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ATTORNEY GENERAL OPINION NO. 2016-21

Barry R. Wilkerson, County Attorney  
Riley County Attorney's Office  
Carnegie Building  
105 Courthouse Plaza  
Manhattan, Kansas 66502-0106

Re: Public Health—Hospitals and Other Facilities—Qualified Persons at Medical Care Facilities to Examine Victims of Sexual Offenses, When; Remedy for Refusal; Costs, Consent and Notice

Synopsis: Pursuant to K.S.A. 2016 Supp. 65-448, the victim or any law enforcement officer with the written consent of the reported victim may request a sexual assault examination and collection of a sexual assault kit for the purpose of gathering evidence of the enumerated crimes. The county where the alleged offense was committed is the responsible party to pay for such examination and sexual assault collection kit but may seek reimbursement as court costs from the convicted defendant for the costs paid by the county. In order to verify the validity of an invoice from the hospital or medical care facility, the county may request non-individually identifiable information associated with the victim to establish a sexual assault examination was conducted and a sexual assault kit was collected pursuant to K.S.A. 2016 Supp. 65-448. A minor, by statute, is competent to give or refuse consent for a sexual assault examination and collection of a sexual assault kit for the purpose of gathering evidence of the enumerated crimes. The hospital or medical care facility shall give written notice to the parent or guardian of a minor that such an examination has taken place even when the parent or guardian is the alleged assailant. Cited herein: K.S.A. 2016 Supp. 21-5107; 21-5503; 21-5504; 21-5506; 21-5604; K.S.A. 38-101; 38-108; 38-122; K.S.A. 38-123; 38-123b; 59-2949; K.S.A. 2016 Supp. 65-448; K.S.A. 65-2892; 65-2892a; K.S.A. 2016 Supp. 65-6704; and 74-7333.

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Dear Mr. Wilkerson:

As Riley County Attorney, you ask for an Attorney General opinion on six questions relating to K.S.A. 2016 Supp. 65-448, the statute which provides for a forensic medical examination of a victim of a specified sexual offense and the collection of a Kansas Bureau of Investigation sexual assault evidence collection kit, or similar kit, by qualified persons at medical care facilities.

Before answering your specific questions, we will first review the Kansas law regarding a forensic medical examination of a victim of a sexual assault and the federal law known as the Violence Against Women Act (VAWA) of 1994.<sup>1</sup> As early as 1977, the State of Kansas provided for a forensic examination of victims of specified sexual offenses for the purpose of gathering evidence of any such crime, upon the request of any law enforcement officer. Further, since 1977, the “costs of conducting such examinations were charged to and paid by the county where the alleged offense was committed.”<sup>2</sup> In 1994, the Legislature added the required use of Kansas Bureau of Investigation sexual assault evidence collection kits, or similar kits, during the examination, and authorized the cost of the kit to be charged to and paid by the county where the alleged offense was committed.<sup>3</sup> An amendment in 1996 authorized the county to seek reimbursement against the convicted defendant for the costs paid by the county as a court cost in the criminal prosecution.<sup>4</sup>

Congress enacted VAWA in 1994. Among its many provisions, VAWA created the Office of Violence Against Women (OVW) within the Department of Justice<sup>5</sup> and authorized the OVW to provide federal funds to states for the investigation and prosecution of violent crimes against women.<sup>6</sup> Under the STOP (Services–Training–Officers–Prosecutors) Violence Against Women Formula Grant Program (STOP Program), grant funds are provided to states and territories<sup>7</sup> based on population, to promote a coordinated, multidisciplinary approach to improve the criminal justice system’s response to violence against women and to provide services to victims of domestic violence, dating violence, sexual assault, and stalking.<sup>8</sup>

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<sup>1</sup> VAWA was originally enacted as Title IV of the Violent Crime Control and Law Enforcement Act of 1994. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994). VAWA was most recently reauthorized with the passage of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No 113-4, 127 Stat. 54 (2013).

<sup>2</sup> L. 1977, Ch. 211, § 1, codified in K.S.A. 2016 Supp. 65-448(c).

<sup>3</sup> L. 1994, Ch. 348, § 9, codified in K.S.A. 2016 Supp. 65-448(c).

<sup>4</sup> L. 1996, Ch. 156, § 1, codified in K.S.A. 2016 Supp. 65-448(c).

<sup>5</sup> 42 U.S.C. § 3796gg-0(a).

<sup>6</sup> 42 U.S.C. § 3796gg(b).

<sup>7</sup> 42 U.S.C. § 3796gg-1(b).

<sup>8</sup> 42 U.S.C. § 3796gg(b).

