

CHAPTER 109

SENATE BILL No. 87

(Amended by Chapters 125 and 143)

AN ACT concerning public agencies; relating to disclosure of certain records; administrative procedure; judicial review; amending K.S.A. 77-501, 77-503, 77-511, 77-513, 77-519, 77-520, 77-521, 77-523, 77-525, 77-528, 77-531, 77-532, 77-534, 77-537, 77-601, 77-612, 77-614, 77-617 and 77-621 and K.S.A. 2008 Supp. 45-221, 77-514, 77-527, 77-529, 77-549, 77-550, 77-551 and 77-603 and repealing the existing sections; also repealing K.S.A. 77-507, 77-507a and 77-605 and K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145 of the 2004 Session Laws of Kansas, and K.S.A. 77-551, as amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas.

*Be it enacted by the Legislature of the State of Kansas:*

New Section 1. (a) In any proceeding under the Kansas administrative procedure act, the presiding officer may provide for the omission from any required notice or order or otherwise keep out of the public record the name, address or other contact information of alleged victims of crime, abuse, domestic violence or sexual assault when it is alleged in an affidavit or a pleading under oath that the health, safety or liberty of such a person would be jeopardized by disclosure of that information. In such cases, notice or service to such persons shall be made through the presiding officer.

(b) This section shall be part of and supplemental to the Kansas administrative procedure act.

Sec. 2. K.S.A. 2008 Supp. 45-221 is hereby amended to read as follows: 45-221. (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 2008 Supp. 75-4315d, and amendments thereto, or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 2008 Supp. 75-4315d, and amendments thereto, to restrict or prohibit disclosure.

(2) Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.

(3) Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.

(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.

(5) Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law.

(6) Letters of reference or recommendation pertaining to the character or qualifications of an identifiable individual, except documents relating to the appointment of persons to fill a vacancy in an elected office.

(7) Library, archive and museum materials contributed by private persons, to the extent of any limitations imposed as conditions of the contribution.

(8) Information which would reveal the identity of an individual who lawfully makes a donation to a public agency, if anonymity of the donor is a condition of the donation, except if the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public officer or employee.

(9) Testing and examination materials, before the test or examination is given or if it is to be given again, or records of individual test or examination scores, other than records which show only passage or failure and not specific scores.

(10) Criminal investigation records, except as provided herein. The district court, in an action brought pursuant to K.S.A. 45-222, and amendments thereto, may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure:

(A) Is in the public interest;

(B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution;

(C) would not reveal the identity of any confidential source or undercover agent;

(D) would not reveal confidential investigative techniques or procedures not known to the general public;

(E) would not endanger the life or physical safety of any person; and

(F) would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.

If a public record is discretionarily closed by a public agency pursuant to this subsection, the record custodian, upon request, shall provide a written citation to the specific provisions of paragraphs (A) through (F) that necessitate closure of that public record.

(11) Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.

(12) Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.

(13) The contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition of property, prior to the award of formal contracts therefor.

(14) Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual.

(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.

(16) Software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, that describes:

(A) The information which the agency maintains on computer facilities; and

(B) the form in which the information can be made available using existing computer programs.

(17) Applications, financial statements and other information submitted in connection with applications for student financial assistance where financial need is a consideration for the award.

(18) Plans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.

(19) Well samples, logs or surveys which the state corporation commission requires to be filed by persons who have drilled or caused to be drilled, or are drilling or causing to be drilled, holes for the purpose of discovery or production of oil or gas, to the extent that disclosure is limited by rules and regulations of the state corporation commission.

(20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

(21) Records of a public agency having legislative powers, which records pertain to proposed legislation or amendments to proposed legislation, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(22) Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(23) Library patron and circulation records which pertain to identifiable individuals.

(24) Records which are compiled for census or research purposes and which pertain to identifiable individuals.

(25) Records which represent and constitute the work product of an attorney.

(26) Records of a utility or other public service pertaining to individually identifiable residential customers of the utility or service, except that information concerning billings for specific individual customers named by the requester shall be subject to disclosure as provided by this act.

