its vote on August 7.

How much money will state and local governments receive from these facilities?

Privilege fees. The State will receive \$75 million from one-time privilege fees that will be paid by casinos in the Northeast, Southeast and South Central gaming zones. The State will receive \$5.5 million from the privilege fee paid by the casino in the Southwest gaming zone.

Revenue sharing. The Act also provides the floor for yearly gaming revenues that must be distributed; however managers competing for the successful bid may propose additional revenues in their effort to secure the contract. The minimums are as follows:

- 22 percent to the state (estimated at \$145 million annually from all 4 casinos);
- 2 percent to the Problem Gambling and Addictions Fund (approximately \$13 million annually from all four casinos);
- In a single county gaming zone, 1.5 percent to the city and 1.5 percent to the county if the facility is located in a city; or 3 percent to the county if the facility is not located in a city;
- In a multi-county gaming zone where the casino is located in a city, 1 percent to the city, 1 percent to the host county, and 1 percent to the non-host county; and
- In a multi-county gaming zone where the casino is not located in a city, 2 percent to the host county and 1 percent to the non-host county. (Sec. 3 (h)(12)-(16))

How will the casino manager be selected?

We anticipate a number of casino managers will compete with one another for the privilege of managing the Lottery's casinos. The Lottery Commission first reviews all management proposals and negotiates contracts with each manager that meets its criteria, and then submits all eligible contracts to the Casino Review Board for final selection.

The seven-member board will select the contracts that best maximize revenue, encourage tourism and otherwise serve the interests of the state of Kansas. In making its determination, the board will conduct public hearings, take testimony from the public and rely on the advice of experts.

The board then forwards the successful contract for each gaming zone to the Kansas Racing and Gaming Commission, which conducts a background check on the manager and key employees. If the background is approved, the contract becomes binding once a resolution of endorsement is received by the city or county in which the casino will be located. If the background is not approved, the process starts over.

A flow chart describing this process is attached in the Appendix.

How will the Lottery own and operate the gaming operations?

The casino manager will be free to manage the gaming facility, but the Kansas Lottery will have full, complete and ultimate ownership and operational control of the gaming operation. The Kansas Lottery will explicitly retain the power to overrule any action of the casino manager affecting the gaming operation without prior notice. The Kansas Lottery will also retain full control over all decisions concerning casino games. (Sec. 3(h)(17))

What oversight will be provided?

While the Kansas Lottery is the owner and operator of the casinos, the Kansas Racing and Gaming Commission (KRGC) will be the regulator. Placing responsibility for regulatory oversight with an agency other than the owner should eliminate conflicts of interest or bias, and provide for vigorous regulation. The KRGC currently provides regulatory oversight for pari-mutuel facilities.

The KRGC will conduct background checks of key employees, oversee the internal controls and security of the casino, audit casino revenues, enforce all state laws and maintain the integrity of gaming operations. The KRGC will also conduct an annual audit of the operations of each casino, ancillary casino facility and racetrack gaming facility. (Sec. 21)

The KRGC can investigate alleged violations of the Act, or any regulations, can request a court to issue subpoenas to compel access to or for the production of any documents, or to compel the appearance of any manager, can inspect and approve all advertising and can take any other action reasonable to enforce the Act. (Sec. 21)

What limits are placed on the expansion of gaming in Kansas?

Under the management contract, the State of Kansas is prohibited from expanding gaming beyond 2,800 slot machines at the tracks and four destination casinos until July 1, 2032. If the state violates this provision, it will be required to repay the casino manager an amount equal to the privilege fee plus 10 percent interest compounded annually.

OVERVIEW OF RACETRACK GAMING FACILITIES

Is Kansas the only state that owns and operates slot machines at racetracks?

No. At this time, Rhode Island, West Virginia, Delaware and New York own and operate slot machines at racetracks.

What racetrack facilities can have slot machines?

The Lottery Commission can place slot machines at the Woodlands in Kansas City, Camptown Greyhound Park in southeast Kansas and Wichita Greyhound Park.

Will voters have to choose whether slot machines will be allowed at a track?

