

February 13, 2018

Re: Proponent Testimony, SB 360, Senate Judicial Committee, Rick Wilborn, Chairman

Chairman Wilborn and members of the Senate Judicial Committee:

I respectfully submit this statement in support of SB 360¹ in my capacity as legal hotline attorney for the Kansas Press Association, the Kansas Association of Broadcasters, and the Kansas Sunshine Coalition for Open Government, as well as in my individual capacity as a Kansas attorney focused on Sunshine Laws and the First Amendment.² I also am a member of the adjunct faculty at Washburn University teaching Mass Media Law, although the views I express herein are not offered on behalf of the University and are strictly my own.

Currently, the Kansas Open Records Act (KORA) provides that a law enforcement agency must disclose body camera footage that captures the death of a family's loved one to "an heir at law" of the decedent.³ However, after Topeka resident Domonique White was killed by police on September 28, 2017, his family was forced to get a court order to determine that Mr. White's father was "an heir at law" entitled to see the footage.⁴ It took well over two months to produce what should have been turned over promptly.⁵

Moreover, under current law, members of the public are effectively blocked from viewing law enforcement video captured by a mobile recording device such as a body camera or a vehicle camera. Even if that footage depicts law enforcement conduct resulting in death or great bodily harm to a member of the public, the agency can choose not to disclose such videos because they are defined to be "criminal investigation records" under the KORA.⁶

Change is needed. If SB 360 were to become law, KORA would more effectively balance the transparency interests of grieving family members and the public at large against privacy concerns related to disclosure of mobile law enforcement video.

A. SB 360, Sec. 2: Access to body camera footage for "an heir at law"

KORA unreasonably restricts access to law enforcement body camera footage, and Section 2 of SB 360 offers solutions. Section 2(b) would allow disclosure of such footage to the subject of that footage, or to "an heir at law" of the subject if deceased, within 24 hours. Further, Section 2(d) of the bill would mandate disclosure of video to the public, upon request, within 30 days, if law enforcement video "documents (1) the discharge of a firearm by a law enforcement officer in the course of duty, other than for training purposes or the killing of an animal that is sick, injured, or dangerous, or (2) the use of force by a law enforcement officer that results in great bodily harm."⁷

Although the bill allows the public increased access to law enforcement video, the bill is careful to balance law enforcement's interests as well. Section 2(g)(2) expressly defines "great bodily harm," thereby narrowing the interpretation of what video is disclosable. More importantly, Section 2(e) also includes a laundry list of exceptions under which law enforcement is not required to disclose police video, such as if it depicts nudity.⁸ However, as in Missouri and Minnesota, the bill also requires disclosure, without obscuring or redacting the footage, if a law enforcement officer is the cause of death or great bodily harm.⁹

Section 2(g)(3) would also define "an heir at law"¹⁰ so that in the future, families such as

the Whites will not have to go to court and wait over two months to obtain footage that depicted the taking of the life of a loved one. I would also respectfully suggest deleting the words “the next of kin” that appear on page 3, line 21 of the bill. These words appear nowhere else in SB 360, and the bill and the statute it would amend already refer to anyone with a familial relationship to a decedent as “an heir at law.” Therefore, that one instance of “the next of kin” in the bill should be stricken and replaced with “an heir at law.”

Through timely disclosure of video, police can be transparent and likely verify that they performed their duties in a professional way.¹¹ To be sure, prosecutors and defense attorneys may object that, if police video is relevant to a pending criminal case, its release to the public could result in prejudicial pretrial publicity. They also may argue for a delay in release of such video. However, the Kansas Supreme Court has held continuously and recently that the earlier video is released, the less likely it is to be prejudicial.¹² Moreover, in the Kansas judicial system, claims of juror prejudice due to publicity typically fail.¹³

The public has a right to know when law enforcement seriously injures or kills someone. Section 2 reflects an effort to strike the correct balance between accountability and privacy.

B. SB 360, Sec. 1: making copies of A/V if “duplication equipment” available

Section 2 presumes that public agencies should be required to disclose copies of audio and video. Because our society has embraced digital technology, the format of such disclosure could be anything from a CD to a shared file the recipient downloads from a link.¹⁴

However, K.S.A. 45-219(a), which hasn’t been amended since its enactment in 1984, provides that public agencies generally need not provide copies of audio or video footage to records requestors.¹⁵ To correct that notion, Section 1(a) of SB 360 generally requires agencies to provide copies, but does not mandate that agencies make such copies in all circumstances. Instead, the bill requires, like Missouri’s law, that an agency provide copies of recordings, but only if the agency possesses “duplication equipment”.¹⁶

Section 1(a) would also amend K.S.A. 45-219(a) so that a public agency can’t assess costs for fees prior to determining which records are available. Under K.S.A. 45-219 as currently worded, an agency can choose to assess a high fee just to determine whether it has the records requested.¹⁷ As a result, a requestor might pay a public agency for a determination that the agency doesn’t have the requested records and receive nothing. The proposed language¹⁸ would make clear that public agencies have a responsibility to determine whether they have requested records before imposing a fee on a requester.