(27) Specifications for competitive bidding, until the specifications are officially approved by the public agency.

(28) Sealed bids and related documents, until a bid is accepted or all bids rejected.

(29) Correctional records pertaining to an identifiable inmate or release, except that:

(A) The name; photograph and other identifying information; sentence data; parole eligibility date; custody or supervision level; disciplinary record; supervision violations; conditions of supervision, excluding requirements pertaining to mental health or substance abuse counseling; location of facility where incarcerated or location of parole office maintaining supervision and address of a releasee whose crime was committed after the effective date of this act shall be subject to disclosure to any person other than another inmate or releasee, except that the disclosure of the location of an inmate transferred to another state pursuant to the interstate corrections compact shall be at the discretion of the secretary of corrections;

(B) the ombudsman of corrections, the attorney general, law enforcement agencies, counsel for the inmate to whom the record pertains and any county or district attorney shall have access to correctional records to the extent otherwise permitted by law;

(C) the information provided to the law enforcement agency pursuant to the sex offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, shall be subject to disclosure to any person, except that the name, address, telephone number or any other information which specifically and individually identifies the victim of any offender required to register as provided by the Kansas offender registration act, K.S.A. 22-4901 et seq. and amendments thereto, shall not be disclosed; and

(D) records of the department of corrections regarding the financial assets of an offender in the custody of the secretary of corrections shall be subject to disclosure to the victim, or such victim's family, of the crime for which the inmate is in custody as set forth in an order of restitution by the sentencing court.

(30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

(31) Public records pertaining to prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the state. This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

(32) Engineering and architectural estimates made by or for any public agency relative to public improvements.

(33) Financial information submitted by contractors in qualification statements to any public agency.

(34) Records involved in the obtaining and processing of intellectual

property rights that are expected to be, wholly or partially vested in or owned by a state educational institution, as defined in K.S.A. 76-711, and amendments thereto, or an assignee of the institution organized and existing for the benefit of the institution.

(35) Any report or record which is made pursuant to K.S.A. 65-4922, 65-4923 or 65-4924, and amendments thereto, and which is privileged pursuant to K.S.A. 65-4915 or 65-4925, and amendments thereto.

(36) Information which would reveal the precise location of an archeological site.

(37) Any financial data or traffic information from a railroad company, to a public agency, concerning the sale, lease or rehabilitation of the railroad's property in Kansas.

(38) Risk-based capital reports, risk-based capital plans and corrective orders including the working papers and the results of any analysis filed with the commissioner of insurance in accordance with K.S.A. 40-2c20 and 40-2d20 and amendments thereto.

(39) Memoranda and related materials required to be used to support the annual actuarial opinions submitted pursuant to subsection (b) of K.S.A. 40-409, and amendments thereto.

(40) Disclosure reports filed with the commissioner of insurance under subsection (a) of K.S.A. 40-2,156, and amendments thereto.

(41) All financial analysis ratios and examination synopses concerning insurance companies that are submitted to the commissioner by the national association of insurance commissioners' insurance regulatory information system.

(42) Any records the disclosure of which is restricted or prohibited by a tribal-state gaming compact.

(43) Market research, market plans, business plans and the terms and conditions of managed care or other third party contracts, developed or entered into by the university of Kansas medical center in the operation and management of the university hospital which the chancellor of the university of Kansas or the chancellor's designee determines would give an unfair advantage to competitors of the university of Kansas medical center.

(44) The amount of franchise tax paid to the secretary of revenue or the secretary of state by domestic corporations, foreign corporations, domestic limited liability companies, foreign limited liability companies, domestic limited partnership, foreign limited partnership, domestic limited liability partnerships and foreign limited liability partnerships.

(45) Records, other than criminal investigation records, the disclosure of which would pose a substantial likelihood of revealing security measures that protect: (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; (B) transportation and sewer or wastewater treatment systems, facilities or equipment; or (C) private property or persons, if the records are submitted to the agency. For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments.