Yes. Slot machines cannot be placed at a racetrack until the county has voted in favor of allowing them. (Sec. 12). This question will be placed on the same ballot as the casino question.

What limits are there on the number of machines?

The Lottery will allocate 2,800 electronic gaming machines between the three racetrack gaming facilities. The machines are not transferable between facilities. Each facility must receive at least 600 machines. The Lottery can only allocate 2,200 machines initially.

How much money will state and local governments receive from these facilities?

Privilege fees. The State will receive \$7 million from one-time privilege fees that the racetrack will have to pay.

Revenue sharing. Net gaming machine yearly income will be distributed as follows:

- 40 percent to the state (estimated at \$87 million annually);
- In a single county gaming zone, 1.5 percent to the city and 1.5 percent to the county if the facility is located in a city; 3 percent to the county if the facility is not in a city (3 percent estimated as \$2.5 million from Woodlands and Wichita Greyhound, and \$1.5 million from Camptown);
- In a multi-county gaming zone, where the facility is located in a city, 1 percent to the city, 1 percent to the host county, and 1 percent to the non-host county;
- In a multi-county gaming zone where the facility is not located in a city, 2 percent to the host county and 1 percent to the non-host county;
- 2 percent to problem gaming and addictions fund (estimated at \$4 million annually);
- 7 percent to live horse racing supplement fund, capped at \$3,750 per machine per year (roughly \$10 million per year);
- 7 percent to greyhound racing supplement fund, capped at \$3,750 per machine per year (roughly \$10 million per year);
- 25 percent to racetrack gaming facility manager (Woodlands and Wichita Greyhound estimated at \$20 million; Camptown estimated at \$12.5 million).
- 15 percent toward gaming expenses, subject to agreement between the Lottery and manager; and
- 1 percent to Kansas Horse Fair Racing Benefit Fund (approximately \$2 million, which benefits Eureka Downs and Anthony Downs as well as other small fair tracks).

What ownership limits and qualifications are there?

The owner or manager of a racetrack facility cannot operate a casino in the same gaming zone. (Sec. 10(e)) The manager must have sufficient access to financial resources to support activities required under the Act and must be current in filing all tax returns with the state. The manager

must also pass a background investigation conducted by the KRGC. Other minimum requirements may be set out by the Lottery in the management contracts. (Sec. 10(b))

When can gaming machines be placed at the tracks?

The Kansas Lottery will adopt rules and regulations governing the allocation and operation of electronic gaming machines at racetrack gaming facilities by September or October, 2008. It must also negotiate a racetrack gaming facility management contract. The Lottery will also need to purchase the central communication system which will monitor every slot machine. Once this groundwork is laid, then the gaming machines can be purchased and placed at the tracks. (Sec. 9, 10) It would be reasonable to expect slots at the tracks to be operational by the beginning of 2008.

What are the rules regarding ownership and regulation?

The Kansas Lottery will own and operate the racetrack gaming facilities. Lottery responsibilities unique to racing gaming facilities include determining the number and type of machines to be allocated. Otherwise, the Lottery has the same responsibilities for racetrack facilities as it does casinos.

The KRGC currently regulates pari-mutuel facilities and will expand its role to also regulate the gaming facilities. The KRGC will undertake the same enforcement responsibilities for racetrack gaming facilities as it does for casinos and will continue regulating races as well.

What limits are there on the expansion of gaming?

