



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 63

Joseph O'Sullivan  
Reno County Counselor  
315 West First Street  
Hutchinson, KS 67504-2066

Re: Automobiles and Other Vehicles -- Uniform Act  
Regulating Traffic; Rules of the Road -- Serious  
Traffic Offenses; Driving Under the Influence is a  
Criminal Offense

Laws, Journals and Public Information -- Records  
Open to Public -- Criminal Investigation Records;  
Breath Test Machine Results

Synopsis: Driving under the influence (DUI) is listed in  
the Kansas statutes as a "serious traffic offense,"  
K.S.A. 1986 Supp. 8-1567. Based on Kansas  
appellate case law, however, it is our opinion that  
DUI is a criminal offense. Therefore, absent a  
court order, a log of breath test machine results  
is a criminal investigation record which is not  
required to be disclosed to the public. Cited  
herein: K.S.A. 1986 Supp. 8-1567; K.S.A.  
21-3108; 45-215; 45-217; 45-221; 45-222.

\* \* \*

Dear Mr. O'Sullivan:

As the Reno County Counselor, you request our opinion  
whether certain records must be disclosed to the public under  
the Kansas Open Records Act (KORA), K.S.A. 45-215 et seq.

You inform us that the Reno County sheriff has maintained a log of breath test machine results performed in the Reno County Detention Center. A request has been made for access to this document. Clearly, if a driving under the influence (DUI) case goes to trial, the person's name and test results are matter of court record and are open to the public. The question is whether these results are subject to public disclosure before trial, where prosecution has been declined, or when the results are below the .10 level.

The KORA provides that records of public agencies must be open for inspection by any person unless it falls within one of the categories of records which is not required to be disclosed or disclosure of which is specifically prohibited by statute. K.S.A. 45-217(f)(1); 45-221(a). One exception provides that criminal investigation records are not subject to mandatory disclosure. K.S.A. 45-221(a)(10). The district court may, however, in an action brought pursuant to K.S.A. 45-222, order disclosure of criminal investigation records if it finds that certain conditions exist. K.S.A. 45-221(a)(1)(A)-(E). "Criminal investigation records" is defined as follows:

"'Criminal investigation records' means records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701 and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law, but does not include police blotter entries, court records, roster of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide." K.S.A. 45-217(b).  
(Emphasis added.)

Sheriffs' offices and police departments are criminal justice agencies. K.S.A. 1986 Supp. 22-4701(c). The exclusion of criminal investigation records from mandatory disclosure does not have the effect of removing all law enforcement documents from the scope of the open records act. For instance, records of traffic violations must be open to the public upon request.

The records in question pertain to arrests made for driving under the influence. K.S.A. 1986 Supp. 8-1567. The 1986 legislature enacted legislation which classifies certain violations as traffic infractions (L. 1986, ch. 41, § 2).

Driving under the influence is not a traffic infraction (K.S.A. 1986 Supp. 8-2118) but is listed in chapter 8 under the heading "serious traffic offenses."

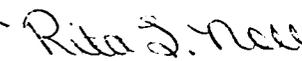
The question is whether the log of breath test machine results given for suspected DUIs is a record pertaining to a violation of a traffic law which must be open to the public, or whether the record is a criminal investigation record which is not required to be disclosed. There is no statutory requirement that such a record be kept. Even though driving under the influence is listed in the statutes as a serious traffic offense, K.S.A. 1986 Supp. 8-1567, the courts have treated DUI as a criminal offense. See State v. McNaught, 238 Kan. 567, Syl ¶ 1 (1986) (DUI referred to as a criminal offense). State v. Brueninger, 238 Kan. 429 (1985) (DUI considered a crime for purposes of the compulsory joinder statute, K.S.A. 21-3108).

In State v. Boos, 232 Kan. 864, Syl. ¶ 1 (1983), the Supreme Court stated that "a crime is an act or omission defined by law and for which, upon conviction, a sentence of imprisonment or fine, or both imprisonment and fine, is authorized." In that case the court held that the habitual violation statute is a civil statute as there is no provision for fine or imprisonment. 864 Kan. at Syl. ¶ 2. A person convicted of DUI is subject to fine and imprisonment. K.S.A. 1986 Supp. 8-1567. It follows, then, that K.S.A. 1986 Supp. 8-1567 is a criminal statute. In addition, K.S.A. 1986 Supp. 8-1567(i) provides that "every diversion agreement entered into in lieu of further criminal proceedings . . . ." See State v. Booze, 238 Kan. 551, 554 (1986).

In conclusion, based on the authority cited above, it is our opinion that DUI is a criminal offense. Therefore, a log of breath test machine results is a criminal investigation record which is not required to be disclosed unless so ordered by the court.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
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