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April 28, 2015

ATTORNEY GENERAL OPINION NO. 2015- 10

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

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

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

Dear Senator Hensley:

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

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

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

¹ K.S.A. 45-215 *et seq.*

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

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

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

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

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

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

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

² K.S.A. 45-218(a).

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

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

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

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

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

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

⁴ K.S.A. 2014 Supp. 45-217(f)(1).

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

⁶ K.S.A. 2014 Supp. 45-217(f)(1).

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

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

Sincerely,

Derek Schmidt
Kansas Attorney General

Cheryl L. Whelan
Assistant Attorney General

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