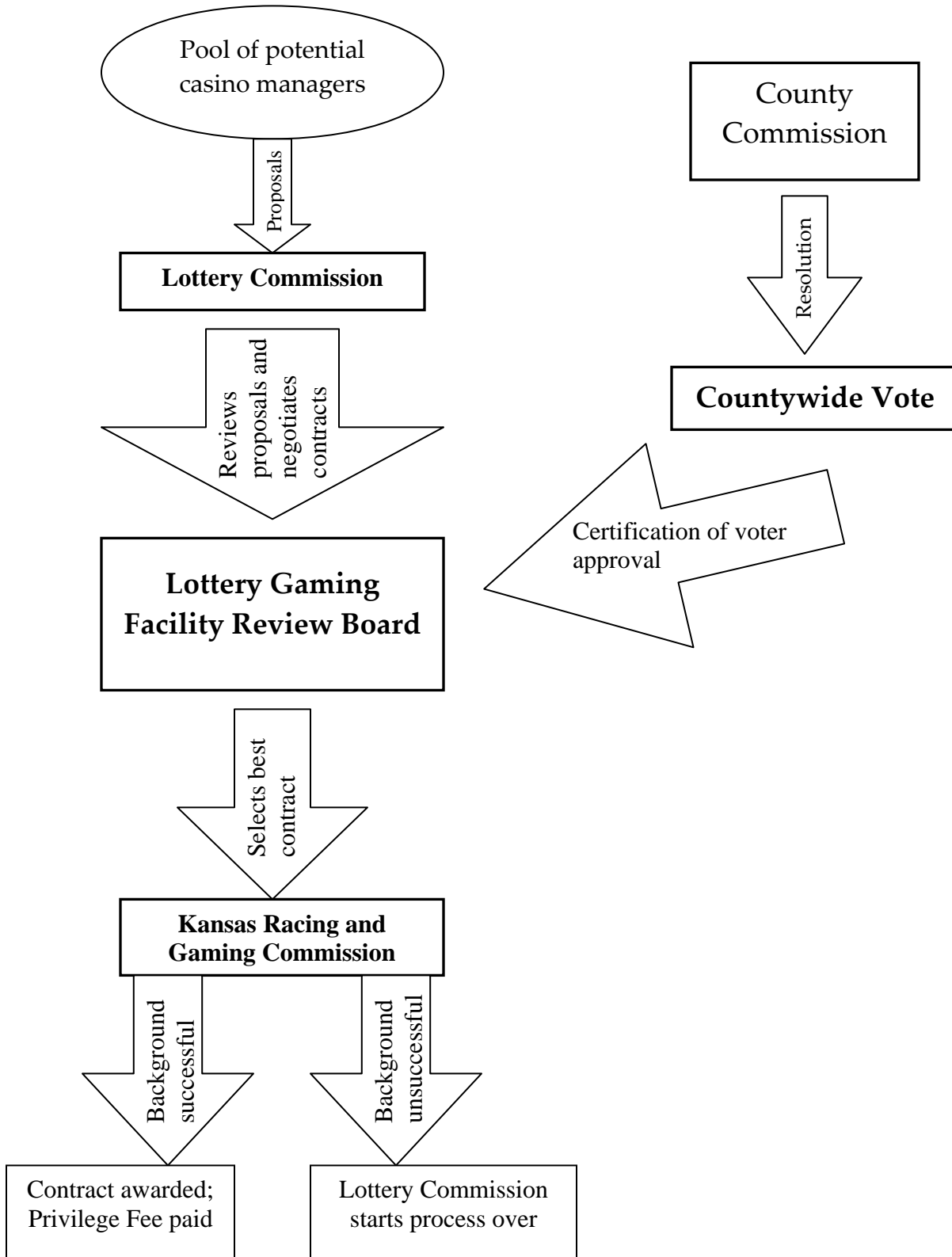
Just as with the casinos, the racetrack gaming facility management contract must prohibit the state from opening additional casinos or operating more than 2,800 electronic gaming machines.

IS THE LAW CONSTITUTIONAL?

Questions have been raised about whether the Expanded Lottery Act complies with the constitutional requirement that the State own and operate the gaming operation. The Attorney General's office will be challenging the statute so that the Kansas Supreme Court can rule on this question. It's believed this issue will be resolved within approximately one year. It's anticipated the Lottery will move forward with selecting the successful casino, and may allow slot machines at the tracks while the legal challenge takes place. However, the successful casino manager likely will not begin construction until this legal issue is resolved.

