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May 6, 2015

Mr. Gordon Self, Revisor
Office of Revisor of Statutes
State Capitol, Suite 24-E
300 SW 10th Ave.
Topeka, Kansas 66612

Dear Mr. Self:

On April 28, 2015, I issued Attorney General Opinion 2015-10, which concluded, in response to a question from Senator Anthony Hensley, that a "state employee" is not a "public agency" within the meaning of K.S.A. 2014 Supp. 45-217(f)(1).[1] Various legislators apparently reached a similar conclusion as evidenced by proposals earlier this year, both in the House of Representatives and the Senate, to amend the Kansas Open Records Act (KORA) to make private emails[2] subject to that statute's requirements. This conclusion should not be surprising because the KORA was enacted 30 years ago, before the advent of modern electronic communications methods, and most of the language at issue is original to the KORA. There is no indication in the legislative history that the drafters of the KORA gave consideration to any of the constitutional issues or limitations associated with applying a government-run regulatory system, like KORA, to information contained in records that are *privately* made, maintained, kept or possessed by citizens (who also happen to be government employees) without any use of government resources and without any requirement for a nexus (other than mere subject matter overlap) to public business.[3] Even if the Legislature did weigh any constitutional considerations

[1] We answered Senator Hensley's question on the narrowest statutory ground that properly disposed of his question. Because we adopted a fair and plausible interpretation of the statute that avoided the need to address the constitutional issues presented in this letter, we had no occasion to discuss these constitutional issues in Attorney General Opinion 2015-10. Like courts, our opinions generally adhere to the canon of constitutional avoidance in construing statutes. *See Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("[T]he canon of constitutional avoidance . . . is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); *see also United States v. Sec. Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978) (When multiple constructions of a statute are possible, courts "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.").

[2] I use the term "private emails" in this letter in the same manner it is defined in Attorney General Opinion 2015-10.

[3] These constitutional problems are neither new nor unique to private email communications and would have existed in 1984. Consider, for example, a state employee in 1984 who while at home writes on personally owned paper with

when enacting the KORA in 1984, the U.S. Supreme Court has since further refined our understanding of the First Amendment's application to public employees' speech, and pertinent commands of the constitutional case law since 1984 have not been incorporated into the statute.

Because I anticipate legislative interest in attempting to amend the KORA before the end of this legislative session to close this "loophole" in the current statute, I am taking the liberty of providing you additional information that may be helpful in any drafting requests you receive. The policy principle, of course, is simple: recorded information constituting or transacting government business should be subject to the KORA, regardless of whether it is recorded on a public or private email account. However, as the expression goes, the "devil is in the details"—and because the First Amendment is involved, these details are important and difficult.

Our published analysis in Attorney General Opinion 2015-10 was limited to what was necessary to answer the specific legal question Senator Hensley posed. However, the task of drafting legislation that would close this private email loophole in the KORA would present other significant issues outside the scope of Opinion 2015-10. Any statutory amendment would need to be carefully crafted to include a constitutionally satisfactory limitation for its application to privately held records; otherwise, the change would risk inadvertently injecting a constitutional defect into the KORA that could imperil the statute itself. Thus, I offer the following information, research, analysis and recommended language for your consideration and use as you deem appropriate.

CONSTITUTIONAL ISSUES

1. The First Amendment limits the power of the State of Kansas to compel disclosure of its employees' private speech.

The First Amendment states, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . ."[4] Open-records statutes serve vital public policy objectives in a self-

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a personally owned pen information related to his or her work. For the government to claim authority to regulate that personal paper merely because of its content—regardless of whether it is created to be a personal letter to the employee's spouse or an entry in a personal journal—by declaring it a "public record," without any further analysis or limitation on the State's power, would have presented significant constitutional issues in 1984 as it does today. The KORA does contain one provision that acknowledges the existence of some outer boundary to the statute's application to records "owned by a private person or entity." K.S.A. 2014 Supp. 45-217(g)(2). But even if that language were intended in 1984 to satisfy the First Amendment (as opposed to a mere policy preference), it now is outdated as a test for *inclusion* of privately held records because as discussed below the "related to" test in K.S.A. 2014 Supp. 45-217(g)(2) was rejected by the U.S. Supreme Court in 2006 as being impermissibly overbroad; moreover, the meaning of that language as a test for *exclusion* of records is currently being tested in a case of first impression before the Kansas Court of Appeals, although not in the context of private emails. *See Hunter Health Clinic v. Wichita State University*, No. 14-111586-A (Kan. Ct. App.). Against this backdrop of outdated and unsatisfying statutory language, the dramatic expansion of the amount and common use of private "recorded information" made possible by modern private email communications and related technologies amplifies and distinguishes the problem today from that when the KORA was enacted. In 1984, these problems could be (and were) ignored by legislative drafters, thus avoiding consideration of any constitutional issues; now, they are central to the policy discussion, and thus the constitutional issues are squarely presented.

