

**BEFORE THE OFFICE OF THE KANSAS ATTORNEY GENERAL**  
**120 SW 10<sup>th</sup> Avenue, 2<sup>nd</sup> Floor**  
**Topeka, Kansas 66612-1597**  
**Shawnee County, Kansas**

In the Matter of the \_\_\_\_\_ )  
City of Independence, Kansas. )

Case No. 2017-OG-0001

**CONSENT ORDER**

NOW on this 23<sup>rd</sup> day of February, 2017 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2016 Supp. 45-251(a)(1), which grants the Attorney General authority to enter into consent orders.

In lieu of further legal proceedings concerning violation of the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, the undersigned hereby knowingly and voluntarily agree as follows:

1. On or about May 12, 2016, the Attorney General's Office received a complaint alleging the City of Independence, Kansas ("the City") violated the KORA. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into allegations that the City improperly refused to disclose a copy of a blank evaluative tool used for the performance evaluation of the city manager in violation of K.S.A. 2016 Supp. 45-218(a) and (d), which provide that public records shall be open for public inspection and access unless otherwise provided by law.

2. The City is a public agency that is subject to the requirements of the KORA, and it must permit access to records as set forth in the KORA.

3. Investigation and/or statements provided on behalf of the City, as described in a letter dated January 30, 2017, to city attorney Austin Parker, which is attached hereto and incorporated by reference as Exhibit A, confirm the following violation of the KORA by a preponderance of the evidence:

- a. On April 1, 2016, the complainant submitted a KORA request to the City seeking "a blank copy of the evaluative tool used by the city commissioner [sic] to evaluate the city manager."
- b. An April 11, 2016, the City denied the KORA request, stating that "[T]his item is related to personnel and not a public record."

- c. On June 6, 2016, the City received a letter from complainant seeking an explanation for the non-disclosure of a blank copy of the evaluative tool used to evaluate the city manager.” The City stated its “response is in accordance with the provisions of K.S.A. 45-221(a)(4), which states, in relevant part, that a city is not required to disclose Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment.”
- d. During the investigation, the City contended that the blank evaluative tool was “specifically created solely to assist in the evaluation” of the Independence city manager, and thus not required to be disclosed by the provisions of K.S.A. 2016 45-221(a)(4). The City also contended that the evaluative tool was only utilized and discussed during executive sessions under the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.* Finally, the City contended that K.S.A. 2016 Supp. 45-221(a)(15) permitted the City to discretionarily close records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session because the evaluative tool was used in executive session negotiations with the city manager concerning the potential adjustment of his annual compensation.
- e. The City provided the Attorney General’s Office a copy of the blank evaluative tool for review. Investigation revealed that the blank evaluative tool “specifically created solely to assist in the evaluation” of the city manager, was in fact a City Manager Performance Evaluation form publicly available on the internet. This form was created in 2008 by the Municipal Technical Advisory Service (MTAS), an entity that provides technical assistance to municipal governments in the state of Tennessee. Comparison revealed that the City’s evaluative tool and the MTAS City Manager Performance Evaluation form publicly available on the internet were identical in every respect.
- f. A copy of a blank form publicly available on the internet is not subject to discretionary closure under K.S.A. 2016 45-221 or any other provision of law.

4. Based upon the above information, the City admits and agrees that it violated the KORA as set out in paragraph 3 above when it failed to provide a copy of the blank evaluative tool to complainant in response to her KORA request.

5. The City agrees it fully understands and agrees that it will comply with the requirements of the KORA as set out in K.S.A. 45-215 *et seq.* in responding to each KORA request it receives.

6. The Attorney General and the City mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. The City understands and waives all rights to further adjudication of facts and law that could be determined pursuant to other enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 45-222(a), 45-251(a)(2), or 45-253 concerning this matter.

8. The City waives any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applies to agency actions that are governed by the provisions of K.S.A. 45-215 *et seq.*, and amendments thereto, relating to open records (the KORA), and subject to an action for civil penalties or enforcement, and thus it does not have a right to appeal under the KJRA.

9. The Attorney General accepts the waivers and stipulations by the City.

**WHEREAS**, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that the City be subject to this Order based on the provisions of K.S.A. 2016 Supp. 45-251(a)(1), which permits the Attorney General to impose conditions or requirements on a public agency for violation of the KORA in a Consent Order;

**AND WHEREAS** the Attorney General and the City mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

**NOW THEREFORE**, the City consents to the following terms and conditions, and the Attorney General orders that:

10. The City shall:

- a. Ensure that City staff, including the City's freedom of information officer, the City's records custodian(s), and any other staff responsible for assuring compliance with the requirements of the KORA obtain at least one (1.0) hour of

training on the provisions of the KORA to be presented by an attorney experienced in dealing with open records issues, within three (3) months of the date of this Consent Order;

- b. Provide the Attorney General's Office with a written statement confirming that City staff responsible for assuring compliance with the KORA have obtained the required KORA training;
- c. Pay a civil penalty of \$250.00. Such payment shall be made payable to the Office of the Attorney General pursuant to K.S.A. 2016 Supp. 75-760;
- d. Provide a copy of the blank evaluative tool to the complainant by the most expedient means available, and provide a copy of such communication with complainant to this office; and
- e. Not engage in any future violations of the KORA.