APPENDIX

FLOW CHART FOR CASINO SELECTION PROCESS



**KANSAS LOTTERY GAMING FACILITY REVIEW BOARD
CODE OF CONDUCT**

INTRODUCTION

In the discharge of its powers, duties and responsibilities, the Kansas Lottery Gaming Facility Review Board (Board) must conduct itself according to high ethical standards. The Board's members and agents are expected to discharge their duties with loyalty and in such a manner to as to promote and preserve public trust and confidence in the Board and the discharge of the Board's duties under the Kansas Expanded Lottery Act.

It is therefore essential that the Board's members must avoid situations where private interest in outside business activities and opportunity for financial or personal gain could influence the members' decision in giving favored treatment to any organization or person. Board members must avoid circumstances and conduct in outside activities that appear questionable to the general public.

1. Policy and Application

- a) The purpose of this Code is to assure that the Board's members and agents avoid situations, relationships or associations that may lead to or represent a conflict of interest for the Board or its members and agents. The provisions in this Code are intended to augment statutory provisions. All Board members and agents should remain aware of their responsibilities under the Kansas Expanded Lottery Act and other statutes governing gaming law and ethical conduct of public officials and agents. If a Board member or Board agent has a question or concern as to the applicability of this Code to a current or prospective situation, relationship or association, that question or concern should be presented to the Executive Director of the Racing and Gaming Commission (Commission) for clarification or guidance.
- b) Each Board member and agent is directed to read and comply with this Code of Conduct. Upon adoption of this Code by the Board, each member shall sign a statement acknowledging that he or she has read the Code of Conduct, understands its terms and agrees to abide by its terms as adopted or as may be amended from time to time. Should a Board member become unable or unwilling to comply with the Code of Conduct as adopted herein or as may be amended, such member shall immediately inform the members of the Board and the Commission's Executive Director.
- c) No Board member or agent shall use or attempt to use his or her official position to secure any privilege, advantage, favor or influence for himself, herself or others.

- d) Board members and agents shall bear responsibility for adherence to this policy and to the specific prohibitions and restrictions set forth in this Code.
- e) Certain of the prohibitions in this Subpart (1) affect or extend to the spouses, parents and children of Board members or agents. For purposes of this Code, these represent the lineal relations of Board members and agents and, in the case of children, legally adopted and step-children. It is recognized that in some cases, a Board member or agent may have limited influence over the decisions of lineal relatives, and that limited influence will be taken into consideration in evaluating the circumstances of an alleged violation.

2. Duty to avoid conflict of interest

Board members and agents, and their spouses, parents and children have a duty to avoid relationships that may cause or have the appearance of causing a conflict of interest. A conflict of interest means a situation in which a Board member's or agent's private interest, whether personal, financial or otherwise, influences or creates the appearance that it may influence the Board member's or agent's judgment in the performance of his or her duties and responsibilities in a fair and impartial manner.

3. Gambling and Other Restrictions

Board members or agents shall not engage in gambling in any establishment, entity, facility or affiliate of a prospective lottery gaming facility manager; any establishment identified by Board action that, in the judgment of the Board, could represent a potential for a conflict of interest; or any entity subject to licensure or approval by the Commission.¹

Board members or agents shall not engage in excessive or inappropriate fraternization with employees, representatives or agents of prospective lottery gaming facility managers and shall adhere to any policies and directives regarding personal conduct while on the premises of any entity subject to licensure or approval by the Commission.

Board members and agents are prohibited from accepting any complimentaries from any entity, affiliate, employee, representatives or agent of a prospective lottery gaming facility manager or any entity subject to licensure or approval by the Commission.

¹ This section provides for restrictions on gambling in addition to those provided in the Kansas Expanded Lottery Act prohibiting Board members, employees and agents and their family members from gambling at Kansas lottery gaming facilities and racetrack gaming facilities.

No Board member or agent shall stay overnight in a guest room at any establishment, entity, facility or affiliate of a prospective lottery gaming facility manager or any entity licensed or certified by the Commission except in the normal course of the member's duties.