[4] U.S. Const. amend. I. *See also Unified Sch. Dist. No. 503 v. McKinney*, 236 Kan. 224, 234, 689 P.2d 860, 870 (1984) ("The First and Fourteenth Amendments guarantee that no state shall abridge the freedom of speech.").

governing society.[5] However, it is well-established that government-compelled disclosures of information are protected by the First Amendment,[6] and the U.S. Supreme Court has stated specifically that disclosures required under state open-records statutes implicate First Amendment protections.[7] Even in the service of a noble and important cause, such as open government, the State of Kansas may not violate the First Amendment. Like other citizens, public employees are entitled to First Amendment protection,[8] and the First Amendment does not permit the State to go fishing about in its citizens' *personal* records in hopes of finding writings or other recorded information that might be properly subject to *public* disclosure.[9]

Therefore, the scope and application of open records statutes, like the KORA, are necessarily limited to whatever access to privately held records, such as private emails, the Legislature has the constitutional authority to grant; a statute that purports to grant access to information in records outside that authority would be constitutionally suspect. To satisfy the First Amendment, any amendment to the KORA to extend it to private emails (or to other privately held "recorded information") must write into the statute express, constitutionally sound limitations on the statute's reach; if the statute is not sufficiently limited on its face, then it could not later be rendered "constitutional by carving out a limited exemption through an amorphous regulatory interpretation."[10] From a First Amendment standpoint, it's simply not good enough that a statute impermissibly burdening a public employee's speech may be well-intended or serve a valuable purpose, and no requirement that a statute be "liberally construed and applied"[11] can overcome the omission from the statute of constitutionally sound limiting terms required by the First Amendment.

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[5] However, open records laws are creatures of the legislature, not commands of the U.S. Constitution, and therefore may not require more access to constitutionally protected information than the State has authority to compel. *See, e.g., McBurney v. Young*, 133 S. Ct. 1709, 1718, 185 L. Ed. 2d 758 (2013) (The U.S. Supreme "Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. . . . The Constitution itself is [not] a Freedom of Information Act . . . [T]he courts declared the primary rule that there was no general common law right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents.") (internal citations and quotation marks omitted). Thus, it was permissible for the Commonwealth of Virginia to enact a statute prohibiting out-of-state persons from accessing its public records.

[6] *See, e.g., Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795, 108 S. Ct. 2667, 2677, 101 L. Ed. 2d 669 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.").

[7] *See generally John Doe No. 1 v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (request under state public records act to disclose names of petition signers subject to First Amendment review).

[8] *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957, 164 L. Ed. 2d 689 (2006) (The Supreme Court "has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

[9] *See, e.g., United States v. Jones*, 132 S. Ct. 945, 956, 181 L. Ed. 2d 911 (2012) (Sotomayor, J, concurring) (Government regulations that seek to gather information about citizens' private speech and communications habits may be prohibited by the First Amendment because mere "[a]wareness that the Government may be watching chills associational and expressive freedoms.").

[10] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324, 130 S. Ct. 876, 889, 175 L. Ed. 2d 753 (2010).

[11] K.S.A. 45-216(a). *See also Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 608, 214 P.3d 676, 678 (2009) ("The court will not speculate on legislative intent and will not read the statute to add something not readily found in it.").

2. Without more, a statutory definition that "public record" includes records containing information "related to functions, activities, programs or operations funded by public funds" would be constitutionally insufficient if applied to private emails or other privately held "recorded information."

   A. By definition, the "related to" test is a content-based regulation of speech and likely would fail strict scrutiny analysis as applied to public employees' private emails.

In distinguishing the private emails of a public employee that may be regulated by the State as "public records" from those that fall outside the authority of the State to regulate, the U.S. Constitution requires more than an assessment of the *content* of the private emails. The U.S. Supreme Court has explained that "the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[12] Thus, a law burdening a public employee's speech by requiring that he or she produce (or defend a refusal to produce when confronted with a government demand) *any and all* private email that contains subject matter "related to" his or her work would face the same First Amendment analysis as a content-based ban on the employee's speech.