11. The City understands and agrees that if it fails to comply with the terms of this Consent Order, the Attorney General may take action to enforce its provisions as authorized by K.S.A. 2016 Supp. 45-251(c) and amendments thereto.

12. The City understands and agrees that if it engages in any future violation of the KORA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

13. The City agrees and understands that this Consent Order does not resolve future and/or currently unknown unlawful conduct that may occur or be brought to the attention of the Attorney General or any other prosecutor, and any such alleged violations of the KORA may be subject to investigation proceedings as provided by K.S.A. 2016 Supp. 45-228 and/or enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 45-222, 45-251(a)(2), or 45-253.

14. In consideration of these admissions and agreements by the City, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violations of the KORA set forth herein.

15. The City agrees that this Consent Order conforms to Kansas and federal law and that the Attorney General has the authority to enter into this Consent Order.

16. Except as provided in paragraphs 11 and 12, this Consent Order shall operate as a complete release of all claims the City may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. The City agrees not to file, or cause to be filed, any litigation or claims in any federal or state court of law or federal or state administrative agency against the Attorney General, the Office of the Attorney General, its agents or employees, individually or in their official capacity. Such litigation or claims include, but are not limited to, any K.S.A. Chapter 60 or Chapter 61 civil action regarding negligence and/or a 42 United States Code action and/or any administrative petition for redress. The City agrees that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability within the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or (e).

17. The City understands that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2016 Supp. 45-251(e) and amendments thereto.

18. This Consent Order shall be a public record in the custody of the Office of the Attorney General.

19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

20. This Consent Order shall become effective on the date indicated in the Certificate of Service.

**WHEREFORE**, the Attorney General and the City consent to these provisions.

**IT IS SO ORDERED.**

**OFFICE OF THE ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read "Derek Schmidt", written over a horizontal line.

Derek Schmidt  
Kansas Attorney General

**Prepared By:**

*Lisa A. Mendoza*

Lisa A. Mendoza, #12034  
Assistant Attorney General  
Director, Open Government Enforcement Unit  
Office of the Kansas Attorney General  
120 SW 10<sup>th</sup> Avenue, Second Floor  
Topeka, KS 66612-1597

**Approved By:**

*Austin K. Parker*

Austin K. Parker, #23654  
Fisher, Patterson, Saylor & Smith  
3550 SW 5<sup>th</sup> Street  
PO Box 949  
Topeka, KS 66606  
*Independence City Attorney*

*Jeffrey A. Chubb #9915  
P.O. Box 747  
Independence, KS 67301  
City Attorney*

**The City of Independence:**

*Gary Hogsett*  
\_\_\_\_\_  
Gary Hogsett, Mayor

*2/23/17*  
\_\_\_\_\_  
Date

*Fred Meier*  
\_\_\_\_\_  
Fred Meier, Vice Mayor

*2/23/17*  
\_\_\_\_\_  
Date

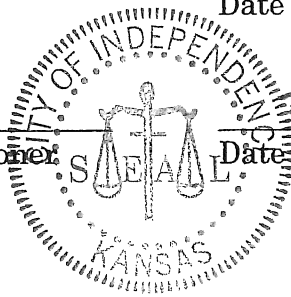
*Leonhard Cafilisch*  
\_\_\_\_\_  
Leonhard Cafilisch, Commissioner

*2/23/17*  
\_\_\_\_\_  
Date

**ATTEST:**

*Jennifer Rutledge*  
\_\_\_\_\_  
Jennifer Rutledge, City Clerk

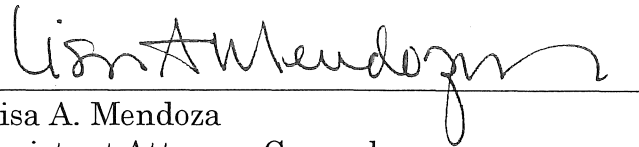
*2/23/17*  
\_\_\_\_\_  
Date



**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of March, 2017, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Jeffrey A. Chubb  
PO Box 747  
Independence, KS 67301  
*Independence City Attorney*



Lisa A. Mendoza  
Assistant Attorney General  
Open Government Enforcement Unit



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
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January 30, 2017

Austin K. Parker, Independence City Attorney  
c/o Fisher, Patterson, Sayler & Smith  
3550 SW 5<sup>th</sup> Street,  
PO Box 949  
Topeka, KS 66606

