

SESSION OF 2015

SUPPLEMENTAL NOTE ON SENATE BILL NO. 206

As Amended by House Committee on Judiciary

Brief*

SB 206 would create and amend law related to the enforcement of the Kansas Open Records Act (KORA) and Kansas Open Meetings Act (KOMA). It also would add exceptions to KORA.

Enforcement of KORA and KOMA

(Note: KOMA applies to a “public body or agency,” while KORA applies to a “public agency.” When describing provisions of this bill that are substantially similar between the KORA and KOMA versions, this brief will use the term “public agency” where “public agency” is used in the KORA version and “public body or agency” is used in the KOMA version.)

The bill would allow the Attorney General to determine, by a preponderance of the evidence after investigation, that a public agency has violated KORA or KOMA, and would allow the Attorney General to enter into a consent order with the public agency or issue a finding of violation to the public agency prior to filing an action in district court.

A consent order could:

- Contain admissions of fact;
- Require completion of training approved by the Attorney General;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Impose a civil penalty of up to \$250 for each violation; and
- Set forth the public agency's agreement that it will comply with the requirements of KORA or KOMA.

The consent order would have to be signed by the head of the public agency, any officer found to have violated KORA or KOMA, and any other person required by the Attorney General. For a KORA violation, if the public agency is a governing body, all members of the governing body would be required to sign the order.

A finding of violation could contain findings of fact and conclusions of law and require the public agency to do any or all of the following:

- Cease and desist from further violation;
- Comply with KORA or KOMA provisions;
- Complete training approved by the Attorney General; and
- Pay a civil penalty of up to \$500 for each violation.

The Attorney General could require submission of proof that requirements of a consent order or finding of violation have been satisfied.

The Attorney General could apply to the district court to enforce a consent order or finding of violation, after making a demand to the public agency to comply and giving the public agency a reasonable opportunity to cure the violation. Such enforcement action could be filed in the district court of the county where the consent order or finding of violation is issued or is effective, and district courts would be given jurisdiction over such enforcement actions. In an action involving KORA, the court would be allowed to view the records in controversy in camera before reaching a decision.

If the court finds the Attorney General did not abuse the Attorney General's discretion in entering into the consent order or issuing the finding of violation, the court would enter an order:

- Enjoining the public agency to comply with the consent order or finding of violation;
- Imposing a civil penalty not less than the amount ordered by the Attorney General and not more than \$500 for each violation;
- Requiring the public agency to pay the Attorney General's court costs and costs incurred in investigating the violation; and
- Providing any other remedy authorized by KORA or KOMA that the court deems appropriate.

If the court finds a violation, it could require the public agency to pay the Attorney General's reasonable attorney fees. Payment of such fees would be required if the violation was not made in good faith and without a reasonable basis in fact or law.

The bill would provide specific requirements for service of a finding of violation on a public agency and would require the Attorney General to maintain and make available for public inspection all consent orders and findings of violation.

In lieu of filing an action in district court to enforce KORA or KOMA, the bill would allow the Attorney General or a county or district attorney to accept a consent judgment with respect to any act or practice violating KORA or KOMA. A consent judgment would have to be approved by the district court and an entry of judgment made. After approval, any breach of the conditions of the consent judgment would be treated as a violation of a court order and subject to the penalties for such violations. A consent judgment could contain any remedy available to the district court except for

an award of reasonable expenses, investigation costs, or attorney fees. For a KORA violation, the consent judgment could include a stipulation regarding the production of the requested records, subject to any permissible redactions as described in the consent judgment.

Any KORA or KOMA complaint submitted to the Attorney General would be required to be on a form prescribed by the Attorney General setting forth the facts the complaining party believes show a violation. The complaining party would be required to attest to the facts under penalty of perjury.

The bill would create, in the State Treasury, the Attorney General's Open Government Fund (Fund) to be used to carry out the provisions and purposes of KORA and KOMA. All civil penalties, expenses, costs, and attorney fees awarded in an action brought by the Attorney General pursuant to KORA or KOMA, or pursuant to a consent order or finding of violation under the provisions of the bill, would be credited to the Fund. Existing provisions would be amended to redirect from the State General Fund to the Fund civil penalties recovered by the Attorney General under KORA and KOMA.

The bill would require the Attorney General, subject to appropriations, to provide and coordinate KORA and KOMA training throughout the state and allow the Attorney General to consult and coordinate with appropriate organizations to provide training. The Attorney General would be allowed to establish and make available a computerized training program and to approve training programs that satisfy requirements imposed by the district court or by any order or judgment pursuant to KORA or KOMA.

