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ATTORNEY GENERAL OPINION NO. 92- 149

Nola Foulston
Sedgwick County District Attorney
County Courthouse
535 N. Main
Wichita, Kansas 67203

Re: Public Records, Documents and Information --
Records Open to Public -- Inspection of Records;
Certain Records Not Required to be Open; Criminal
Investigation Records; Invasion of Personal
Privacy; Victim Specific Information on Alleged
Sexual Offense

Synopsis: The Wichita police department is a public agency the records of which are subject to the provisions of the Kansas open records act (KORA), K.S.A. 45-215 et seq. Incidents reported to Kansas law enforcement agencies such as the Wichita police department should be contained on standard offense report forms which comply with approval procedures set forth at K.S.A. 21-2501a. The first page of such standard offense reports contains information which generally is not closed pursuant to K.S.A. 1991 Supp. 45-221(a)(10)(A)-(E). However, the alleged crime reported in the case at hand concerns sexual matters and the personal privacy exception to the KORA, set forth at K.S.A. 1991 Supp. 45-221(a)(30) and the Kansas constitutional amendment guaranteeing basic rights to crime victims as set forth in the Victims' Bill of Rights permit, but do not require, the Wichita police department to decline access to the victim's name, address and telephone number, until such time as the matter may be made public or brought to trial.

Cited herein: K.S.A. 21-2501a, as amended by L. 1992, ch. 239, § 33; 45-215; 45-217, as amended by L. 1991, ch. 321; K.S.A. 1991 Supp. 45-221; 74-7333; L. 1992, ch. 343.

* * *

Dear Ms. Foulston:

We are responding to Mr. Roth's November 9, 1992 letter requesting our opinion on whether the Kansas open records act (KORA) requires the Wichita police department to release certain records or information. The record in question is a police report concerning an alleged sexual assault. You enclose for our information a copy of the "press report" which is generally released by the department and the redacted incident report in question.

The Wichita police department is a public agency as that term is defined by K.S.A. 45-217(e), as amended. Thus, records in the possession of that agency are public records, as defined by K.S.A. 45-217(f), as amended. Pursuant to K.S.A. 45-215 et seq., public records are presumed open unless specific legal authority permits or requires closure of the record in question. K.S.A. 21-2501a, as amended, requires approval by this office of the official Kansas offense report form. The first page of the required standard offense report (SOR) contains most, if not all, of the information requested in this situation.

You inform us that, as a matter of policy, the Wichita police department does not release copies of the front page of what it calls the incident report. As discussed in Attorney General Opinion No. 87-25, this office believes the first page of the SOR is open, pursuant to K.S.A. 45-215 et seq. Although the provisions of K.S.A. 1991 Supp. 45-221(a)(10) permit discretionary closure of criminal investigation records [as that term is defined by K.S.A. 45-217(b)], application of the factors set forth in sections (A) through (E) of that closure statute would ordinarily result in a court ordered disclosure of the information generally contained on the first page of the SOR. Thus, whether or not an agency believes the first page of a standard offense report is a criminal investigation record, it remains our opinion that the KORA generally requires disclosure of the first page of the SOR and all information contained therein.

This brings us to the issue you raise concerning whether specific legal authority permits or requires closure of the victim specific information in question. You note that the victim in this instance allegedly suffered a sexual assault at a hospital and does not want her name, address or telephone number released. The news media requests this information in order to contact the victim for a possible interview and to determine the victim's background as it relates to her reliability or previous claims against hospitals. The Wichita police department has declined release of the requested victim specific information because of the strong privacy issues involved and the belief that such release is "a clearly unwarranted invasion of personal privacy." This quoted language is contained in K.S.A. 1991 Supp. 45-221(a)(30):
"(a) except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose
(30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

Attorney General Opinions No. 91-50 and 89-106 discuss this invasion of personal privacy exception to the openness ordinarily mandated by the KORA. Both these opinions recognize the importance of case law in determining if release of specific public records constitutes a clear invasion of personal privacy rights.