4. Other employment

- a) Board members and agents must not hold or pursue employment, office, position, business or occupation that may conflict with the Board member or agent's official duties. Board members and agents may engage in other employment so long as it does not interfere or conflict with their duties, provided that such employment is disclosed to the Executive Director of the Commission and approved by the Board.
- b) Disclosure of other employment by Board members must be made at the time of adoption of this Code of Conduct or before accepting the other employment. Any Board member who discloses outside employment to the Board shall recuse himself or herself from any discussion and decision made by the Board relative to his/her outside employment.
- c) Board members and agents may not solicit, suggest, request or recommend the appointment of any person to an office, place or position or the hiring of any person for direct or indirect employment to any prospective lottery gaming facility manager or applicant for or holder of a license issued by the Commission or to any representative or agent of such prospective lottery gaming facility manager applicant for or holder of a license issued by the Commission.

5. Restrictions on receiving gifts

Board members and agents and their spouses, children and parents may not, directly or indirectly, accept any hospitality, gift, gratuity, service, compensation, travel, lodging or any thing of value, with the exception of unsolicited items of an incidental nature, from a prospective lottery gaming facility manager; or Commission licensee or applicant; or affiliates, key personnel and representatives of a prospective lottery gaming facility manager or licensee or applicant of the Commission. This prohibition may be extended by Board action to any entity or individual that, in the judgment of the Board, could represent a potential for a conflict of interest.

6. Prohibition on holding or acquiring ownership

- a) Board members or agents and their spouses, children and parents may not, directly or indirectly, hold or acquire or cause or encourage any other person to acquire any actual or contingent form of ownership interest or other financial interest in a prospective lottery gaming facility manager,

affiliate or parent corporation, or Commission licensee, applicant, or its affiliates, key persons and representatives. This prohibition may extend to the holding or acquisition of an interest in any entity identified by Board action that, in the judgment of the Board, could represent the potential for or the appearance of a conflict of interest. The holding or acquisition of an interest in such entities through an indirect means – such as through a mutual fund – shall not be prohibited, except that the Board may identify specific investments or funds that, in its judgment, are so influenced by gaming holdings as to represent the potential for or the appearance of a conflict of interest.²

- b) After a member's Board service terminates, that Board member is precluded for 5 years from acquiring any actual or contingent form of ownership interest, or other financial interest in, a prospective lottery gaming facility manager, or the prospective lottery gaming facility's affiliate or parent corporation, or Commission licensee, applicant, or their affiliates, key personnel and representatives. This prohibition may be extended by Board action to any entity that, in the judgment of the Board, could represent a potential for or the appearance of a conflict of interest. The holding or acquisition of an interest in such entities through an indirect means – such as through a mutual fund – shall not be prohibited, except that the Board may identify specific investments or funds that, in its judgment, are so influenced by gaming holdings as to represent the potential for or the appearance of a conflict of interest.

7. Prohibition on economic associations

Board members or agents and their spouses, children and parents shall not be employed by or solicit employment or directly or indirectly under contract with, or have any economic association with:

- a) prospective lottery gaming facility managers or their affiliates or parent corporations,
- b) licensees of the Commission,
- c) applicants of the Commission,
- d) licensee or applicant affiliates of the Commission,
- e) licensee or applicant key personnel of the Commission and
- f) representatives of any race track, racing association or any person, organization or entity engaged in the conducting of greyhound or horse racing in the State of Kansas.

8. Disclosure of economic associations

² These provisions are in addition to those in the Kansas Expanded Lottery Act making it a criminal offense for state and local officials and affiliated persons to enter into any business dealing, venture or contract with an owner or lessee of a Kansas lottery gaming facility or racetrack gaming facility.

Each Board member who owns or is employed by a firm or business entity shall, to the best of the member's ability, identify any current economic relationship, whether direct or indirect, which could create the appearance of a conflict of interest that may exist between the Board member's firm or business entity and any prospective lottery gaming facility manager or Commission licensee, applicant, their affiliates, key personnel and representatives. The Board member shall declare his or her intention to refrain from deliberations and voting on questions related to the gaming entity in such relationship. This requirement may be extended by Board action to any entity or individual that, in the judgment of the Board, could represent the potential for or the appearance of a conflict of interest.