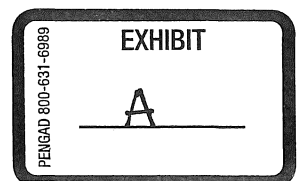
Re: KORA Complaint – City of Independence

Dear Mr. Parker:

On May 12, 2016, we received a KOMA/KORA Complaint form submitted online at 9:00 a.m. by Maxwell Kautsch on behalf of his client Debbie Miller. In her complaint, Ms. Miller alleged that the City of Independence (“the City”) violated the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, when it failed to provide her with “[A] blank copy of the evaluative tool used by the city commissioner [sic] to evaluate the city manager.” Her requested remedy is “[R]eceive requested records, Other – Consent decree or finding of violation as set forth in K.S.A. 45-251.”

After clarifying certain matters with Ms. Miller and her attorney, on June 28, 2016, we requested a response from the City concerning the allegations raised in her complaint. On September 9, 2016, and following your request for an extension of time to respond, we received the City’s response to our inquiry. Included in your response was an unredacted copy of the blank evaluation form Ms. Miller requested in her KORA request.

The purpose of this letter is to inform you of the results of our review. We relied on the complaint and associated documents, the City’s response, information obtained from the City’s website, including recordings of relevant City Commission meetings and information obtained from website for The University of Tennessee Institute for Public Service – Municipal Technical Advisory Service. We relied on this collected information, as well as the provisions of the KORA, prior Attorney General Opinions, and caselaw as noted herein, in reviewing this matter.





Following our review, it is clear that the City of Independence is a public agency subject to the KORA,<sup>1</sup> and thus this office has jurisdiction to review any complaint that the KORA has been violated.<sup>2</sup> Relevant to our inquiry is whether a public agency knowingly violated any provisions of or intentionally failed to furnish information required by the KORA.

To assist in understanding our conclusions, we discuss the applicable law, describe the facts in detail, and then discuss our conclusions.

### *The KORA generally*

The KORA applies to public agencies. As mentioned previously, the City of Independence meets the definition of a public agency under the KORA, and thus must comply with its requirements.

The KORA generally declares that public records shall be open for inspection by any person unless otherwise provided by the Act.<sup>3</sup> The KORA was “passed by the legislature to ensure public confidence in government by increasing the access of the public to the government and its decision-making processes.”<sup>4</sup> The KORA is to be “liberally construed and applied to promote” the policy of openness.

The KORA provides the public with the ability to access<sup>5</sup> and obtain copies<sup>6</sup> of public records.<sup>7</sup> Under the KORA, “[E]ach request for access to a public record shall be acted upon “as soon as possible, but not later than the end of the third business day following the date the request is received.”<sup>8</sup> The KORA provides that the public agency must “act” on a request but does not require that a requester receive his or her response within three (3) business days. It also does not specify how a public agency must communicate its response. Because the KORA refers to “business days,” intervening Saturdays, Sundays and holidays are not considered when calculating when the three business days

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<sup>1</sup> K.S.A. 2016 Supp. 45-217(f)(1) (“Public agency” means the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, or 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.”). Although we cite the current version of the statutes throughout, they remain substantially unchanged from the version in effect at the time this complaint arose.

<sup>2</sup> See K.S.A. 2016 Supp. 45-222, 45-223, and 45-228, 45-251, and 45-253.

<sup>3</sup> K.S.A. 45-216(a) (“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.”)

<sup>4</sup> *Data Tree, LLC v. Meek*, 279 Kan. 445, Syl. ¶12 109 P.3d 1226 (2005).

<sup>5</sup> K.S.A. 45-218.

<sup>6</sup> K.S.A. 2016 Supp. 45-219(a).

<sup>7</sup> K.S.A. 2016 Supp. 45-217(g)(1). At the time this complaint was filed, a public record was defined as “any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of a public agency. . . .” In 2016, the legislature amended this section so that a public record was defined as any recorded information, regardless of form, characteristics *or location*, which is made, maintained or kept by or is in the possession of a public agency. . . .”

<sup>8</sup> K.S.A. 45-218(d).

expires. Additionally, a public agency's time to act does not begin to run until the day after it receives a KORA request. In essence, the KORA provides a "window" or interval of time for a public agency to respond when it receives a KORA request.

The KORA's rules apply to existing public records that are not otherwise closed by some law.<sup>9</sup> Public records are presumed open unless permissibly or mandatorily closed pursuant to a specific law applicable to the specific record. Where there is ambiguity about a record, it should be resolved in favor of openness.<sup>10</sup> The KORA does not allow a public agency unregulated discretionary power to refuse to release information sought by the public.<sup>11</sup> The KORA provides that a public agency may not be required to disclose certain records. However, there are also some 55 categories of records that public agencies are not required to disclose.<sup>12</sup> The KORA does not prohibit disclosure of records contained within these exceptions, but makes their release discretionary with the agency's official records custodian.<sup>13</sup> The burden is on the public agency opposing disclosure to justify the decision not to release the public record.<sup>14</sup> The exceptions to disclosure "are to be narrowly interpreted."<sup>15</sup> It is important to remember that if a public record contains some material which is not subject to disclosure and some material that is subject to disclosure, a public agency is under a duty to make available that material which is subject to disclosure.<sup>16</sup>

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<sup>9</sup> Attorney General Opinion No. 2002-029, <http://ksag.washburnlaw.edu/opinions/2002/2002-029.htm#txt25>, accessed January 24, 2017.