(46) Any information or material received by the register of deeds of a county from military discharge papers (DD Form 214). Such papers shall be disclosed: To the military dischargee; to such dischargee's immediate family members and lineal descendants; to such dischargee's heirs, agents or assigns; to the licensed funeral director who has custody of the body of the deceased dischargee; when required by a department or agency of the federal or state government or a political subdivision thereof; when the form is required to perfect the claim of military service or honorable discharge or a claim of a dependent of the dischargee; and upon the written approval of the commissioner of veterans affairs, to a person conducting research.

(47) Information that would reveal the location of a shelter or a safehouse or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of crime, domestic violence or sexual assault.

(b) Except to the extent disclosure is otherwise required by law or as

appropriate during the course of an administrative proceeding or on appeal from agency action, a public agency or officer shall not disclose financial information of a taxpayer which may be required or requested by a county appraiser or the director of property valuation to assist in the determination of the value of the taxpayer's property for ad valorem taxation purposes; or any financial information of a personal nature required or requested by a public agency or officer, including a name, job description or title revealing the salary or other compensation of officers, employees or applicants for employment with a firm, corporation or agency, except a public agency. Nothing contained herein shall be construed to prohibit the publication of statistics, so classified as to prevent identification of particular reports or returns and the items thereof.

(c) As used in this section, the term "cited or identified" shall not include a request to an employee of a public agency that a document be prepared.

(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.

(e) The provisions of this section shall not be construed to exempt from public disclosure statistical information not descriptive of any identifiable person.

(f) Notwithstanding the provisions of subsection (a), any public record which has been in existence more than 70 years shall be open for inspection by any person unless disclosure of the record is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or by a policy adopted pursuant to K.S.A. 72-6214, and amendments thereto.

(g) Any confidential records or information relating to security measures provided or received under the provisions of subsection (a)(45) shall not be subject to subpoena, discovery or other demand in any administrative, criminal or civil action.

Sec. 3. K.S.A. 77-501 is hereby amended to read as follows: 77-501. K.S.A. 77-501 through ~~77-541~~ 77-566 shall be known and may be cited as the Kansas administrative procedure act.

Sec. 4. K.S.A. 77-503 is hereby amended to read as follows: 77-503. (a) This act applies only to the extent that other statutes expressly provide that the provisions of this act govern proceedings under those statutes.

(b) This act creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes.

(c) *In computing any period of time prescribed by this act, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. As used in this act, unless otherwise specified, "day" means calendar day and not business day; therefore, intermediate Saturdays, Sundays and legal holidays shall be included in the computation. As used in this act, "business day" means any day that is not a Saturday, Sunday or legal holiday. "Legal holiday" includes any day designated as a holiday by any statute or regulation of this state.*

Sec. 5. K.S.A. 77-511 is hereby amended to read as follows: 77-511. (a) Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute, a state agency shall process an application for an order on which a statute provides for a hearing under this act as follows:

(1) Within 30 days after receipt of the application, the state agency shall acknowledge receipt thereof and inform the applicant of the name, official title, mailing address and telephone number of a state agency member or employee who may be contacted regarding the application.

As soon as practicable, the state agency shall notify the applicant of any apparent errors or omissions. Failure to detect such errors or omissions does not preclude the state agency from raising them at a later stage of the proceeding.

(2) When practicable, within 90 days after receipt of a completed application, the state agency shall:

(A) Approve or deny the application, in whole or in part, on the basis of emergency or summary proceedings, if those proceedings are available under this act for disposition of the matter; or

(B) commence a formal hearing or a conference hearing in accordance with this act.

(b) Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute, a state agency shall process a request for a hearing as follows:

(1) Within 30 days after receipt of the request, the state agency shall acknowledge receipt thereof and if the state agency has not previously done so, the state agency shall notify the applicant of the name, official title, mailing address and telephone number of a state agency member or employee who may be contacted regarding the request; and

(2) when practicable, within 90 days after receipt of the request the state agency shall commence a formal or conference hearing in accordance with this act unless a statute makes the granting of a hearing discretionary with the state agency and the state agency determines not to conduct a hearing.

