

Date: March 15, 2017

To: Kansas Senate Judiciary Committee, Sen. Rick Wilborn, Chair

From: Mike Kautsch, Professor, University of Kansas School of Law

Re: Hearing on House Bill No. 2070

Introduction

I respectfully offer my opinion about HB 2070 as further amended by the House Judiciary Committee. I appreciate the opportunity to express my view and hope that it might be helpful to the Committee.

HB 2070 interests me, because it would affect citizens' access to certain public records. Transparency of government is among subjects I address through teaching and research. However, the view I express regarding HB 2070 is my own and does not in any way represent the views of the School of Law or the University of Kansas.

Summary

In my opinion, HB 2070 is unnecessary insofar as it proposes to exempt certain public records of the Commission on Peace Officers' Standards and Training (CPOST) from disclosure under the Kansas Open Records Act, K.S.A. 45-215 *et seq.* (KORA). The proposal is to specify which of KORA's existing exemptions from disclosure would apply to CPOST's records.

CPOST's records are important to the public, because they bear on whether qualified peace officers are serving in Kansas communities. When a member of the public currently requests a public record from CPOST, the agency now can disclose it under KORA. Alternatively, CPOST can invoke a KORA exemption and withhold the record or make a redacted version available to the requester.

HB 2070 is duplicative and unnecessary, because it essentially proposes to specify existing KORA exemptions for CPOST to invoke, even though the agency already is free to invoke them.

If HB 2070 nonetheless is to be advanced, the bill ideally at least would be amended in ways that would harmonize it with KORA.

CPOST and the Public Interest

CPOST serves a purpose that is plainly of great public interest. As CPOST states on its Web site, the agency "is committed to providing the citizens of Kansas with qualified, trained, ethical, competent, and professional peace officers. It is also dedicated to adopting and enforcing professional standards for certification of peace officers to promote public safety and preserve public trust and confidence." CPOST, <http://www.kscpost.org/kscpost.php>.

For CPOST to "preserve public trust and confidence," it must be transparent, not secretive. As a public agency, CPOST is subject to KORA, and the Legislature has declared that openness of agency records is presumed. As KORA states, in K.S.A. 45-216(a), "public records shall be open for inspection by any person unless otherwise provided by this act."

Public records that CPOST maintains and that are of interest to the public include a "central registry of all Kansas police officers or law enforcement officers." CPOST is required

to maintain the registry under K.S.A. 74-5611a. Also of public interest are CPOST's records of complaints that are filed against peace officers, as well as CPOST's responses to those complaints.

Why the proposed legislation is unnecessary

KORA includes 55 exemptions that a public agency may invoke as a basis for denying a request for its public records. In fact, KORA now includes so many exemptions from disclosure of public records that it may be in danger of evolving from an Open Records Act into a Secret Records Act.

Be that as it may, the fact is that CPOST has ample, existing grounds in KORA to withhold a record, or disclose it only with redactions, if the record contains sensitive information. CPOST should be expected to function exactly the same as any other agency. If a member of the public requests a record that justifiably should not be disclosed, CPOST can respond the same as any other public agency could. CPOST can identify and invoke an appropriate KORA exemption and either deny the request for the record or disclose it with redactions.

If HB 2070 specifies any KORA exemption as applicable to CPOST, which should it be?

HB 2070 includes a provision, Sec. 2(f), related to CPOST's "central registry of all Kansas police officers or law enforcement officers, which the agency maintains under K.S.A. 74-5611a. The bill proposes that the central registry be subject to KORA's exemption for personnel records, which is K.S.A. 45-221(a)(4). However, that exemption, on its face, authorizes a public agency to deny a request for a record about one or more of its own employees, not another agency's employees. The exemption should not be contrived to apply to CPOST records that are about peace officers the agency does not directly employ.