<sup>10</sup> Attorney General Opinion 2010-03, <http://ksag.washburnlaw.edu/opinions/2010/2010-003.pdf>, accessed January 25, 2017; see also *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 997 P.2d 681, 28 Media L. Rep. 1617 (2000).

<sup>11</sup> *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 274 Kan. 194, 219, 50 P.3d 66, 30 Media L. Rep. 2505 (2002).

<sup>12</sup> K.S.A. 2016 Supp. 45-221(a)(1) – (55).

<sup>13</sup> *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 63-64, 734 P.2d 1083 (1987).

<sup>14</sup> *Data Tree*, supra, 279 Kan. at 454-55; see also *Southwest Anesthesia Associates v. Southwest Medical Center*, 23 K.A.2d 950, Syl. ¶ 2 (1997) ("The burden of establishing the applicability of an exemption from disclosure under [KORA] 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.")

<sup>15</sup> *Data Tree*, supra, 279 Kan. 455.

<sup>16</sup> See K.S.A. 2016 Supp. 45-221(d) ("If a public record contains material which is not subject to disclosure pursuant to this act, the public agency shall separate or delete such material and make available to the requester that material in the public record which is subject to disclosure pursuant to this act. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency shall delete the identifying portions of the record and make available to the requester any remaining portions which are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable, the public agency shall not be required to disclose those portions of the record which pertain to such individual or individuals."); see also Attorney General Opinion 2002-29, supra; and see *Tew v. Topeka Police & Fire Civ. Serv. Comm'n*, 237 Kan. 96, Syl. ¶7 (1985) (discussing prior law).

### *Background*

On April 1, 2016, Ms. Miller submitted a KORA request to Independence City Clerk Jennifer Rutledge. Her request contained three (3) numbered paragraphs describing the records she were seeking. Ms. Miller's complaint concerns one of the records sought in paragraph number three of her request:

3. A blank copy of the evaluative tool used by the city commissioner [sic] to evaluate the city manager.

At the time of the request, Micky Webb was the Independence City Manager. Mr. Webb's contract with the City was non-renewed and officially ends on March 31, 2017.

According to the City, the "evaluative tool was specifically created solely to assist in the evaluation of Mr. Micky Webb." The City provided no information on who created the evaluative tool or when it was created. The City contends that the "evaluative tool was exclusively utilized and discussed in the context of executive sessions" under the KOMA. It also contended that the "evaluative tool is a record used in executive session negotiations with Mr. Webb concerning the potential adjustment of his annual compensation."

On April 11, 2016, Ms. Rutledge responded to Ms. Miller's KORA request via email. With regard to this request, she indicated that, "[T]his item is related to personnel and not a public record [sic]." Ms. Miller does not challenge the timeliness of the City's response to her KORA request or the City's response to the remainder of her KORA requests.

On May 12, 2016, Ms. Miller filed her KORA complaint. That same day, she appeared at the Independence City Commission meeting to speak during the public comment portion of the meeting:

. . . Not long ago I requested a blank copy of the evaluation tool used to evaluate Mickey Webb. I'm nervous (laughs). Once again, my request was denied because, quote unquote, the item is related to personnel and not a public record. A blank form is not a personnel record. So there is little doubt the city once again violated the Kansas Open Records Act. . . .<sup>17</sup>

On May 26, 2016, and as requested by the City Commission, Ms. Rutledge provided a "Report on citizen comments."<sup>18</sup> One of the items she addressed was the comments made by Ms. Miller on May 12, 2016:

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<sup>17</sup> May 12, 2016, City Commission meeting, 03:59 to 04:24 mark in recording, <https://www.youtube.com/watch?v=9I5DSfBB6F8&feature=youtu.be>, accessed January 24, 2017.