(c) *For purposes of this section*, a hearing commences when the state agency or presiding officer notifies a party that a prehearing conference or other stage of the hearing will be conducted.

(d) If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the state agency has taken final action upon the application for renewal or, if the state agency's action is unfavorable, until the last day for seeking judicial review of the state agency's action or a later date fixed by the reviewing court.

Sec. 6. K.S.A. 77-513 is hereby amended to read as follows: 77-513. When a statute provides for a hearing in accordance with this act, the hearing shall be governed by K.S.A. 77-513 through 77-532, and amendments thereto, except as otherwise provided by:

(a) A statute other than this act; or

(b) K.S.A. 77-533 through ~~77-541~~ 77-542, and amendments thereto.

Sec. 7. K.S.A. 2008 Supp. 77-514 is hereby amended to read as follows: 77-514. (a) ~~For agencies listed in subsection (b) of K.S.A. 75-37, 121, and amendments thereto, The~~ *For all agencies, except for the state court of tax appeals, the* agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. ~~For all other agencies, the agency head, one or more members of the agency head, a presiding officer assigned by the office of administrative hearings, or, unless prohibited by K.S.A. 77-551, and amendments thereto, one or more other persons designated by the agency head shall be the presiding officer.~~

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

(f) If the office of administrative hearings cannot provide a presiding officer, a state agency may enter into agreements with another state agency to provide presiding officers to conduct proceedings under this act.

(g) Notwithstanding any quorum requirements, if the agency head of a professional or occupational licensing agency is a body of individuals,

the agency head, unless prohibited by law, may designate one or more members of the agency head to serve as presiding officer and to render a final order in the proceeding.

*(h) Except as otherwise provided by law, in any proceeding under this act, a person shall not be eligible to act as presiding officer, and shall not provide confidential legal or technical advice to a presiding officer in the proceeding, if that person:*

*(1) Has served in an investigatory or prosecutorial capacity in the proceeding or a proceeding arising out of the same event or transaction;*

*or*  
*(2) is supervised or directed by a person who would be disqualified under paragraph (1).*

Sec. 8. K.S.A. 77-519 is hereby amended to read as follows: 77-519.

(a) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, objections and motions, including, but not limited to, motions to dismiss and motions for summary judgment.

(b) The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by state agency rule and regulation *or by the presiding officer.*

Sec. 9. K.S.A. 77-520 is hereby amended to read as follows: 77-520.

(a) If a party fails to attend or participate in a prehearing conference, hearing or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties written notice of a proposed default order, including a statement of the grounds.

(b) Within seven days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

(c) The proposed default order shall become effective after expiration of the time within which the party may file a written motion under subsection (b) unless a written motion to vacate the order is filed with the agency within such time. Upon receipt of a motion to vacate a proposed default order, the presiding officer shall either vacate the proposed order or issue the default order as proposed. If the presiding officer issues a default order as proposed, the order shall become effective upon service.

(d) After a default order becomes effective, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The presiding officer in lieu of determining the issues affecting the defaulting party may, unless otherwise prohibited by law, dismiss such party's application for an adjudicative proceeding.

*(e) If the presiding officer is the agency head, or has been designated under K.S.A. 77-514, and amendments thereto, to issue a final order, the order shall be deemed a final order. If the presiding officer is not the agency head, and has not been designated to issue a final order under K.S.A. 77-514, and amendments thereto, the order shall be deemed an initial order.*

Sec. 10. K.S.A. 77-521 is hereby amended to read as follows: 77-521.

(a) The presiding officer shall grant a petition for intervention if:

(1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least three *business* days before the hearing;

(2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

(3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

(b) The presiding officer may grant a petition for intervention at any

time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(1) Limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

(2) limiting the intervener's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) requiring two or more interveners to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

(d) The presiding officer, at least ~~24 hours~~ *one business day* before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying or modifying intervention to the petitioner for intervention and to all parties.

Sec. 11. K.S.A. 77-523 is hereby amended to read as follows: 77-523. At a hearing:

(a) The presiding officer shall regulate the course of the proceedings.