With few exceptions that are not relevant here,[13] the First Amendment subjects to strict scrutiny any government efforts to regulate speech based on its content. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[14] Even assuming that the purposes of the KORA constitute a compelling government interest, the government still would bear the burden[15] to demonstrate that the statute is narrowly tailored and that no less restrictive alternative would serve the compelling interest. Without statutory limitation beyond the mere *content* of a public employee's private emails to guide which private emails constitute "public records," the statute plainly would not be narrowly tailored and a less restrictive alternative would be available. In a closely analogous case, the U.S. Supreme Court has expressly rejected the "related to" test for regulating the speech of public employees because "[t]he First Amendment protects some expressions related to the speaker's job;"[16] the same reasoning would apply here.

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[12] *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011) (internal quotation marks and citations omitted).

[13] *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) (certain well-defined and narrowly limited categories of speech unprotected by the First Amendment).

[14] *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000) (internal and citations omitted).

[15] The usual presumption of constitutionality would not apply to such a statute. *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (*quoting Ashcroft v. ACLU*, 542 U.S. 656, 660, 124 S. Ct. 2783, 2788, 159 L. Ed. 2d 690 (2004)) ("[T]he Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'").

[16] *Garcetti*, 547 U.S. at 421. The *Garcetti* court illustrated the point with this example: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. The same is true of many other categories of public employees." *Id.* (internal quotation marks and citations omitted).

B. Without more, the "related to" test burdens a substantial amount of protected public-employee speech and thus would risk rendering part of the KORA unconstitutionally overbroad on its face.

The "related to" test for declaring public employee private emails to be "public records," taken alone, is constitutionally suspect on its face under the First Amendment overbreadth doctrine. The U.S. Supreme Court long has recognized that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[17] Under the First Amendment overbreadth doctrine, which is a form of facial challenge, "a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[18] The overbreadth doctrine protects against self-censorship and an unconstitutional chilling effect on protected speech: "The purpose of the overbreadth doctrine is to excise statutes which have a deterrent effect on the exercise of protected speech."[19] The Kansas Supreme Court has explained:

> [A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected. . . . A successful overbreadth challenge can thus be made only when 1) the protected activity is a significant part of the law's target, and 2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional application.[20]

Here, if the only statutory test of whether a public employee's private emails are "public records" subject to the KORA were that the content of any such email "related to" the subject matter of public business, then the KORA on its face would apply to a virtually *unlimited* amount of private and personal information of public employees.

To illustrate the broad sweep of the "related to" test if it were applied to private emails, consider a hypothetical public employee who sends a private email to his or her spouse stating, "I had a bad day at work because we couldn't get the agency budget to balance again" and then proceeds to describe the problem. Or an employee who records daily activities, including his or her public work activities, in a private email to his or her children who are away at college. Or an employee who sends a private email to his or her union representative disclosing concerns about

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[17] *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963) (citations omitted).

[18] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008) (internal quotation marks omitted).

[19] *Rosenfeld v. New Jersey*, 408 U.S. 901, 908, 92 S. Ct. 2479, 2482, 33 L. Ed. 2d 321 (1972) (footnote omitted) (Powell, J, dissenting); *see also id.* at 907, 2482 ("[The overbreadth doctrine] results often in the wholesale invalidation of the legislature's handiwork, creating a judicial-legislative confrontation. In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.") (internal quotation marks omitted) (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 852 (1970)).

[20] *State v. Whitesell*, 270 Kan. 259, 270, 13 P.3d 887, 900 (2000) (quoting *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 533, 646 P.2d 1091 (1982)).

the public workplace. Or an employee who writes, under a pseudonym,[21] a privately emailed article criticizing the agency where he or she works. Or an employee who sends a private email with important public information about a public agency matter to a watchdog or news organization. Or an employee who sends a private email to, or as part of, a political campaign providing commentary or information about state or local government. Or an employee who engages in political debate or discussion, by private email, criticizing state or local government. Or an employee who communicates, through private email, with a minister or other religious adviser about personal stressors, ethical dilemmas or other issues related to his or her work. Or an employee who sends a private email to personal friends characterizing or describing the employee's interactions at the office with coworkers or supervisors. Clearly, the State has no legitimate reason (or constitutional authority) to regulate these sorts of private communications as "public records" merely because they mention or discuss matters "related to" the public employee's work, and the threat the State might do so would impermissibly chill constitutionally protected expression.