<sup>18</sup> *Agenda*, Independence City Commission, Thursday, May 26, 2016, Adoption of Consent Agenda, section n., Report on citizen comments [CITIZENS],

This is just a summary related to the issues that were raised at the May 12<sup>th</sup> meeting in the citizens comment section, so I'll just go through each of them. . . Um, Debbie Miller addressed KORA violations that she's reported to the Attorney General's Office, and I'm just going to throw out, before I summarize the memo, is that KORA is not, I mean Debbie can probably attest to this, it's an imperfect process. She makes a request and she gets a response. It's not a conversation. . . .The second request was, um, that the evaluative tool for, um, the city manager. And, and that's one of those things that I think it can be argued both ways, it's a personnel document related to one city employee, we have an attorney that agrees with that. Um, Debbie felt differently. The only thing I will say is that I wouldn't, it was in all those meetings, and I never heard a specific tool mentioned, so I don't know if that's something that was discussed in executive session, but in public session, I wasn't even aware that there was a tool used. . . .<sup>19</sup>

On June 3, 2016, Ms. Miller wrote the City concerning its reasons for non-disclosure of the blank evaluation form. On June 6, 2016, the City received her letter. On June 8, 2016, the City responded that its April 11, 2016, response was "in accordance with K.S.A. 45-221(a)(4), which states, in relevant part, that a city is not required to disclose 'Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment.'" It provided no further explanation and did not assert any other provisions of the KORA to support the denial of access to the blank evaluation form.

We will discuss additional facts as necessary to assist in understanding our conclusions.

*Personnel records, performance ratings or individually identifiable records pertaining to employees*

The City relied on the provisions of K.S.A. 2016 Supp. 45-221(a)(4) to deny Ms. Miller's KORA request. This section provides as follows:

- (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose . . . (4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such. . . .

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<http://www.independenceks.gov/AgendaCenter/ViewFile/Agenda/05262016-194>, accessed January 24, 2017.

<sup>19</sup> May 26, 2016, City Commission meeting, 1:57:57 to 1:58:37 mark in recording <https://www.youtube.com/watch?v=wcj-U42uDsI&feature=youtu.be>, accessed January 24, 2017.

“The intent of the exception for personnel records is to protect employee’s privacy, save personal reputations and encourage qualified people to work for government. Protected personnel records generally include personal performance ratings and evaluations, discipline, references, resumes, ADA [citation omitted] and FMLA [citation omitted] documents, personal contact information and social security numbers. . . .”<sup>20</sup>

The language of the statute does not seem to limit its application to records within the personnel file. Rather, it lists three categories of records which may be exempt from KORA’s disclosure requirements: personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment.

Statutory use of [the word] ‘or’ treats all three categories as separate and distinct from each other rather than regarding them as interchangeable definitions of one category of records. ‘In its elementary sense the word ‘or,’ as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately [citations omitted].’ In our opinion, the three categories of records are not to be regarded as interchangeable definitions but rather the performance ratings and individually identifiable records are to be treated as separate categories of records, and not necessarily the same as personnel files.

The legislative history of K.S.A. 45-221(a)(4) supports the conclusion that the three types of records mentioned should be treated as separate. The first draft of the KORA, introduced in 1981 . . . did not include a disjunctive ‘or,’ nor did the statute list individually identifiable records as an exempted category. . . .

The original draft of the statute contained an ‘and’ between personnel records and performance ratings. The 1981 bill . . . was never acted upon. When introduced a second time in 1983 and passed in 1984, the enacted KORA . . . exempted ‘personnel records, performance ratings or individually identifiable records.’ These revisions demonstrate the legislature’s intent to exempt the category of individually identifiable records from mandatory disclosure and, more importantly, for the three categories of records to be treated as separate and distinct from each other. We believe the legislature intended to allow closure of personnel/employment records identifiable to an individual public employee no matter where the record is kept, except for names, positions, salaries, and lengths of service. . . .<sup>21</sup>

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<sup>20</sup> Attorney General Opinion 2010-3, *supra*.

<sup>21</sup> Attorney General Opinion 97-52, <http://ksag.washburnlaw.edu/opinions/1997/1997-052.htm>, accessed January 26, 2017.

Thus, it is clear that personnel records, and other individually identifiable records that pertain to public employees may be discretionally closed under the KORA's personnel records exemption to disclosure. This includes information that is part of an individually identifiable public record that pertains to the public employee.<sup>22</sup>

This is supported by reference to the provisions of K.S.A. 2016 Supp. 45-221(d), concerning redaction. This section requires that if a public record contains both open and closed material, the public agency must separate the open from the closed material and release the open material "unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable." In this event, "the public agency shall not be required to disclose those portions of the record which pertain to such individual or individuals."

It is for this reason that the City argues that it is not required to redact and release the blank "evaluative tool . . . specifically created solely to assist in the evaluation of Mr. Micky Webb, the Independence City Manager."

Whether a record falls within the parameters of the KORA's personnel record provision is a question of fact, and "may in part be determined by examining the nature, content, use of and general internal access to the record in question."<sup>23</sup> However, just because a record contains the name of a public employee or concerns that employee does not mean that the record is shielded from public access.<sup>24</sup>

Because whether a record falls within the parameters of the KORA's personnel records provision is a question of fact, we asked the City to provide us with an unredacted copy of the blank evaluative tool pursuant to the provisions of K.S.A. 2016 Supp. 45-228(a) and (b).<sup>25</sup> This was to help us assess the "nature, content, use of and general internal access to the record."