C. Conclusion

Passage of this bill would moderate the broad discretion KORA affords law enforcement agencies as to when and under what circumstances such agency must disclose mobile video. It would protect members of the public requesting records from the unreasonable legal and logistical hurdles current law erects.

These matters are at top of mind for the public.¹⁹ I am hopeful that the committee gives the bill careful consideration. I have posted this testimony online so the hyperlinked references are readily available.²⁰ Please do not hesitate to contact me if I can be of any assistance.

¹ [SB 360](#), introduced February 1, 2018.

² <http://kautschlaw.com/about/>

³ [K.S.A. 45-254](#).

⁴ Katie Moore, *Attorney: City of Topeka restricts body cam footage to Dominique White's minor children*, Topeka Capital-Journal (November 13, 2017), <http://www.cjonline.com/news/local/2017-11-13/attorney-city-topeka-restricts-body-cam-footage-dominique-white-s-minor>; Katie Moore, *Body camera footage to be shown to Dominique White's father on Friday*, Topeka Capital-Journal (Dec 14, 2017), <http://www.cjonline.com/news/local/crime-courts/2017-12-14/body-camera-footage-be-shown-dominique-white-s-father-friday>.

⁵ John Hanna, *DA won't file charges against Topeka police officers in fatal shooting of black man; video released*, Lawrence Journal-World via Associated Press (December 28, 2017) <http://www2.ljworld.com/news/2017/dec/27/da-wont-file-charges-against-topeka-police-officer/>.

⁶ [K.S.A. 45-217\(c\)](#); [K.S.A. 45-221\(a\)\(10\)](#); *Harris Enterprises, Inc. v. Moore*, 241 Kan. 59, 66 (1987); see also Maxwell E. Kautsch, *Proponent Testimony, HB 2571*, [kautschlaw.com](#).

⁷ Language adapted from [Minnesota Statute 13.825](#), Subd. 2(a)(1).

⁸ Language adapted from [MRS 610.205.1](#); [Okla. Stat. tit. 51 §24A.8\(A\)9, 10](#); and [K.S.A. 45-221\(a\)\(10\)\(B\)-\(F\)](#).

⁹ See, e.g., Missouri, [MRS 610.205.1](#), and Oklahoma, [Okla. Stat. tit. 51 §24A.8\(A\)9, 10](#).

¹⁰ Language adapted from [MRS 610.205.1\(1\), \(2\) and \(3\)](#).

¹¹ See Teri L. Hansen, *Body cameras promote trust, improve transparency for officers*, McPherson Sentinel (April 7, 2017), <http://www.mcphersonsentinel.com/news/20170407/body-cameras-promote-trust-improve-transparency-for-officers> (quoting an assistant police chief in McPherson as saying, ““Our officers, being highly trained and very professional, strive to maintain their integrity by being more transparent. Though they know they are often videotaped by the public, body cameras provide an additional eye witness to the situations they encounter.””)

¹² See *State v. Carr*, 300 Kan. 1, 68 (2014) (observing that the potential for prejudice due to publicity diminishes over time and that a lapse of three months “would ordinarily be sufficient to dissipate any pretrial publicity arising at the preliminary hearing.” (reversed on other grounds by *Kansas v. Carr*, 136 S. Ct. 633 (2016), citing *State v. Higgenbotham*, 271 Kan. 582, 592 (2001)).

¹³ Max Kautsch and Mike Kautsch, *Probable Cause Affidavits Open in Kansas*, Journal of the Kansas Bar Association (May, 2015) (“There is no Kansas Supreme Court case where the Court found that the defendant failed to receive a fair trial because of pretrial publicity alone, even though the contention has been frequently advanced.”).

¹⁴ In 2018, virtually any modern computer can use software that constitutes “duplication equipment.” [Free software for copying digital audio files options](#) include Audacity, and there and there are [lots of options for free video editing software](#), such as iMovie or Lightworks.

¹⁵ A public agency “shall not be required to provide copies of radio or recording tapes or discs, video tapes.” [K.S.A. 45-219\(a\)](#). See Ted P. Frederickson, *Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act*, 33 U. Kan. L. Rev. 205, 227 (1985).

¹⁶ Language adapted from [MRS 610.010\(2\)](#).

¹⁷ For example, the KBI, in response to a request by Fox 4 News, sought to charge \$4,025.00 as an “estimated cost” to undertake the review of documents requested, rather than first undertaking the review and then assessing a copy charge. [Letter from KBI, March 4, 2016](#). In another instance, Leavenworth County quoted \$1,934.52 as an “estimated” cost in its response to a request made by a member of the public this past November. [Letter from Leavenworth County, November 17, 2017](#). The practical effect of responses such as these is that the requested records are simply unavailable because the agency is not complying with its implicit responsibility to assess the request before charging a fee. The proposed language would make that responsibility more explicit.

¹⁸ Language adapted from [MRS 610.026.2](#).

¹⁹ See, e.g., Lawrence Journal-World Editorial Staff, *Stepping into the Sunshine*, Lawrence Journal-World (February 9, 2018), <http://m.ljworld.com/news/2018/feb/09/editorial-stepping-sunshine/>.

²⁰ Maxwell E. Kautsch, *Proponent Testimony, SB 360, House Judicial Committee* (February 12, 2018), <http://kautschlaw.com/>.