Statement on SB 361 as amended

AN ACT concerning the open records act; relating to definitions; public agency and public record; amending K.S.A. 2015 Supp. 45-217 and repealing the existing section.

Date: March 7, 2016

To: House Standing Committee on Judiciary, Kansas Legislature
c/o Rep. John Barker, Chair, Judiciary

From: Mike Kautsch, Professor
School of Law
University of Kansas
1535 W. 15th St.
Lawrence, Kansas 66045
E-mail: mkautsch@ku.edu
Phone: 785.864.5377

Re: Hearing on SB 361 as amended, at 3:30 p.m. March 9, 2016, in Rm. 112-N

SB 361, as amended by the Senate Judiciary Committee, would redefine the term "public record" in the Kansas Open Records Act (KORA)[1] for a worthy purpose. The redefinition is intended to encompass recorded information that is about official business and that is in the form of e-mail or other electronic communication by a public employee using a personally owned device or private account. Under the current definition of "public record" in KORA, when public employees' communications about official business are in their personal control, rather than the control of a public agency, the communications generally are not public records accessible to the public.

The definition of "public record" in SB 361 as amended differs from the definition in SB 361 as originally introduced. In testimony before the Senate Judiciary Committee on February 2, 2016, I supported SB 361 as introduced. I did so on the basis of my service in fall 2015 as a member of the Kansas Judicial Council Open Records Advisory Committee, chaired by Sen. Molly Baumgardner. I participated in all of the Advisory Committee's meetings as it sought to fulfill its charge from Sen. Jeff King.[2] The charge was, in part, to review definitions of the term "public record" in previous bills, SB 306/307—definitions that Sen. King noted were "similar to proposals made by the Attorney General."[3] The charge also called on the Advisory Committee "to analyze approaches taken by other states and provide insight on their preferred method of balancing privacy concerns versus the need for disclosure" of public records.[4]

SB 361 as introduced was the result of the Advisory Committee's study. In my opinion, it defined "public record" in a way that resembled approaches successfully taken by other states to the task of balancing interests in privacy and disclosure. In my view, SB 361 as introduced was a fair and legally sound way to bring within KORA's purview public employee e-mails like ones that were at the center of state-wide controversy last year.[5]

Now, SB 361 as amended defines "public record" in a way that differs from SB 361 as introduced and from definitions adopted by other states. I have expressed reservations about the

wording that appears in SB 361 as amended and the rationale for that wording. The definition in SB 361 as amended is novel when compared to others.

Nevertheless, I regard SB 361 as amended as being worthy of passage. The Attorney General has given assurance that, under the definition in SB 361 as amended, e-mails would be public records if they were about official business and if they were like the ones at the center of the controversy last year.[6] Because of the Attorney General's assurance, I trust that SB 361 as amended would be the functional equivalent of SB 361 as introduced. With SB 361 as amended in mind as a functional equivalent of SB 361 in its original form, I offer below some of my thoughts about the original:

1. SB 361 AS INTORDUCED AND ITS APPROACH TO DEFINING "PUBLIC RECORD"

Under SB 361 as introduced, recorded information would be a public record if held by a public agency or by "any officer or employee of a public agency in connection with the transaction of public or official business or bearing upon the public or official activities and functions of any public agency." Under this definition, KORA would have encompassed electronic communications, such as e-mails, that were about public or official business and were exchanged by public officers and employees using personal devices and private accounts.

2. TRANSACTION OF PUBLIC BUSINESS

Where the definition in SB 361 referred to the "transaction" of public business, it achieved the purpose of a public records law as described by the Attorney General in a letter last year to the Office of Revisor of Statutes.[7] "The policy principle," he said, "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." He indicated that a public records law appropriately would encompass "private" e-mails that "actually involve the conduct or transaction of public business." He also said that 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.'" In addition, he noted that KORA's purpose has been characterized "as allowing public access of the '*business workings* of state and local government' and as strongly 'favor[ing] openness in *governmental transactions*.'" (Emphasis in the original.)[8]

3. SB 361 AS INTRODUCED AND RECORDS PRESERVATION

The definition in SB 361 as introduced had certain wording in common with the definition of "government records" in the state Government Records Preservation Act K.S.A. 45-401 *et seq*. Like SB 361 as introduced, the Preservation Act is concerned with records originated, received or held "in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency."[9] The commonality between SB 361 as introduced and the Preservation Act recognized the important link between two obligations of public officials—first, to preserve records and, second, to make the records accessible to the public.

The definition of "public record" in SB 361 as amended does not resemble the definition of "government records" in the Preservation Act.

If SB 361 as amended becomes law, I would recommend that the Legislature consider how to synchronize it with the Preservation Act. Ideally, the records that an official must

disclose under KORA would be the same as the records that an official must maintain under the Preservation Act.

4. THE TERM "PUBLIC RECORD" AS DEFINED IN ANTECEDENTS OF SB 361 AS AMENDED

Under the definition of "public record in SB 306/307," the antecedents of SB 361 as amended, a pre-requisite for classifying recorded information as a "public record" was that it be possessed by "any officer or employee of a public agency pursuant to the officer's or employee's official duties."[10] This phrase "pursuant to…official duties" was drawn from *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a case that did not define the term "public record" and instead indicated when a public employee's speech is protected by the First Amendment[11] Neither the Advisory Committee study nor my own research since then indicates that any state has taken a *Garcetti*-based approach to defining "public record."