The blank evaluative tool "specifically created solely to assist in the evaluation of Mr. Micky Webb, the Independence City Manager" is a seven (7) page document. It does not

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<sup>22</sup> Attorney General Opinion 2006-8, <http://ksag.washburnlaw.edu/opinions/2006/2006-008.htm>, accessed January 25, 2016.

<sup>23</sup> Attorney General Opinion 91-127, <http://ksag.washburnlaw.edu/opinions/1991/1991-127.pdf>, accessed January 25, 2017.

<sup>24</sup> Attorney General Opinion 2010-3, *supra*.

<sup>25</sup> K.S.A. 2016 Supp. 45-228(a) provides that, "[I]n investigating alleged violations of the open records act, the attorney general . . . may (3) examine or cause to be examined any records or other documentary material of whatever nature relevant to such alleged violations. . . ." Subsection (b) provides that, "[I]f a public agency claims in writing that any records or documents, or any portion thereof, obtained by the attorney general . . . pursuant to subsection (a) are exempt from disclosure for any reason, the attorney general . . . shall not further disclose that record or document, nor the contents thereof, unless ordered to do so by a district court enforcing the open records act in connection with such record or document. Such records and documents in the possession of the attorney general . . . shall not be subject to a request for inspection and copying under the open records act and shall not be subject to discovery, subpoena or other process."

mention Mr. Webb's name. It is titled "City Manager Performance Evaluation," and its purpose is to evaluate the performance of a city manager.

Content-wise, the evaluative tool contains spaces to insert the name of a City, a date range for the evaluation period under consideration, as well as for the name and signature of the "governing body" member completing the form. It also contains spaces for a mayor's signature. Additionally, it contains a scoring system, instructions for scoring, ten (10) performance categories to be scored, and a narrative evaluation section with four questions. Under each of the ten (10) performance categories, there are five (5) areas on which to rate the city manager. Throughout, the "blank evaluative tool" refers to the "governing body" or "council." It does not specifically mention the City of Independence, the Independence City Commission, any individual commissioner, the mayor or vice mayor. It also does not mention or identify any specific goals for professional development set for Mr. Webb by the Commission, any specific areas of improvement to be addressed by Mr. Webb, or any other unique areas on which he is to be rated. It is not personalized for Mr. Webb or his performance in any way.

The "blank evaluative tool" is sufficiently generic that it raised a question about whether it was in fact "specifically created solely to assist in the evaluation of Mr. Micky Webb, the Independence City Manager." To test our theory that the evaluative tool was simply a generic form, or consisted of mainly generic attributes or performance categories, we selected a phrase from page 1 of the form and conducted an internet search for the phrase. The phrase we selected is from page 1 of the form: "[E]valuations will be summarized and included on the agenda for discussion at the work session."

Using Google, we searched for this phrase. We immediately located a link to a document titled "[DOC] City Manager Performance Evaluation – MTAS" on the internet. When we clicked on this link, it opened a Word document titled "City Manager Performance Evaluation." When we compared this document to the document the City provided for our review, we discovered it is *identical* to the blank evaluative tool the City asserted was "specifically created solely to assist in the evaluation of Mr. Micky Webb, the Independence City Manager."

Exploring further, we easily discovered that "MTAS" referred to the Municipal Technical Advisory Service.<sup>26</sup> "The MTAS was created in 1949 to provide technical assistance to municipal governments within the state of Tennessee."<sup>27</sup> It appears the MTAS website is hosted by The University of Tennessee Institute for Public Service.

Using the search function in the upper right hand corner of the MTAS homepage, we searched for the phrase "city manager performance evaluation." This produced a link

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<sup>26</sup> <http://www.mtas.tennessee.edu/web2012.nsf/Web/Home>, accessed January 25, 2017.

<sup>27</sup> <http://www.mtas.tennessee.edu/web2012.nsf/Web/MTAS+Services>, accessed January 26, 2017; see also [http://www.mtas.tennessee.edu/web2012.nsf/0/7C17B923D5EEFD3D85257C190048D5F1/\\$file/mtas\\_history.pdf?openelement](http://www.mtas.tennessee.edu/web2012.nsf/0/7C17B923D5EEFD3D85257C190048D5F1/$file/mtas_history.pdf?openelement), accessed January 26, 2017.

to a document titled "City Manager Performance Evaluation.docx." Following this link, we again located an *identical* copy of the blank evaluative tool the City contended was "specifically created solely to assist in the evaluation of Mr. Micky Webb, the Independence City Manager."