(b) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

(c) The presiding officer may, and when required by statute shall, give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

(d) The presiding officer may conduct all or part of the hearing by telephone or other electronic means, if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place.

(e) The presiding officer shall cause the hearing to be recorded at the state agency's expense. The state agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense and subject to such reasonable conditions as the state agency may establish, may cause a person other than the state agency to prepare a transcript from the state agency's record, or cause additional recordings to be made during the hearing.

(f) The hearing is open to public observation, except ~~for the parts that to the limited extent, as determined by the presiding officer states to be closed,~~ *that it is necessary to close parts of the hearing pursuant to a provision of law requiring confidentiality or expressly authorizing closure. Notwithstanding any other provision of law to the contrary, any hearing held pursuant to this act shall not be deemed a meeting pursuant to K.S.A. 75-4317a, and amendments thereto.*

Sec. 12. K.S.A. 77-525 is hereby amended to read as follows: 77-525.

(a) A presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding while the proceeding is pending, with any party or participant, with any person who has a direct or indirect interest in the outcome of the proceeding or with any person who *has served in an investigatory or prosecutorial capacity* or presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) A member of a multimember panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not:

(1) Receive *ex parte* communications of a type that the presiding



officer would be prohibited from receiving; or

(2) furnish, augment, diminish or modify the evidence in the record.

(c) Unless required for the disposition of *ex parte* matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may directly or indirectly communicate in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer unless notice and an opportunity are given all parties to participate in the communication.

(d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an *ex parte* communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an *ex parte* communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made and the identity of each person from whom the presiding officer received an *ex parte* communication and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the *ex parte* communication must be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(f) If necessary to eliminate the effect of an *ex parte* communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The state agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each state agency, by rule and regulation, may provide for appropriate sanctions, including default, for any violations of this section.

(h) This section shall not apply to adjudicative proceedings before:

(1) The state corporation commission. Such proceedings shall be subject to the provisions of K.S.A. 77-545, *and amendments thereto*;

(2) the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction or adjudicative proceedings held pursuant to the Kansas insurance holding companies act. Such proceedings shall be subject to the provisions of K.S.A. 77-546, *and amendments thereto*; and

(3) the director of taxation. Such proceedings shall be subject to the provisions of K.S.A. 77-548, *and amendments thereto*.

Sec. 13. K.S.A. 2008 Supp. 77-527 is hereby amended to read as follows: 77-527. (a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:

(1) A provision of law precludes or limits state agency review of the initial order; or

(2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised.

(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) *Subject to K.S.A. 77-621, and amendments thereto*, in reviewing an initial order, the agency head or designee shall exercise all the decision-

making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. *In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.*

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526, and amendments thereto.

(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by K.S.A. 77-531, and amendments thereto.

(j) Unless a petition for reconsideration is a prerequisite for seeking judicial review, a final order under this section shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

Sec. 14. K.S.A. 77-528 is hereby amended to read as follows: 77-528. *Until the time at which a petition for judicial review would no longer be timely*, a party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order ~~until the time at which a petition for judicial review would no longer be timely~~, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

Sec. 15. K.S.A. 2008 Supp. 77-529 is hereby amended to read as follows: 77-529. (a) (1) Except as otherwise provided by paragraph (2), any party, within 15 days after service of a final order, may file a petition for reconsideration with the agency head, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review except as provided in K.S.A. 44-1010 and 44-1115, and amendments thereto, concerning orders of the Kansas human rights commission, K.S.A. 55-606 and 66-118b, and amendments thereto, concerning orders of the corporation commission and K.S.A. 74-2426, and amendments thereto, concerning orders of the state court of tax appeals.

(2) Any party applying for an exemption under: (A) Section 13, of article 11 of the Kansas Constitution, or (B) K.S.A. 79-201a *Second*, and amendments thereto, for property constructed or purchased, in whole or in part, with the proceeds of revenue bonds under the authority of K.S.A. 12-1740 to 12-1749, inclusive, and amendments thereto, may file a petition for reconsideration with the state court of tax appeals within 30 days after service of a final order.