In the absence of additional statutory limits beyond the "related to" test, there would "exis[t] no satisfactory method of severing that law's constitutional from its unconstitutional application."[22] Nor could this overbreadth be cured by somehow adopting a *practice* of using the KORA solely to reach constitutionally *appropriate* private emails, such as those that actually involve the conduct or transaction of public business; the First Amendment does not permit courts to uphold an overbroad statute that impermissibly burdens a substantial amount of protected speech "merely because the Government promise[s] to use it responsibly."[23] If the KORA were to be extended to apply to private emails, the statute would need to expressly impose a limit, consistent with the First Amendment, on the scope of private emails (or other "recorded information") to be included within its sweep. The "related to" test is not sufficiently limited to satisfy the First Amendment.

3. To extend KORA to private emails, the First Amendment would be satisfied by a "pursuant to official duties" test.

In drawing the line to determine the boundaries of the First Amendment's shield that surrounds public employee speech, the U.S. Supreme Court in 2006 adopted a "pursuant to official duties" test. In interpreting the First Amendment to permit a public employer to discipline an employee for the employee's speech about office-related matters, the Supreme Court held:

> We hold that when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[24]

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[21] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42, 115 S. Ct. 1511, 1516, 131 L. Ed. 2d 426 (1995) (noting right to publish pseudonymously is protected by the First Amendment and government-imposed burdens on that right are subject to strict scrutiny).

[22] *Whitesell*, 270 Kan. at 270 (quoting *Palmgren*, 231 Kan. at 533).

[23] *United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435 (2010).

[24] *Garcetti*, 547 U.S. at 421 (emphasis added).

The same reasoning would apply here. Thus, an amendment to the KORA that requires public employees to produce private emails that were made, maintained, kept or possessed "pursuant to their official duties" would be constitutionally permissible. This test is distinct from the "related to" test, which looks only at the *content* of the private email and not at the *reason* for its existence. Under the "pursuant to official duties" test, a public employee who uses a private email account to bypass KORA when conducting or transacting public business would be acting "pursuant to their official duties" and the private email would be a "public record." However, if the employee sent a private email to, for example, his or her mother and in that personal communication (sent not as a public employee but as a citizen or as a son or daughter) mentions or discusses matters "related to" his or her agency or office, that email would not be a "public record." This distinction should satisfy the important public interest in government openness while also remaining within the bounds of the First Amendment as interpreted in current U.S. Supreme Court case law.[25]

LEGISLATION CONSIDERED EARLIER THIS YEAR IS INADEQUATE

On February 2, 2015, the House of Representatives considered but defeated an amendment that proposed a version of the "pursuant to official duties" test by requiring both that a "public record" be "in furtherance of such public agency's duties" and also have a "substantial nexus with the public agency's duties." [26] However, that amendment did not resolve the statutory definition problem identified in Attorney General Opinion 2015-10. Thus, if that amendment had been adopted in the form proposed, it likely would have cured the First Amendment defect that precludes applying the current KORA to private emails but nonetheless would not have successfully applied the KORA to the private emails of state employees who currently are omitted from the statute's terms.

Senate Bill 201 remains pending in that body, and on March 19, 2015, during floor debate on House Bill 2023, its text was considered but defeated as an amendment.[27] That bill/amendment proposed a version of the "pursuant to official duties" test by requiring that the record be "in furtherance of the public agency's duties" and also retained the current law's "related to" test. However, it did not address the statutory definition problem identified in Attorney General Opinion 2015-10. In addition, because the amendment by its terms would have applied only to records "made, maintained or kept on a personal electronic device," its adoption may have created an implication that the KORA would not apply to other privately made, maintained or kept "recorded information." That amendment also does not appear to include a definition of "personal electronic device." Thus, if that bill/amendment were adopted in the form proposed, it likely would have cured the First Amendment defect that precludes applying the current KORA

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[25] One oft-cited legal article has described the purpose of the KORA as allowing public access of the "*business workings* of state and local government" and as strongly "favor[ing] openness in *governmental transactions.*" Theresa Marcel Nuckolls, *Kansas Sunshine Law; How Bright Does It Shine Now? The Kansas Open Meetings and Open Records Acts*, 72 J. Kan. B. Ass'n 28, 29 (May 2003) (emphasis added). Both of those purposes would be wholly satisfied by the "pursuant to official duties" test.

[26] House Journal 144-45 (2015 Session) (motion of Representative Ward).