The Attorney General would be given authority to adopt rules and regulations to implement and administer KORA and KOMA.

The bill would amend the statutes governing civil KORA and KOMA remedies to add declaratory judgments to the orders that a district court may use to enforce KORA and

KOMA and to allow a district court to require a defendant to complete training approved by the Attorney General. A provision would be added allowing the court to award the Attorney General or the county or district attorney reasonable expenses, investigation costs, and attorney fees if the court finds a violation. Such award would be required if the court determines the violation was not in good faith and without reasonable basis in fact or law. A provision specifying the burden of proof is on the public agency would be added for KORA.

Statutes governing investigations of alleged KORA or KOMA violations would be amended to allow the Attorney General or county or district attorney to subpoena, examine, or cause to be examined records and administer oaths and affirmations. Specific requirements for service of interrogatories or subpoenas would be added. The bill would add provisions allowing the Attorney General or county or district attorney, when a person willfully fails or refuses to respond to a request for information, records or other materials, respond to interrogatories, or obey a subpoena, to apply to the district court for an order requiring a response or compliance. The district court would be given authority to issue such orders or grant other relief as required until a response is provided or the person complies.

For KORA investigations, the bill would add a provision prohibiting the Attorney General or county or district attorney from further disclosing a record or document, or the contents of such, if a public agency claims in writing that such record or document is exempt from disclosure. Such records or documents could be disclosed by order of a district court in enforcing KORA. Such records or documents in the possession of the Attorney General or a county or district attorney would not be subject to a KORA request or to discovery, subpoena, or other process.

KORA Exceptions

The bill would add exceptions to KORA for records of a public agency on a public website which are searchable by a keyword search and identify the home address or home ownership of a municipal judge, city attorney, assistant city attorney, special assistant city attorney, special assistant U.S. attorney, special assistant attorney general, special assistant county attorney, or special assistant district attorney.

Background

The bill was introduced by the Senate Committee on Federal and State Affairs.

In the Senate Committee on Judiciary, the Kansas Attorney General, a law professor, an attorney, and representatives of the Kansas Association of Counties, Kansas Press Association, and Kansas Association of Broadcasters testified in support of the bill. A representative of the League of Kansas Municipalities provided neutral testimony. There was no opponent testimony.

The Senate Committee amended the bill to remove a provision requiring all members of a governing body to sign a consent order in the case of a KOMA violation.

In the House Committee on Judiciary, the Kansas Attorney General, a law professor, and representatives of the Kansas Press Association and Kansas Association of Counties testified in support of the bill. A representative of the Kansas Association of Broadcasters provided written proponent testimony. A representative of the League of Kansas Municipalities provided written neutral testimony. There was no opponent testimony.

The House Committee amended the bill to adjust attorney fee provisions, standardize references to “public body or agency” in the KOMA provisions, and add the

provisions of SB 128, adding KORA exceptions. Further background information for SB 128 is provided below.

According to the fiscal note prepared by the Division of the Budget on SB 206, as introduced, the Attorney General's Office indicates it would be able to administer the bill's provisions using existing resources and revenues generated by the bill in the form of civil penalties, expenses, costs, and attorneys' fees awarded to the Attorney General in enforcement actions. The revenues are expected to be small and would be used to offset expenses associated with KOMA and KORA enforcement, investigations, and training. The precise costs and revenues are difficult to estimate because the number of violations that may occur is unknown. Any fiscal effect is not reflected in *The FY 2016 Governor's Budget Report*.

Background of SB 128

SB 128 was introduced by the Senate Committee on Corrections and Juvenile Justice at the request of Senator Smith. In the Senate Committee, a representative of the City of Overland Park and an Overland Park municipal judge testified in favor of the bill. The League of Kansas Municipalities submitted written testimony supporting the bill. There was no neutral or opponent testimony.

The Senate Committee amended the bill to add special assistant city attorneys, special assistant U.S. attorneys, special assistant attorneys general, special assistant county attorneys, and special assistant district attorneys to the records exception.

In the House Committee on Judiciary, the same conferees testified and provided written testimony supporting the bill as before the Senate Committee. There was no neutral or opponent testimony.

According to the fiscal note prepared by the Division of the Budget, SB 128, as introduced, would have no fiscal effect on the judiciary, but local governments may incur some expense in restricting information from public access on public websites. A precise fiscal effect cannot be determined.