(b) Within 20 days after the filing of the petition, the agency head shall render a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. ~~The petition may be granted, in whole or in part, only if the agency head states, in the written order, An order on reconsideration altering a prior order shall be in writing and~~

~~shall include findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, to justify the order.~~ In proceedings before the Kansas corporation commission, the petition is deemed to have been denied if the agency head does not dispose of it within 30 days after the filing of the petition.

An order under this section shall be served on the parties in the manner prescribed by K.S.A. 77-531, and amendments thereto.

*(c) If there are multiple parties to an agency adjudication and one party files a petition for judicial review, the agency retains jurisdiction to act on a timely petition for reconsideration filed by another party.*

~~(d)~~ *(d)* Any order rendered upon reconsideration or any order denying a petition for reconsideration shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

~~(d)~~ *(e)* For the purposes of this section, "agency head" shall include a presiding officer designated in accordance with subsection (g) of K.S.A. 77-514, and amendments thereto.

Sec. 16. K.S.A. 77-531 is hereby amended to read as follows: 77-531. Service of an order or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order or notice to the person to be served or by mailing a copy of the order or notice to the person at the person's last known address. *Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service.* Delivery of a copy of an order or notice means handing the order or notice to the person or leaving the order or notice at the person's principal place of business or residence with a person of suitable age and discretion who works or resides therein. ~~Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service.~~ Service by mail is complete upon mailing. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period.

Sec. 17. K.S.A. 77-532 is hereby amended to read as follows: 77-532.

(a) A state agency shall maintain an official record of each formal hearing.

(b) The state agency record consists only of:

(1) Notices of all proceedings;

(2) any prehearing order;

(3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(4) evidence received or considered;

(5) a statement of matters officially noticed;

(6) proffers of proof and objections and rulings thereon;

(7) proposed findings, requested orders and exceptions;

(8) the record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(9) any final order, initial order, or order on reconsideration; ~~and~~

(10) staff memoranda or data submitted to the presiding officer *other than confidential internal communications permitted under K.S.A. 77-525, and amendments thereto; and*

*(11) any oral or written statement allowed by the presiding officer pursuant to K.S.A. 77-523, and amendments thereto.*

(c) Except to the extent that this act or another statute provides otherwise, the state agency record, excluding matters under paragraph (10) of subsection (b), constitutes the exclusive basis for state agency action in formal hearings and for judicial review thereof.

Sec. 18. K.S.A. 77-534 is hereby amended to read as follows: 77-534. The procedures of this act pertaining to formal hearings apply to a conference hearing, except to the following extent:

~~(a) If a matter is initiated as a conference hearing, no prehearing conference may be held.~~

~~(b)~~ The provisions of K.S.A. 77-522, and amendments thereto, do not apply to conference hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

~~(b)~~ *(b)* Paragraphs (a), (b) and (c) of K.S.A. 77-523, and amendments thereto, do not apply; but (1) the presiding officer shall regulate the

course of the proceedings; (2) only the parties may testify and present written exhibits; and (3) the parties may offer comments on the issues.

Sec. 19. K.S.A. 77-537 is hereby amended to read as follows: 77-537.

(a) A state agency may use summary proceedings, subject to a party's request for a hearing on the order, if:

(1) The use of those proceedings in the circumstances does not violate any provision of law; ~~and~~

(2) the protection of the public interest does not require the state agency to give notice and an opportunity to participate to persons other than the parties;

(3) *based upon an investigation of the facts by the state agency, beyond receipt of the allegations, the state agency believes in good faith that the allegations will be supported to the applicable standard of proof, provided however that an alleged failure to meet the standards set forth in this subsection shall not be subject to immediate judicial review and shall not invalidate any later agency action that has been supported to the applicable standard of proof; and*

(4) *the order does not take effect until after the time for requesting a hearing has expired.*

(b) The state agency shall serve each party with a copy of the order in a summary proceeding in the manner prescribed by K.S.A. 77-531, and amendments thereto. The order shall include at least:

(1) A statement of the state agency's action and, if unfavorable action is taken, a brief statement of the reasons for the action;

(2) notice of the time and manner for requesting a hearing on the order, as provided in K.S.A. 77-542; and

(3) notice that, if a hearing is not requested, the order shall become effective upon the expiration of the time for requesting a hearing.