When we downloaded the form, it opened in Microsoft Word's "Protected View." Once we clicked on the "Enable Editing" button, the form opened to a fully editable version of the City Manager Performance Evaluation. We then reviewed the document's properties, and discovered it was created by a Gary Petree on June 26, 2008, at 6:48 AM, and was last modified by a B. Smeltzer on January 14, 2009, at 7:02 AM.

From our research, it is abundantly clear that the blank evaluative tool sought by Ms. Miller was in fact *not* specifically created for use in Mr. Webb's evaluation. Even if the City Commission intended to and did use this form to evaluate Mr. Webb's performance, a blank version of a form that is *publicly available on the internet* cannot be said to have been specifically created for use in Mr. Webb's evaluation. A generic evaluative tool publicly available on the internet plainly is not exempt from disclosure under the KORA. A public agency cannot change the character of a publicly available form simply by asserting that it was used to evaluate the performance of a specific public employee. To do so undermines the very foundation and purpose of the KORA.

The blank evaluative tool is publicly available on the internet. It was created to evaluate the performance of a city manager, not the Independence city manager. It is a blank form. It was not specifically created or designed to evaluate Mr. Webb's performance as a city manager. No effort was made to tailor or personalize it to Mr. Webb's work performance. While it may have been used for Mr. Webb's evaluation and there may have been limited access, we cannot conclude that this particular blank form is a personnel record or other individually identifiable record pertaining to an employee.

In light of the foregoing, we find that the provisions of K.S.A. 2016 Supp. 45-221(a)(4) do not support the City's denial of access to the blank evaluative tool as requested by Ms. Miller.

Based on our finding, we need not decide whether the City should have undertaken efforts to redact some or all of this blank publicly available form.

### *Discussion during executive session*

In its response to our inquiry, the City also asserted that the "evaluative tool specifically created solely to assist in the evaluation of Mr. Micky Webb, the Independence City Manager . . . was only utilized and discussed during executive sessions held under the '[p]ersonnel matters of nonelected personnel' exception to the Kansas Open Meetings Act (KOMA) found at K.S.A. 75-4319(b)(1), consistent with guidance provided in Kansas Attorney General's Opinion Number 2009-21. . . ." The question being addressed in that



opinion was “whether during the course of an evaluation of an employee conducted in executive session, if the employee is evaluated upon the ability to implement policies, to what extent may those policies be discussed during the closed session.”

The “personnel matters of nonelected personnel” subject matter under the KOMA has a similar purpose to the personnel records exemption to disclosure found in the KORA:

The purpose of the ‘personnel matters of non-elected personnel’ exception is to ‘protect the privacy of employees, saving personal reputations, and encouraging qualified people to select and remain in the employ of government. . . .<sup>28</sup>

[Emphasis in the original.]

The City contends that disclosure of public records discussed during an executive session under the KOMA is subject to the provisions of the KORA and cites Attorney General Opinion 1995-119.<sup>29</sup> This opinion generally discusses public records discussed while in an executive session. If a public body, such as the Independence City Commission, properly convenes an executive session to discuss matters falling under “personnel matters of nonelected personnel” subject matter,<sup>30</sup> it may discuss public records during the course of the executive session. Public records discussed during executive session do not lose or change character merely because they are discussed during executive session. Such public records are still subject to the KORA and any exemptions to disclosure that may exist under the KORA or any other applicable law. Whether or not a specific document fits the definition of a public record or is subject to closure under a specific law is a question of fact to be answered on a case by case basis.

The City asserts that both K.S.A. 2016 Supp. 45-221(a)(4) and (15) exempt the evaluative tool from disclosure. For the reasons previously discussed, a blank evaluative tool publicly available on the internet is not a personnel record or an individually identifiable record pertaining to an employee. Thus, K.S.A. 2016 Supp. 45-221(a)(4) does not support the City’s decision to deny access to the blank evaluative tool requested by Ms. Miller.

K.S.A. 2016 Supp. 45-221(a)(15) concerns records pertaining to employer-employee negotiations:

(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose: . . .

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<sup>28</sup> Attorney General Opinion 88-25, <http://ksag.washburnlaw.edu/opinions/1988/1988-025.pdf>, accessed January 26, 2017; *see also* Attorney General Opinion 2009-21, <http://ksag.washburnlaw.edu/opinions/2009/2009-021.htm#txt9>, accessed January 26, 2017.

<sup>29</sup> <http://ksag.washburnlaw.edu/opinions/1995/1995-119.htm>, accessed January 26, 2017.

<sup>30</sup> K.S.A. 2016 Supp. 75-4319(b)(1).

(15) Records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session under K.S.A. 75-4319, and amendments thereto. . . .

Although the City did not raise this KORA exemption in its June 8, 2016, letter to Ms. Miller, we will consider its merits.

There are no Attorney General Opinions describing the purpose of this exemption to disclosure. Based on the plain language of the statute, it appears that the purpose of this section is to protect from disclosure negotiations between employers and their employees about the conditions of employment, including wages, working hours, and the like. It does not appear that this section is limited to negotiations between a public agency and a union or labor organization.

