

February 11, 2022

Testimony regarding SB 386 (version by Committee on Ways and Means 1-25)

*Submitted by Mike Kautsch, emeritus professor, University of Kansas School of Law\*  
For a hearing February 14, 2022, by the Kansas Senate Transparency and Ethics Committee*

I appreciate the opportunity to testify in support of SB 386. In my view, the bill proposes needed improvements in the Kansas Open Records Act (KORA), and they fit squarely within the state's public policy. As KORA states, the policy is that "public records shall be open for inspection" unless specifically exempted from disclosure.<sup>1</sup> In other words, public records are presumed to be generally available upon request.

I will focus on three ways SB 386 would help records requesters under KORA:

- First, SB 386 aims to make access to public records affordable. Public agencies at times charge excessive fees when processing requests for public records. For example, as Kansas Attorney General Derek Schmidt found in 2020, the City of Frontenac violated KORA "when it requested a \$3,500 fee in order to furnish copies of public records to a reporter."<sup>2</sup> Fees charged by public agencies can be exceptionally high if the agencies unnecessarily assign their highest-paid staff members to respond to records requests. SB 386, however, would limit the cost of time spent by staff on records requests to "the lowest hourly rate of the person who is qualified to provide the requested records."<sup>3</sup> This requirement is similar to a guideline in a draft Kansas Attorney General Guidance Document regarding fees charged by public agencies under KORA. The guideline says that, when processing KORA requests, agencies should use "in good faith the lowest-cost category of staff reasonably necessary to provide access to or furnish copies of public records."<sup>4</sup>
- Second, SB 386 would provide for copying of public records that are in a form other than printed documents. Such records include audio-visual materials. Since KORA's enactment in 1984, it has required public agencies to furnish copies of requested public records when the records are in conventional printed form. SB 386 simply would extend the requirement to public records that are kept in the form of audio-visuals and the like, but only when the agency has the means to copy such records.<sup>5</sup>
- Third, SB 386 would grant discretion to records custodians to waive or reduce fees they charge for processing KORA requests, if doing so would be likely to serve the public interest. Specifically, a fee waiver or reduction would be warranted if disclosure of requested records would likely "contribute significantly to public understanding of the operations or activities of the government."<sup>6</sup> The federal Freedom of Information Act contains a similar provision.<sup>7</sup>

In the foregoing three ways, SB 386 would enhance the ability of citizens to gain access to public records under KORA. The bill would serve the worthy purpose of maintaining an informed citizenry and facilitating democratic self-governance.

\* My view of SB 386 is based on my years of experience at the University of Kansas teaching, researching and writing about laws related to freedom of expression and freedom of information.

In testifying, however, I speak only for myself personally and neither for the University of Kansas nor any other entity.

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<sup>1</sup> K.S.A. 45-216(a).

<sup>2</sup> *AG Derek Schmidt: City of Frontenac violated KORA with fee request*, Release, Kansas Attorney General's Office (Feb 17, 2020), <https://www.ag.ks.gov/media-center/news-releases/2020/02/17/ag-derek-schmidt-city-of-frontenac-violated-kora-with-fee-request>.

<sup>3</sup> See lines 19-21, pg. 2, SB 386.

<sup>4</sup> See VII.c., p. 4 of *DRAFT 5/19/2020: Guidance Document – Kansas Open Records Act (KORA) Fees for Cost of Staff Time*, Kansas Attorney General, [https://www.ag.ks.gov/docs/default-source/publications/draft-kora-fees-guidance-document.pdf?sfvrsn=599dac1a\\_6](https://www.ag.ks.gov/docs/default-source/publications/draft-kora-fees-guidance-document.pdf?sfvrsn=599dac1a_6).

<sup>5</sup> See lines 13-17, pg. 1, SB 386.

<sup>6</sup> See lines 24-29, pg. 2, SB 386.

<sup>7</sup> See 5 U.S.C.A. § 552.