(c) *If a hearing is requested, the prior issuance of a summary order shall not affect the burden of proof.*

Sec. 20. K.S.A. 2008 Supp. 77-549 is hereby amended to read as follows: 77-549. (a) The filing of a return with the director of taxation under article 15, 32, 33, 34, 36, 37, 41, 42 or 47 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, shall not be deemed an application for an order under the Kansas administrative procedure act.

(b) A determination by the division of taxation or the audit services bureau of the department of revenue concerning tax liability under article 15, 32, 33, 34, 36, 37, 41, 42 or 47 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, which is made prior to the opportunity for a hearing or prior to the opportunity for an informal conference before the secretary or the secretary's designee on such tax liability, shall not require an adjudicative proceeding under the Kansas administrative procedure act.

(c) For purposes of *administrative proceedings of the division of taxation under the Kansas administrative procedure act*, the secretary of revenue may designate the director of the division of taxation ~~or a presiding officer from the office of administrative hearings~~ as agency head.

(d) Final orders of the director of taxation pursuant to K.S.A. 77-526, and amendments thereto, shall be rendered in writing and served within 120 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) of K.S.A. 77-526, and amendments thereto, unless this period is waived or extended with the written consent of all parties or for good cause shown. If extended for good cause, such good cause shall be set forth in writing on or before the expiration of the 120 days.

Sec. 21. K.S.A. 2008 Supp. 77-550 is hereby amended to read as follows: 77-550. For purposes of administrative proceedings of the division of property valuation under the Kansas administrative procedure act, the secretary of revenue may designate the director of the division of property valuation ~~or a presiding officer from the office of administrative hearings~~ as agency head.

Sec. 22. K.S.A. 2008 Supp. 77-551 is hereby amended to read as follows: 77-551. (a) Except as provided in subsection (b), in all hearings of any state agency ~~specified in subsection (h) of K.S.A. 75-37,121, and amendments thereto~~, that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative

hearings.

(b) The provisions of this section shall not apply to the employment security law, pursuant to K.S.A. 44-701 et seq., and amendments thereto or article 5 of chapter 44 and amendments thereto, except K.S.A. 44-532 and 44-5,120 and amendments thereto, concerning the workers compensation act.

(c) Notwithstanding subsection (a) the agency head or one or more members of the agency *head* who will serve as a presiding officer may designate any other person to serve as a presiding officer to determine procedural matters that may arise prior to the hearing on the merits, including but not limited to conducting prehearing conferences pursuant to K.S.A. 77-516 and 77-517 and amendments thereto.

~~(d) This section shall be part of and supplemental to the Kansas administrative procedure act.~~

Sec. 23. K.S.A. 77-601 is hereby amended to read as follows: 77-601. K.S.A. 77-601 through ~~77-627~~ 77-631 shall be known and may be cited as the *Kansas judicial review act for judicial review and civil enforcement of agency actions*.

Sec. 24. K.S.A. 2008 Supp. 77-603 is hereby amended to read as follows: 77-603. (a) This act applies to all agencies and all proceedings for judicial review and civil enforcement of agency actions not specifically exempted by statute from the provisions of this act.

(b) This act creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes.