[27] Senate Journal 297 (2015 Session) (motion of Senator Hensley).

to private emails but nonetheless would not have successfully applied the KORA to the private emails of state employees who currently are omitted from the statute's terms.

PROPOSED LEGISLATIVE LANGUAGE

In light of the above analysis, we have taken the liberty of preparing draft legislative language that we think would extend the KORA to apply to the private emails of public employees when used to conduct public agency business without running afoul of existing U.S. Supreme Court precedent. A copy is enclosed with this letter. It contains six important elements:

First, it removes the term "officer" from K.S.A. 2014 Supp. 45-217(f)(1), rendering a "public agency" defined by (f)(1) to consist *only* of government or corporate entities, not of living beings.[28] This is important because (1) the problem of distinguishing protected private emails from private emails that may be "public records" is unique to the context of flesh-and-blood individuals since government entities, by definition, cannot maintain a private email account; and (2) defining individuals to be a "public agency" renders other parts of the KORA unreasonable or absurd[29] and thus subject to legal challenge. The two concepts should be separated into different paragraphs for distinct handling rather than intermingled in the same paragraph.

Second, it inserts "location" into the definition of "public record" in K.S.A. 2014 Supp. 45-217(g)(1). This insertion makes clear that the location of the record (for example, on a private email server) is not, *per se*, an impediment to defining it as a public record.

Third, it inserts a new subparagraph (B) in the definition of "public record" in K.S.A. 2014 Supp. 45-217(g)(1) that expressly applies to living persons who do the work of public agencies. Specifically, this new subsection would apply to "officers" (the term relocated from K.S.A. 2014 Supp. 45-217(f)(1), as described above) and to "employees," who are not currently covered by the statute. This insertion of "employee" remedies the omission identified in Attorney General

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[28] On its face, neither an "office" nor an "agency" can be a living person. While in some contexts, the term "instrumentality" might include living persons, the context here suggests otherwise. For example, to interpret "instrumentality" here to include living persons would be to attach to such living persons various other duties of a "public agency," which would lead to absurd or unreasonable results as discussed in footnote 29. Moreover, the term "instrumentality" is undefined in the KORA and thus should be given its ordinary meaning; the term is ordinarily defined as a "thing" or an "agency . . . such as a branch of a governing body," none of which implies inclusion of a living person. *See* Black's Law Dictionary (10th ed. 2014) (defining instrumentality). Additionally, interpreting "instrumentality" to be distinct from living "person" is analogous to the manner in which Kansas courts long have interpreted the term in the context of tax law. *See, e.g., Clinton v. State Tax Comm'n*, 146 Kan. 407, 71 P.2d 857, 866 (1937).

[29] For example, K.S.A. 2014 Supp. 45-219(c) authorizes a public agency to "prescribe reasonable fees for providing access to or furnishing copies of public records," but it would be absurd and unreasonable to authorize each and every public officer or employee (as an individual "public agency") to set his or her own fee schedule. Additionally, K.S.A. 2014 Supp. 45-220(a) requires that "[e]ach public agency shall adopt procedures to be followed in requesting access to and obtaining copies of public records," but it would be absurd and unreasonable to require each and every public officer or employee to adopt his or her own procedures for handling open records requests. *See generally State v. Tapia*, 295 Kan. 978, 992, 287 P.3d 879, 889 (2012) ("It is a fundamental rule of statutory interpretation that courts are to avoid absurd or unreasonable results.").

Opinion 2015-10 and also is consistent with the phrase "officer or employee of a public agency" that the Legislature has used elsewhere in the KORA.[30]

Fourth, it constructs within the new subsection (B) constitutionally sound limiting principles that allow for the application of the KORA to the private emails of flesh-and-blood officers and employees who work in state government, or any political or taxing subdivision thereof, without violating their First Amendment rights. It adopts the Supreme Court's *Garcetti* test for permitting government regulation of state employee speech that is "pursuant to official duties" and *also* includes the familiar "related to" test currently found in K.S.A. 2014 Supp. 45-217(g)(2).[31] The First Amendment would not be offended by the two tests operating in conjunction; it is offended only by the State's reliance on the "related to" test alone.

Fifth, consistent with the approach of separating non-living "public agencies" from living "officers and employees," it relocates the exclusions for judges and part-time officers and employees currently found in K.S.A. 45-217(f)(2)(B) and (C) to subsection (g)(2). In short, this reorganization ensures the current law's limitation for judges and part-time officers and employees actually applies to officers and employees, which is the intent of the language.