9. Restrictions on professional service agents

For purposes of this provision, agents of the Board may include any experts, consultants or other professionals.

Agents of the Board may be subject to terms and conditions relating to restrictions or prohibitions in representation, employment and contracting with prospective lottery gaming facility managers, their affiliates and parent corporations and Commission licensees, applicants, their affiliates, key personnel or representatives. Such restrictions and prohibitions shall be contained in the professional service contracts of the Board.

10. Disclosure statements

Board members are required to submit a Statement of Substantial Interest and shall complete and timely file such statements and provide a copy to the Board for its review in addition to filing with the Office of the Secretary of State. The financial disclosure statements shall be filed with the Executive Director of the Commission.

11. Restrictive Covenant

Board members or agents shall not for a period of 5 years after termination of their Board appointment or employment engage in any employment or contractual relations with, or have any financial interest in, any licensee, applicant, their affiliates, key personnel or representatives of the Commission.

12. Violations

Violation of this Code by a member of the Board may result in written notification to the Office of the Attorney General for consideration of a possible ouster action, per K.S.A. 74-714. Violation of this Code by a Board agent may result in discipline up to and including termination.

13. Ex Parte Communications

No Board member shall knowingly have *ex parte* communications relating to a matter pending before the Board that may require a public vote of the Board with any party or any representative or agent of a party to the matter pending before the Board or any person with a material interest in the outcome of the matter pending before the Board. As *ex parte* communications, either oral, written, electronic or otherwise communicated, may occur inadvertently, any Board member participating in such communication shall report the details about the communication to the Executive Director of the Commission.

14. Effective date

The provisions of this Code shall be effective and binding as of December 20, 2007, upon the Kansas Lottery Gaming Facility Review Board's members and agents. Amendments to the Code shall be effective and binding on the date of adoption.

CODE OF CONDUCT RECEIPT

I, _____, hereby acknowledge that I have received
(PLEASE PRINT)
the Kansas Lottery Gaming Facility Review Board Code of Conduct adopted
_____, 2007.

I, _____, hereby acknowledge that I have read and
(PLEASE PRINT)
understand the Kansas Lottery Gaming Facility Review Board Code of Conduct.

Signed: _____ Date: _____

NOTE: This receipt must be signed, dated and returned to the Executive Director.

Kansas Lottery Gaming Facility Review Board

STAFF AGENDA MEMORANDUM

DATE OF MEETING: December 20, 2007

AGENDA ITEM: Discussion, consideration and possible action on hiring expert consultants for Lottery Gaming Facility Review Board

PRESENTER: Stephen Martino, Executive Director

ISSUE SUMMARY: The Kansas Expanded Lottery Act allows the Lottery Gaming Facility Review Board to employ experts and consultants in reviewing proposals from prospective lottery gaming facility managers. “The board may employ any experts, consultants or other professionals at the expense of a prospective lottery gaming facility manager to provide assistance in evaluating a lottery gaming facility management contract submitted to the board.” SB 66, §4(h).

Consulting services that the board might consider are:

1. Market analysis for each of the regions in Kansas authorized for gaming. This would involve estimating potential gross gaming revenues in each of the regions, likely employment impacts, and the potential for revenue generation for the State;
2. Assistance in specifying and designing criteria for evaluation of lottery gaming facility management proposals in terms of required information and amount of detail on submitted proposals, financial projections, economic impact projections (i.e. effects of the proposed casino on the local and regional economy, effect on public sector revenues and expenses)
3. Provision of historic information and analysis of competitive bidding processes for casino licenses in other jurisdictions, including:
 - a. Specification of minimum standards required for consideration
 - b. Decision-making processes by appropriate bodies
 - c. Designation of criteria on which final selections will be made
 - d. Clarification of areas of weakness or vulnerability in the competitive bid process;
 - e. Implications of experiences of other jurisdictions in competitive bidding processes: important lessons for decision-makers in Kansas
4. Background research and financial evaluation of the companies or consortiums responsible for each of the submitted bids for lottery gaming facility management contracts in Kansas;
5. Evaluation of the specific proposals in terms of a number of key characteristics, such as:
 - a. the feasibility of the over-all proposal,
 - b. the reasonability of the economic forecasts,

- c. the reasonability of operational projections, such as departmental revenues, expenses, and contributions to income;
 - d. the reasonability of the proposal's estimates of economic and fiscal impacts at the local, regional, and state level.
6. Evaluation of hospitality, amenities and ancillary development proposed by lottery gaming facility management proposals, including but not limited to a review of the economic impact of nongaming developments and proposals including restaurants, hotels, entertainment venues, spas, golf courses, convention and meeting space, and retail, commercial and residential development.