A more appropriate exemption for CPOST could be K.S.A. 45-221(a)(30), under which a public agency may deny a request for a record if its disclosure would result in a "clearly unwarranted invasion of personal privacy." Under this exemption, CPOST could withhold a record, or release only a redacted version of it, if it contains personal information that justifiably needs to be kept private.

HB 2070 also includes a provision, Sec. 1(g), that would restrict public access to any "complaint or report, record or other information relating to a complaint that is received, obtained, created or maintained" by CPOST. The bill would place all such records under the KORA exemption for "criminal investigation records," which is K.S.A. 45-221(a)(10).

One problem is the scope of the records that would be exempt under HB 2070 as further amended. Under the bill, CPOST would have vast discretion to treat information as "relating" to a complaint, thereby making such information inaccessible to the public. HB 2070 sweeps too broadly. It imposes virtually no limit on the records that CPOST may consider exempt as criminal investigation records. Even records that ordinarily would not qualify as criminal investigation records could be classified as such and placed off limits to the public.

In general, KORA's exemption for criminal investigation records is arguably the most problematic of all 55 exemptions in the law. For example, the definition of criminal investigation records, in K.S.A. 45-217(c), does not distinguish between records of investigations that are active and those that are inactive. As a result, a law enforcement agency is not, as a practical matter, prevented from treating a record as an exempt criminal investigation record

even if the investigation has stalled and has nothing more than a nominal chance of someday resulting in a prosecution.

Another problem with KORA's exemption for criminal investigation records is that an agency may cite it to deny public access even to information that has previously been accessible as a matter of public record.

In an illustrative case in another state, a public official cited an exemption for "confidential law enforcement investigatory" records as a basis for denying a newspaper's request for records. However, the court found that the requested records consisted "largely of nonexempt public records, e.g., newspaper articles, [a sanitary district's] contracts and records, and records of campaign contributions." The court ruled that the state's exemption for investigatory records did not apply. The court said, "Records which are unquestionably nonexempt do not become exempt simply because they are placed in a prosecutor's file...." *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St.3d 261, 267 (1997).

KORA includes a provision under which a records requester may file a court action challenging a public agency's use of the exemption for criminal records investigation. However, in contrast to the Ohio court's ruling in favor of openness, Kansas courts have not been inclined to allow disclosure under KORA's exemption for criminal investigation records. Kansas courts' construction strongly favors strict application of the exemption and non-disclosure. Because of the position taken by Kansas courts, a legal challenge to an agency's use of the exemption is likely to be costly and produce a disappointing outcome. See, for example, Eric Weslander, *Judge rules against newspaper in open records lawsuit*, Lawrence Journal-World (July 31, 2004), http://www2.ljworld.com/news/2004/jul/31/judge_rules_against/ (about a district court finding that a newspaper's request for access to police dispatch radio communications was moot), and *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59 (1987) (holding that a trial court properly found that a "definable public interest" existed in disclosure of requested criminal investigation but that the trial court nevertheless acted "within its sound discretion" to find they contained no information which would 'promote the public interest found in this case.'").

If HB 2070 is to be advanced, I suggest substituting KORA's exemption for records "of agencies involved in administrative adjudication," in K.S.A. 45-221(a)(11), for the problematic exemption that applies to criminal investigation records.

If HB 2070 could propose any improvement in existing law, what might it be?

Although K.S.A. 74-5611a requires CPOST to maintain a "central registry of all Kansas police officers or law enforcement officers," the statute does not make clear the nature of the registry's contents. A way to improve the statute may be to add a definition of the term "registry."

The principal concern

Because CPOST's purpose is to "preserve public trust and confidence," it should be subject to KORA the same as other agencies. When justified under a KORA exemption, it may withhold requested records. Otherwise, it should respond favorably to requests for records that meet KORA's disclosure requirements. The citizens of Kansas need access to information from CPOST that will verify the extent to which the agency is assuring that peace officers throughout the state are—as CPOST states—"qualified, trained, ethical, competent, and professional."