The tort of invasion of privacy protects against publication of private facts; once facts become public the right of privacy ceases. Rawlins v. Hutchinson Publishing Company, 218 Kan. 295 (1975). See also Hartman v. Meredith Corp., 638 F.Supp. 1015 (D.C. Kan. 1986). Persons unfortunate enough to become connected with certain events may not always be protected by tort law from invasion, scrutiny or inquiry into the matter. E.g., Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (family of hostages held by escaped convicts); Edminston v. Time, Inc., 257 F.Supp. 22 (D.C. 1966) (rape victim identified). However, courts have recognized that some matters are and should remain private. E.g., U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (disclosure of private citizen's F.B.I. "rap sheet" held to be unwarranted invasion of personal privacy); Nappier v. Jefferson Standard Life Insurance Co., 322 F.2d 502 (Cal. 1963) (rape victims' records). See also Annot. "What Constitutes Personal Matters Exempt From Disclosure by Invasion of Privacy Exemption Under State Freedom of

Information Act", 26 A.L.R. 4th 666 (1983); 62A Am.Jur.2d
Privacy, § 103 (1990).

Whether release of specific information contained in a public record constitutes a clearly unwarranted invasion of personal privacy is a highly fact sensitive question which must necessarily be answered on a case by case basis. However, we believe a recent Kentucky Supreme Court decision offers persuasive, if not controlling, advice on situations involving crimes of a sexual nature.

The Kentucky open records law was used as model when drafting the KORA. Minutes, Special Committee on Federal and State Affairs, June 28-29 (1979). See also Frederickson "Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act," 33 K.L.R. 205, 210 (1985). The Kentucky open records law contains a provision virtually identical to K.S.A. 1991 Supp. 45-221(a)(30). K.R.S. 61.878(1)(a). Thus, we believe Kansas courts may look to Kentucky case law in interpreting the KORA.

In Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Company, 286 S.W.2d 324 (Ky. 1992), the Kentucky Supreme Court held that a licensing agency's investigation file was exempt from disclosure, despite the openness of the petition and final order in the matter. The investigation file in question contained client complaints about alleged sexual misconduct by a psychologist. Although the court recognized that the investigation file was a public record, it stated that the "file was within exemption from disclosure requirements of the open records act; complaints about sexual misconduct touched upon most intimate and personal features of private lives." Id. at syl. @ 4. In reaching this decision, the court reviewed the underlying purpose of the open records law:

"The public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.

. . . .

"Mindful that the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity, and that the board has in this case effectually promoted the public interest in regulation, and that there is a countervailing public interest in personal privacy, here strongly substantiated, we hold that further disclosure of information contained in the public record in this case would, as a matter of law, constitute a clearly unwarranted invasion of personal privacy."

In addition to this very recent case concerning disclosure of an administrative agency's investigation file when that file contains allegations of sexual misconduct, we must consider the provisions of K.S.A. 1991 Supp. 74-7333. This statute created the victims bill of rights and states in pertinent part:

"(a) In order to ensure the fair and compassionate treatment of victims of crime and to increase the effectiveness of the criminal justice system by affording victims of crime certain basic rights and considerations, victims of crime shall have the following rights:

"(1) Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system." (Emphasis added).

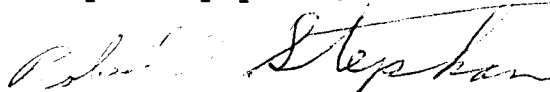
The importance of the above referenced statutory right was overwhelmingly emphasized in November of this year when the electorate approved Senate Concurrent Resolution No. 1634 (L. 1992, ch. 343). This amendment to the Kansas constitution provides that "victims of crimes as defined by law, shall be entitled to certain basic rights." Thus, privacy of a victim has taken on constitutional importance.

Based upon the facts you provide, the Kansas victim rights laws, the KORA exception set forth at K.S.A. 1991 Supp. 45-221(a)(30), and the recent Kentucky case, we believe that

the victim specific or identifying information in the case at hand may be discretionarily closed by the Wichita police department. Thus, pursuant to K.S.A. 1991 Supp. 45-221(d), the victim specific or identifying information in question may be deleted from the rest of the police report.

The remaining information in the report should be disclosed in accordance with K.S.A. 45-215 et seq. and Attorney General Opinion No. 87-25. Such disclosure appears to be in the public interest, would not interfere with any prospective law enforcement action, would not reveal the identity of any confidential source or undercover agent, would not reveal confidential investigative techniques or procedures not known to the general public, and would not endanger the life or physical safety of any person.

Very truly yours,



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