According to the City, “the evaluative tool is a record used in executive session negotiations with Mr. Webb concerning potential adjustment of his annual compensation.” We assume that the City did not use the *blank* form to negotiate with Mr. Webb, but rather used a completed form.

Here, the blank evaluative tool was not specifically created to evaluate Mr. Webb’s performance. Ms. Miller requested a blank copy of the form, not one that contained the actual assessment of Mr. Webb’s performance as the Independence city manager. Assuming that a completed copy of this form was used to evaluate Mr. Webb’s performance, we do not believe a blank copy of a publicly available form should be exempted from disclosure even if a completed version of the form was discussed during an executive session to negotiate potential adjustment of Mr. Webb’s annual compensation.

Thus, under the facts presented here, we conclude that the provisions of K.S.A. 2016 Supp. 45-221(a)(15) do not support the City’s position that these records may be discretionarily closed under the KORA.

### *Penalties under the KORA*

The KORA provides for civil penalties in an amount not to exceed \$500.00 for each violation of the KORA.<sup>31</sup> Additionally, completion of training concerning the requirements of the KORA may also be required.<sup>32</sup>

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<sup>31</sup> K.S.A. 2016 Supp. 45-223(a).

<sup>32</sup> K.S.A. 2016 Supp. 45-222(a); *see also* K.S.A. 2016 Supp. 45-251(a).

### *Conclusion*

In light of the foregoing, we find by a preponderance of the evidence that the City violated the KORA.

We are perplexed by the City's denial of access to a *blank copy of a publicly available form*. The exemptions to disclosure under the KORA are to be "narrowly interpreted" to effectuate the purposes of the KORA. While the KORA permits a public agency to use its discretion when determining whether public records should be disclosed, that discretion is not unfettered. A public agency has no discretion to withhold non-confidential information, such as a blank copy of a form publicly available on the internet.

Under the facts presented here, the City fell well short of meeting its KORA obligations.

The City indicates that it is its "intent and desire to fully comply with all the provisions of the [KORA]." You further indicated during a phone call with this office that the City is willing to produce the blank evaluative tool requested by Ms. Miller. We also note that we have not identified any prior substantiated violations of the KORA by the City.

We appreciate that the City wants to comply with the KORA, as well as its offer to produce the record Ms. Miller requested. However, the fact that the City refused to produce a blank copy of a publicly available form simply cannot be ignored.

Based on the totality of the circumstances, we believe remedial action is required to ensure the City's compliance with the KORA. However, we have determined to seek the City's voluntary compliance through the means of a Consent Order as provided for by the KORA.<sup>33</sup> We have also determined to seek a civil penalty to ensure future compliance with the KORA.<sup>34</sup>

We have enclosed the Consent Order for the City's review. The Consent Order requires the City to acknowledge the KORA violation, and agree to comply with the KORA in the future. Additionally, because we strongly believe that training is an effective means to ensure that a public agency understands its obligations under the KORA, it requires city personnel responsible for handling KORA matters to attend at least one (1) hour of KORA training. We urge the City to send all its personnel to a KORA training to ensure each employee and official understands the City's obligations under the KORA. Finally, the Consent Order imposes a civil penalty in the amount of \$250.00. We also expect the City to promptly follow through on its offer to provide the requested record to Ms. Miller and provide this office with a copy any communication with Ms. Miller for this purpose.

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<sup>33</sup> K.S.A. 2016 Supp. 45-251(a)(1).

<sup>34</sup> K.S.A. 2016 Supp. 45-251(a)(1)(A)(ii).

Letter to Austin K. Parker  
January 30, 2017  
Page 13

Our offer of a Consent Order as authorized by K.S.A. 2016 Supp. 45-251(a)(1), is effective up to **5:00 p.m. on Friday, March 10, 2017**. Because the City Commission meets regularly, we believe this will offer you sufficient time to confer with the City Commission, and others as necessary, about this matter. If additional time is needed to discuss this matter, the City Commission may wish to call a special meeting.

If the Consent Order is approved, please secure the necessary signatures and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, March 10, 2017**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2016 Supp. 45-222, 45-251(a)(2), or 45-253.

We note that our office periodically offers training on the KORA. This training is free to the public. You may find more information about upcoming training here: <https://ag.ks.gov/open-government/upcoming-training>.

We look forward to hearing from you. Please feel free to contact me at (785) 296-2215 or [lisa.mendoza@ag.ks.gov](mailto:lisa.mendoza@ag.ks.gov) with any questions or concerns.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL  
DEREK SCHMIDT



Lisa A. Mendoza  
Assistant Attorney General  
Director, Open Government Enforcement Unit

Enclosure (Consent Order)

cc: Jeff Chubb  
Independence City Attorney  
PO Box 747  
Independence, KS 67301