The board should be mindful of a couple of factors when determining how to proceed with consultants. First, the board, through its statutory attachment to the Racing and Gaming Commission, is not exempt from state procurement law, unlike the Lottery Commission, which does not have to go to bid with its vendors. At a minimum, consultants would have to be identified and contracted through a sole source bidding process. The other option would be to issue a request for proposal. The RFP process likely would take more than a month to complete. Second, it is likely that the Lottery Commission will hire experts and consultants to guide them through the contract development and negotiation phase of expanded gaming. In some cases, there may be no conflict of interest in using the work product of Lottery consultants or employing them separately to provide consultation to the Board.

BOARD ACTION REQUIRED/REQUESTED: Given the statutory timelines of SB66, the Board should be prepared to discuss these matters and approve a process for identifying and securing experts and consultants.

KANSAS EXPANDED LOTTERY ACT
RESULTS OF COUNTY ELECTIONS
WITH RESULTING DEADLINES FOR
LOTTERY GAMING FACILITY MANAGER APPLICATIONS

Wyandotte County

Election June 26, 2007 – Certified July 2, 2007
 Deadline to submit to Lottery, December 31, 2007 (as extended)
 Deadline for Lottery to submit to LGFRB, March 31, 2008
 Deadline for LGFRB decision, May 30, 2008

<u>Casino</u>			<u>Electronic Gaming Machines at Racetrack</u>		
Yes	16,138	(80.87%)	Yes	16,350	(82.05%)
No	3,818	(19.13%)	No	3,577	(17.95%)

Cherokee County

Election June 5, 2007 – Certified June 8, 2007
 Deadline to submit to Lottery, December 6, 2007 (as extended)
 Deadline for Lottery to submit to LGFRB, March 5, 2008
 Deadline for LGFRB decision, May 5, 2008

Yes	4,663	(69.42%)
No	2,054	(30.58%)

Crawford County

Election April 3, 2005 – Approved by Lottery Commission May 16, 2007
 Deadline to submit to Lottery, December 6, 2007 (as extended)
 Deadline for Lottery to submit to LGFRB, March 5, 2008
 Deadline for LGFRB decision, May 5, 2008

<u>Casino</u>			<u>Electronic Gaming Machines at Racetrack</u>		
Yes	5,791	(60.78%)	Yes	5,919	(62.02%)
No	3,737	(39.22%)	No	3,625	(37.98%)

Ford County

Election June 26, 2007 – Certified June 29, 2007
 Deadline to submit to Lottery, December 26, 2007 (as extended)
 Deadline for Lottery to submit to LGFRB, March 25, 2008
 Deadline for LGFRB decision, May 27, 2008 (May 26 is Memorial Day)

Yes	3,273	(64.05%)
No	1,837	(35.95%)

Sumner County

Election December 20, 2005 – Approved by Lottery Commission June 22, 2007
 Deadline to submit to Lottery, December 28, 2007 (per Sedgwick Co. certification 08/13/07 and extension)
 Deadline for Lottery to submit to LGFRB, March 27, 2008
 Deadline for LGFRB decision, May 26, 2008

Yes	4,842	(63.05%)
No	2,838	(36.95%)

Sedgwick County

Election August 7, 2007
 Certified August 13, 2007

<u>Casino</u>			<u>Electronic Gaming Machines at Racetrack</u>		
Yes	45,410	(43.90%)	Yes	51,624	(49.88%)
No	58,035	(56.10%)	No	51,868	(50.12%)