Sixth, it consolidates all existing exceptions to the definition of "public record" into subsection (g)(2) for ease of reference and understanding.

Thank you for your consideration of this information, analysis and recommendation. I hope it is helpful. While I am one who believes the private email "loophole" in the KORA should be fixed, I also am mindful that in the delicate area of government regulation of speech, an ill-considered "fix" risks unintentionally creating more problems than it solves. We now know more than we did in 1984 about what the First Amendment requires, and forbids, when applying open records laws to private records that contain public employee speech, and in my view we should update the KORA to reflect the current state of the law and the realities of modern communications technology.[32]

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[30] Compare the definition of "official custodian" in K.S.A. 2014 Supp. 45-217(e) (any "officer or employee of a public agency") with the definition of "public agency" in K.S.A. 2014 Supp. 45-217(f)(1) (including only "officer" but not "employee").

[31] Please note that in this reference, we also substituted the phrase "of the public agency" for the phrase "funded by public funds." We made that substitution because, in the context of applying KORA to public employees, the phrase "of the public agency" seems both more appropriate and more inclusive; however, the choice between these two phrases is not imperative to our analysis or recommendation.

[32] Rapidly evolving communications technology also has presented significant Fourth Amendment issues regarding public employees' private emails. The state of the law in that area is in significant flux, and thus we cannot offer a further recommendation at this time and do not recommend waiting for judicial clarity on any potential Fourth Amendment issues before repairing the identified First Amendment concerns in applying the KORA to private emails. *See, e.g.*, *City of Ontario v. Quon*, 560 U.S. 746, 756, 130 S. Ct. 2619, 2628, 177 L. Ed. 2d 216 (2010) (recognizing, in the context of government employees' electronic communications, "the general principle that [i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer"); *id.* at 759 ("The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."); *see also In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 616 (5th Cir. 2013) (citing *Jones*, 132 S. Ct. at 953–54; *Quon*, 130 S. Ct. at 2629–30) (Dennis, J, dissenting) ("The substantial difficulty of this question is reflected in the Supreme Court's conscientious

If I may be of further assistance to you or the Legislature in attempting to fix the current statute's shortcomings, please let me know.

Sincerely,

Derek Schmidt
Kansas Attorney General

Enclosure (proposed KORA amendment)

Cc: Honorable Susan Wagle
Honorable Ray Merrick
Honorable Anthony Hensley
Honorable Tom Burroughs
Honorable Jeff King
Honorable John Barker

avoidance of similar questions regarding the Fourth Amendment implications of modern telecommunications technologies.").

45-217. Definitions

As used in the open records act, unless the context otherwise requires:

(a) "Business day" means any day other than a Saturday, Sunday or day designated as a holiday by the congress of the United States, by the legislature or governor of this state or by the respective political subdivision of this state.

(b) "Clearly unwarranted invasion of personal privacy" means 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 of legitimate concern to the public.

(c) "Criminal investigation records" means records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701, and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law, but does not include police blotter entries, court records, rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide as defined by K.S.A. 21-3405, prior to its repeal, or K.S.A. 21-5406, and amendments thereto.

(d) "Custodian" means the official custodian or any person designated by the official custodian to carry out the duties of custodian of this act.

(e) "Official custodian" means any officer or employee of a public agency who is responsible for the maintenance of public records, regardless of whether such records are in the officer's or employee's actual personal custody and control.

(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.

(2) "Public agency" shall not include~~: (A)~~ *a*ny entity solely by reason of payment from public funds for property, goods or services of such entity~~; (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court; or (C) any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week~~.

(g)(1) "Public record" means any recorded information, regardless of form, ~~or~~ characteristics *or location*, which is made, maintained or kept by or is in the possession of:

(A) any public agency including, but not limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund; *or*

(B) any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions, activities, programs or operations of the public agency.

(2) "Public record" shall not include:

(A) records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds; ~~or~~

(B) records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state;

(C) records of any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court;

(D) records of any officer or employee of the state or political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week; or

(E) records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.

~~(3) "Public record" shall not include records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subsection shall not apply to records of employers of lump-sum payments for contributions as described in this subsection paid for any group, division or section of an agency.~~

(h) "Undercover agent" means an employee of a public agency responsible for criminal law enforcement who is engaged in the detection or investigation of violations of criminal law in a capacity where such employee's identity or employment by the public agency is secret.