The phrase "pursuant to," now in SB 361 as amended, commonly is defined in dictionaries as acting in "compliance," "accordance" or "conformity" with rules, responsibilities or requirements.[12] The scope of the term "public record" could be quite narrow if such a record only consists of information created or held by a public employee in "compliance," "accordance" or "conformity" with official duties. Thus, an e-mail about official business potentially would not be a public record if a public employee were to send it contrary to his or her official duties.

5. THE FIRST AMENDMENT AND PUBLIC RECORDS

In the words of the Attorney General, an open records law needs 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."[13] The rationale for the definition in SB 306/307 essentially was that it would prevent Kansas open-records law from being overbroad. The definition appeared to be advocated, not only as a way to prevent overbreadth, but as the only defensible way. However, my research during and after the Advisory Committee meetings indicates that First Amendment attacks on state laws with conventional definitions of "public record" have been rare and unsuccessful.

Based on the Advisory Committee's study, my sense is that, regardless of the particular terms used in a definition of "public record," courts tend to view recorded information as public if it plainly deals with a public agency's transaction of public business.

6. LEGAL TRADITION AND THE TERM "PUBLIC RECORD"

SB 361 as introduced was consistent with the legal tradition that recognizes recorded information as a public record if it memorializes a public agency's transaction of official business or performance of its official functions. A public records law in that tradition does not unduly jeopardize public employees' freedom of speech or privacy, and it focuses on the public interest in access to information about government.

The nature of recorded information traditionally subject to public records laws is evident in a wide range of precedents.[14] They include *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975). The case dealt with former President Richard Nixon's ultimately unsuccessful attempt to retain personal control over certain records of his presidency. The judge in *Sampson* said, "It is a general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official."[15]

In my opinion, even though the definition of the term "public record" is novel in SB 361 as amended, the Office of Attorney General will be obligated to interpret it consistently with the

longstanding legal tradition that gives the term meaning and value in our democracy. The Office also will need to interpret the term "public record" consistently in accordance with K.S.A. 45-216(a), the provision in KORA that states: "It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

NOTE: *As a faculty member at the University of Kansas School of Law, I teach classes and engage in research related to First Amendment. My areas of interest include laws that provide for public access to records and proceedings of public agencies. My views regarding SB 361are entirely my own. They are not representative of the law school or the University.*

---

[1] The Kansas Open Records Act (KORA) is in K.S.A. 45-215 *et seq*. The term "public record," as defined in K.S.A. 45-217(g)(1), means "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency."

[2] Letter from Sen. Jeff King, Chair, Kansas Senate Judiciary Committee, to Nancy J. Strouse, Executive Director, Kansas Judicial Council (May 26, 2015) (Referenced on the first page of the *Report of the Kansas Judicial Council Open Records Advisory Committee on 2015 SB 306/307 Relating to Public Records and Private Email*, approved by the Kansas Judicial Council December 4, 2015).

[3] *Id*.

[4] *Id*.

[5] *See* Bryan Lowry, *Budget director sent e-mail from private account to lobbyists on proposed budget/ Gov. Sam Brownback's budget director used a private e-mail account to share a working version of the governor's proposed budget with two lobbyists three weeks before it was unveiled to lawmakers*, The Wichita Eagle (January 27, 2015), http://www.kansas.com/news/politics-government/article8345505.html.

[6] The assurance was given by Attorney General Derek Schmidt on February 8, 2016, according to members of the Kansas Judicial Council Open Records Advisory Committee who had attended a meeting that morning with the Attorney General.

[7] Letter from Attorney General Derek Schmidt to Revisor Gordon Self (May 6, 2015), https://ag.ks.gov/docs/default-source/documents/20150506-gordon-self-ltr-re-kora.pdf?sfvrsn=2.

[8] *Id*., pages 2, 6 and 7.

[9] K.S.A. 45-402(d).

[10] SB 306/307 defined a "public record" to include recorded information such as an e-mail "made, maintained or kept by or is in possession of…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."

[11] Schmidt letter, note 7, above. *Garcetti* arose from a claim by a deputy district attorney that his employer retaliated against him for writing an internal memorandum to his supervisors about what he regarded as misconduct in an investigation. *Garcetti,* 547 U.S. 410, 413-416. The Court concluded that "his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. Because the deputy district attorney had spoken "as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case," the First Amendment did not protect his expression. *Id.*

[12] For a list of dictionary definitions of "pursuant to," see *Fazio v. Fazio*, 162 Conn.App. 236 (2016).

[13] Schmidt letter, p. 6, cited in note 7, above.

[14] Examples from the federal courts include *Wilson v. United States*, 221 U.S. 361 (1911); *Public Affairs Associates, Inc., v. Rickover*, 369 U.S. 111, 113 (1962), and *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

[15] *Sampson*, 389 F. Supp. 107,133.