(c) This act does not apply to agency actions:

(1) Of the Kansas parole board concerning inmates or persons under parole or conditional release supervision;

(2) concerning the management, discipline or release of persons in the custody of the secretary of corrections;

(3) concerning the management, discipline or release of persons in the custody of the commissioner of juvenile justice;

(4) under the election laws contained in chapter 25 of the Kansas Statutes Annotated, and amendments thereto, except as provided by K.S.A. 25-4185, and amendments thereto;

(5) concerning pardon, commutation of sentence, clemency or extradition;

(6) concerning military or naval affairs other than actions relating to armories;

(7) governed by the provisions of the open records act and subject to an action for enforcement pursuant to K.S.A. 45-222, and amendments thereto; ~~or~~

(8) governed by the provisions of K.S.A. 75-4317 et seq., and amendments thereto, relating to open public meetings, and subject to an action for civil penalties or enforcement pursuant to K.S.A. 75-4320 or 75-4320a, and amendments thereto; *or*

(9) *concerning the civil commitment of sexually violent predators pursuant to K.S.A. 59-29a01 et seq., and amendments thereto.*

Sec. 25. K.S.A. 77-612 is hereby amended to read as follows: 77-612. A person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, but:

(a) A petitioner for judicial review of a rule or regulation need not have participated in the rulemaking proceeding upon which that rule and regulation is based, or have petitioned for its amendment or repeal;

(b) a petitioner for judicial review need not exhaust administrative remedies to the extent that this act or any other statute states that exhaustion is not required; ~~and~~

(c) a petitioner for judicial review need not seek reconsideration unless a statute makes the filing of a petition for reconsideration a prerequisite for seeking judicial review; *and*

(d) *the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm.*

Sec. 26. K.S.A. 77-614 is hereby amended to read as follows: 77-614. (a) A petition for judicial review shall be filed with the clerk of the court.

(b) A petition for judicial review shall set forth:

(1) The name and mailing address of the petitioner;

- (2) the name and mailing address of the agency whose action is at issue;
- (3) identification of the agency action at issue, together with a duplicate copy, summary or brief description of the agency action;
- (4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;
- (5) facts to demonstrate that the petitioner is entitled to obtain judicial review;
- (6) the petitioner's reasons for believing that relief should be granted; and
- (7) a request for relief, specifying the type and extent of relief requested.

(c) *Failure to include some of the information listed in subsection (b) in the initial petition does not deprive the reviewing court of jurisdiction over the appeal. Leave to supplement the petition with omitted information required by subsection (b) shall be freely given when justice so requires.*

~~(e)~~ (d) Within 30 days after service on the agency or notice to other parties of the petition as provided in K.S.A. 77-615, and amendments thereto, a party to judicial review proceedings may file an answer or other responsive pleading and shall serve a copy of any such answer or pleading in the manner provided by subsection (e) of K.S.A. 77-613, and amendments thereto, upon all parties to the proceedings.

(e) *In any method of serving process, substantial compliance shall effect valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware that the petition or appeal had been filed.*

Sec. 27. K.S.A. 77-617 is hereby amended to read as follows: 77-617. A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

- (a) The agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;
- (b) the agency action subject to judicial review is a rule and regulation and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;
- (c) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding; or
- (d) the interests of justice would be served by judicial resolution of an issue arising from:

- (1) A change in controlling law occurring after the agency action; or
- (2) agency action occurring *or first reasonably knowable to the person* after the person exhausted the last feasible opportunity for seeking relief from the agency.

Sec. 28. K.S.A. 77-621 is hereby amended to read as follows: 77-621.

(a) Except to the extent that this act or another statute provides otherwise:

- (1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and
- (2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported *to the appropriate standard of proof* by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act;

or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) *For purposes of this section, “in light of the record as a whole” means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency’s explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.*

~~(d)~~ (e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error.

Sec. 29. K.S.A. 77-501, 77-503, 77-507, 77-507a, 77-511, 77-513, 77-519, 77-520, 77-521, 77-523, 77-525, 77-528, 77-531, 77-532, 77-534, 77-537, 77-601, 77-605, 77-612, 77-614, 77-617 and 77-621 and K.S.A. 2008 Supp. 45-221, 77-514, 77-527, 77-529, 77-549, 77-550, 77-551 and 77-603 and K.S.A. 77-551, as amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas, and K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145 of the 2004 Session Laws of Kansas are hereby repealed.

Sec. 30. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 20, 2009.

---