Statement on SB 361

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: February 1, 2016

To: Senate Standing Committee on Judiciary, Kansas Legislature
c/o Sen. Jeff King, Chair, Judiciary

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Re: Hearing February 2, 2016, on SB 361

In the fall of 2015, I was privileged to serve on 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. King. The charge was, in part, to review definitions of the term "public record" in SB 306/307—definitions that Sen. King noted were "similar to proposals made by the Attorney General."[1] 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.[2]

SB 361, the result of the Advisory Committee's study, in my opinion, resembles approaches successfully taken by other states to the task of balancing interests in privacy and disclosure and is worthy of enactment into law. On the basis of my participation in the Advisory Committee's study, coupled with my own continuing research since then, I offer the following observations with the hope that they might be helpful:

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

Under SB 361, recorded information is a public record if it is 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, the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, would encompass electronic communications, such as e-mails, that are about public business and are exchanged by public officers and employees using personal devices and private accounts.

2. TRANSACTION OF PUBLIC BUSINESS

Where the definition in SB 361 refers to the "transaction" of public business, it achieves the purpose of a public records law as described by the Attorney General in a May 6, 2015, letter to the Office of Revisor of Statutes.[3] "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.)[4]

3. SB 361 AND RECORDS PRESERVATION

The definition in SB 361 has 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, 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." K.S.A. 45-402(d). The commonality between SB 361 and the Preservation Act recognizes the important link between two obligations of public officials—first, to preserve records and, second, to make the records accessible to the public.

4. THE TERM "PUBLIC RECORD" IN SB 306/307

Under the definition of "public record in SB 306/307," 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."[5] This phrase "pursuant to…official duties" was drawn from *Garcetti v. Ceballos*, 547 U.S. 410 (2006).[6] Neither the Advisory Committee study nor my own research thus far indicates that any state has taken this particular approach to defining "public record."

a. For enlightenment about the meaning of the words "pursuant to…official duties" in the context of public records, one may look to their source, *Garcetti*. Unfortunately, however, the case is neither about public records nor about any effort by a public agency to compel an employee to disclose information. The case instead focuses on recorded information in the form of a memorandum that a public employee had prepared and voluntarily disclosed.

b. The phrase "pursuant to" commonly is defined in dictionaries as acting in "compliance," accordance" or "conformity" with rules, responsibilities or requirements.[7] *Garcetti* is in line with such definitions, suggesting that a public employee acts "pursuant to" official duties when "fulfilling a responsibility to advise" a supervisor.[8] Thus, an issue is whether, under *Garcetti*, recorded information is a public record only if held by a public employee who is in conformity with official duties. If so, recorded information possessed by a public employee when *not* in conformity would not be a public record. Possible examples of non-conformity by a public employee may include falsifying recorded information to cover up misfeasance or using a private cell phone for agency business in contravention of policies of a public agency. The U.S. Court of Appeals for the 10th Circuit has said it takes a "'broad' view" of *Garcetti*[9] but, even so, does not appear to treat a public employee's non-conformity with official duties as being "pursuant to" such duties. For example, the 10th Circuit has said that if a public employee's speech "'reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties.'"[10]

c. A definition of "public record" can be crafted to include information that is recorded in non-fulfillment of official duties. For example, the public records law in Arkansas applies to

materials that "constitute a record of the performance *or lack of performance* of official functions that are or should be carried out by a public official or employee, a governmental agency," and others.[11] (Emphasis added.)

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."[12] The rationale for the definition in SB 306/307 essentially was that it would prevent Kansas open-record 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 since the Advisory Committee meetings thus far indicates that First Amendment attacks on state laws with conventional definitions of "public record" are rare and unsuccessful when the occur.

a. Based on the Advisory Committee's study, my sense is that, regardless of the particular terms used in a definition, courts tend to view a public record as that which plainly deals with a public agency's transaction of public business. Even if a statute broadly or ambiguously defines "public record," courts carefully consider whether the record may be exempt from disclosure on privacy or other such grounds.

b. The few cases I have located thus far that feature First Amendment attacks on public records laws include *John Doe No. I v. Reed,* 561 U.S. 186, (2010), which the Attorney General has cited in support of the proposition that "disclosures required under state open-records statutes implicate First Amendment protections."[13] In *Doe No. 1 v. Reed,* the U.S. Supreme Court held that, as a general matter, a requested disclosure of the names and addresses of persons who sign referendum petitions did not violate the First Amendment. The case centered on a public agency's obligations under Washington State's public records law, rather than on a public employee as *Garcetti* did. However, *Doe No. 1* v. *Reed* included two features that were absent from *Garcetti*: 1) U.S. Supreme Court consideration of a state public records law, and 2) a First Amendment challenge to a request that information be disclosed under that law. Thus, the case merits attention when assessing public records laws generally.

c. Because *Garcetti* gave rise to SB 306/307 and was about government retaliation against public employees for their speech, one may wonder about the place of this particular precedent in judicial deliberations about public records laws. Consequently, I have attempted to trace citations to *Garcetti* through appellate court cases that dealt with public records issues. Thus far, out of 184 cases culled from a database, I have found only one that included both a dispute over a request for public records and a reference to *Garcetti*. In this case,[14] the South Carolina Supreme Court held that the state's public records law did not violate the First Amendment rights of a non-profit corporation that was assumed to be a "public body" under state law. *Doe No. 1 v. Reed* was central to the majority opinion. The reference to *Garcetti* appeared in a concurring opinion (also dissenting in part) that considered the relationship between the First Amendment and government.

6. AN EXAMPLE OF A LAW THAT APPLIES TO PRIVATE CELL PHONES

Although Washington State's definition of "public record" was not specifically at issue in *Doe No. 1 v. Reed,* it nonetheless is noteworthy. On the face of the definition, it applies to a public agency rather than an employee of the agency. However, the Washington Supreme Court, in *Nissen v. Pierce County*, 357 P.3d 45 (Wash. 2015), construed the term "agency" to extend to public employees. The court held that text messages sent or received by an agency employee

acting in an official capacity are public records, "even if the employee uses a private cell phone."[15]

SB 361 is 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.[16] 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 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."[17]

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] 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).

[2] *Id*.

[3] Letter from Attorney General Derek Schmidt to Revisor Gordon Self (May 6, 2015).

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

[5] 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."

[6] Schmidt letter, note 2, 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.*

[7] For a list of dictionary definitions of "pursuant to," see *Fazio v. Fazio*, 162 Conn.App. 236 (2016). [8] *Garcetti*, at 421.

[9] *Thomas v. City of Blanchard*, 548 F.3d 1317, 1324 (10th Cir.2008) (citing a scholarly work). [10]
Id. (citing precedents).

[11] A.C.A. 25-19-103 (6)(A).

[12] Schmidt letter, p. 5, cited in note 1, above.

[13] *Id*., p. 3, cited in note 1, above.

[14] *Disabato v. South Carolina Association of School Administrators*, 404 S.C. 433 (2013).

[15] *Nissen*, 357 P.3d 45, 49.

[16] 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).

[17] *Sampson*, 389 F. Supp. at 133.