



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 127

Mr. Stan Teasley  
Executive Director  
Kansas Commission on Veterans' Affairs  
Jayhawk Tower, Suite 701  
Topeka, Kansas 66603

Re: Public Records, Documents and Information --  
Records Open to Public -- Certain Records Not  
Required to be Open; Internal Civil Investigation  
of State Employee

Soldiers, Sailors and Patriotic Emblems -- Kansas  
Commission on Veterans' Affairs -- Executive  
Director; Appointment, Powers and Duties; Employees

Synopsis: Records pertaining to an internal investigation of  
an agency's employee, disclosure of which would not  
interfere with a prospective administrative  
adjudication or civil litigation nor disclose the  
identity of a confidential informant, may  
nevertheless be discretionarily closed if they  
fit the definition of a personnel record set forth  
in K.S.A. 1990 Supp. 45-221, as amended. Unless  
specifically altered by law, the decision  
concerning how to exercise existing discretionary  
closure authority may be made by the official  
custodian or custodian of the record, as those  
terms are defined by K.S.A. 45-217(c) and (d).  
Cited herein: K.S.A. 45-215; 45-217; K.S.A. 1990  
Supp. 45-221, as amended by L. 1991, ch. 149, §  
11; K.S.A. 73-1207; K.S.A. 1990 Supp. 73-1208c;  
K.S.A. 73-1209.

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Dear Mr. Teasley:

As executive director of the Kansas commission on veteran's affairs, you request our opinion on disclosure of specific records in the custody of your agency. These records pertain to an internal investigation of one of your employees. You inform us that you conducted this investigation as the result of an official grievance filed by one state employee against another and that this investigation ultimately resulted in disciplinary action against the employee in question. You advise that copies of these records have now been requested. We note that we have not been provided copies of the records in question. Thus, in reaching our conclusions we have relied upon your description and characterization of these records.

K.S.A. 73-1207 et seq. create the Kansas commission on veterans' affairs and delineate its functions. The position of executive director is created pursuant to K.S.A. 1990 Supp. 73-1208c, and the duties of executive director are set forth at K.S.A. 73-1209. The executive director is authorized to carry out the general policies of the commission relating to furnishing services to veterans, their relatives and dependents and the director has other powers and duties as the commission and the secretary of human resources shall confer or impose for the purposes of carrying out the provisions of this act. Thus, it is assumed that your investigation of the commission's employee and the compilation and maintenance of the investigative records in question occurred pursuant to authority conferred upon you by the commission and the secretary of human resources.

The Kansas open records act (KORA), set forth at K.S.A. 45-215 et seq., declares all public records open unless otherwise closed by law. The Kansas commission on veterans' affairs meets the definition of a public agency set forth at K.S.A. 45-217(e). The definition of a public record contained at K.S.A. 45-217(f) is broad enough to include the investigative report and relevant documents in question. Thus, these records are subject to the KORA and presumed open to anyone unless some law either permits or requires closure of the specific record in question.

K.S.A. 1990 Supp. 45-221, as amended by L. 1991 ch. 149, § 11, establishes authority for closing certain types of public records. The pertinent subsections of this statute which may permit closure of the records in question include (a)(1), (4) or (11). We will examine each of these provisions.

K.S.A. 1990 Supp. 45-221(a)(11), as amended, provides that a public agency shall not be required to disclose:

"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."  
(Emphasis added).

You inform us that the records in question were in fact compiled in the process of investigating alleged violations of civil law or administrative rules and regulations. Thus, it appears that these records fall within the description set forth at K.S.A. 1990 Supp. 45-221(a)(11), as amended. However, such records may only be discretionarily closed by a public agency "if disclosure would interfere with prospective administrative adjudication or civil litigation or reveal the identity of a confidential source. . . ."

We are unaware of any facts indicating that disclosure of these records would reveal the identity of a confidential source. Further, you indicate that your agency has completed any disciplinary action pending against the investigated employee. Thus, it appears there is no prospective administrative adjudication or civil litigation involving your agency and these records. In addition to the requirement that there be prospective administrative adjudication or civil litigation, there must also be a determination that disclosure of the record would interfere with such adjudication or litigation. As adjudication by your agency appears complete, it is not possible for disclosure of the records to interfere with adjudication. Thus, based on the information you have provided, we do not believe this exception may be used to close the records in question.

K.S.A. 1990 Supp. 45-221(a)(4), as amended, provides alternative authority for discretionary closure if the specific records in question fit the definition of "personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment. . . ." Whether a specific record meets this definition is a fact specific question, but may in part be determined by examining the nature, content, use of and general internal access to the record in question. See Attorney General Opinions No. 89-106, 88-61 and 87-10. We have not been provided sufficient information to determine whether the records in question are personnel records, but if they are, K.S.A. 1990 Supp. 45-221(a)(4), as amended,

permits discretionary closure by the record custodian unless some other law specifically negates such exercise of discretion. See State Department of SRS v. PERB, 249 Kan. 163 (1991).

In addition to the discretionary closure authority cited above, K.S.A. 1990 Supp. 45-221(a)(1), as amended, recognizes that federal laws, state statutes, or Supreme Court rules may prohibit or restrict access to a specific record. Should such mandatory closure exist and apply to a specific record, the openness dictated by the KORA is essentially superseded by such mandatory directives. However, we have thus far been unable to locate a specific law prohibiting or restricting disclosure of records that are compiled in the process of a civil investigation conducted by the veterans' commission pursuant to an employee grievance complaint. Absent applicability of mandatory or discretionary closure authority, public records must be made available upon request.

If a record is mandatorily closed by a federal law, state statute or rule of the Supreme Court, or if it fits within the definition of a personnel record or a record compiled in the process of investigating a violation of civil law or administrative rules and regulations, disclosure of which would interfere with prospective administrative adjudication or civil litigation, such record may be closed by the public agency. Unless specifically altered by state law concerning the agency or record in question, the custodian or official custodian, as defined by K.S.A. 45-217(c) and (d), may make decisions concerning disclosure of public records which may be discretionarily closed. Thus, it is our opinion that, if the records in question may be discretionarily closed pursuant to K.S.A. 1990 Supp. 45-221, the commission on veterans' affairs may choose to close or open such records or may delegate to you the authority to make that decision.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls  
Assistant Attorney General