In order to be entitled to funds under the STOP Program, the state or unit of local government must incur the full out-of-pocket costs of forensic medical examinations for alleged victims of sexual assault and must notify victims of sexual assault of the availability of forensic medical examinations at no cost to the victim.<sup>9</sup> “The term forensic medical examination means an examination provided to a sexual assault victim by medical personnel trained to gather evidence of a sexual assault in a manner suitable for use in a court of law.”<sup>10</sup> According to federal regulations, the examination, at a minimum, should include “(i) Examination of physical trauma; (ii) Determination of penetration or force; (iii) Patient interview; and (iv) Collection and evaluation of evidence.”<sup>11</sup>

After VAWA’s adoption, three amendments were made to K.S.A. 65-448. First, in 2002, the Kansas law was amended to add a licensed physician assistant and a registered professional nurse who has been specially trained in performing sexual assault evidence collection to the existing list of health care personnel required to conduct a sexual assault examination if on call or on duty.<sup>12</sup> Further, the law made refusal to conduct such examination by listed health care personnel subject to injunction or reportable to the appropriate licensing agency for disciplinary action.<sup>13</sup>

Second, in 2008, the Kansas law was amended to add the victim as a person who may request an examination and collection of a sexual assault evidence collection kit pursuant to K.S.A. 65-448.<sup>14</sup> If the victim requests the examination, the medical care facility is prohibited from notifying any law enforcement agency without the written consent of the victim, unless otherwise required by law.<sup>15</sup> When the victim chooses not to release the kit to law enforcement, the sexual assault evidence collection kit is required to be sealed by either the sexual assault nurse examiner program or the facility and sent to the Kansas Bureau of Investigation for storage.<sup>16</sup> After five years, such kits are required by statute to be destroyed.<sup>17</sup>

Also in 2008, the law was changed to require the Kansas Department of Health and Environment to establish the fee chargeable by the hospital or medical care facility for conducting an examination and the cost of the sexual assault evidence collection kit.<sup>18</sup> The amendment also provided that the refusal of the victim to report the alleged offense to law enforcement shall not excuse or exempt the county from paying such fee;<sup>19</sup> and

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<sup>9</sup> 42 USC § 3796gg-4. See also, 28 C.F.R. § 90.14. VAWA 2013 clarified that victims cannot be required to pay any out-of-pocket costs to obtain a forensic medical examination.

<sup>10</sup> 28 C.F.R. § 90.2(b).

<sup>11</sup> 28 C.F.R. § 90.2(b)(1).

<sup>12</sup> L. 2002, Ch. 128, § 2.

<sup>13</sup> *Id.*

<sup>14</sup> L. 2008, Ch. 157, § 1, codified in K.S.A. 2016 Supp. 65-448(a).

<sup>15</sup> *Id.*

<sup>16</sup> L. 2008, Ch. 157, § 1, codified in K.S.A. 2016 Supp. 65-448(b).

<sup>17</sup> *Id.*

<sup>18</sup> L. 2008, Ch. 157, § 1, codified in K.S.A. 2016 Supp. 65-448(c).

<sup>19</sup> *Id.*

the fee for conducting an examination shall not be charged or billed to the victim or to the victim's insurance carrier.<sup>20</sup>

Finally, in 2011, the law was amended to update the statutory references to the sexual offenses cognizable as violations authorizing examination and evidence collection pursuant to K.S.A. 65-448.<sup>21</sup>

With that background, we now turn to your specific questions.

### **Requesting an Examination**

First, you ask, pursuant to K.S.A. 2016 Supp. 65-448, "who may request a sexual assault examination and collection of a sexual assault kit for the purpose of gathering evidence of the crimes of [rape,<sup>22</sup> criminal sodomy,<sup>23</sup> aggravated criminal sodomy,<sup>24</sup> indecent liberties with a child<sup>25</sup> and aggravated indecent liberties with a child,<sup>26</sup> and incest<sup>27</sup> and aggravated incest]."<sup>28</sup>

To answer your question, we consider the plain language of K.S.A. 2016 Supp. 65-448. Our analysis is guided by the rules of statutory interpretation:

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.<sup>29</sup>

K.S.A. 2016 Supp. 65-448(a) provides, in pertinent part:

Upon the request of any law enforcement officer and with the written consent of the reported victim, or upon the request of the victim, any physician, a licensed physician assistant, who has been specially trained in performing sexual assault evidence collection, or a registered professional nurse, who has been specially trained in performing sexual assault evidence collection, on call or on duty at a medical care facility of this state,

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<sup>20</sup> *Id.*

<sup>21</sup> K.S.A. 2016 Supp. 65-448(a).

<sup>22</sup> K.S.A. 2016 Supp. 21-5503.

<sup>23</sup> K.S.A. 2016 Supp. 21-5504.

<sup>24</sup> *Id.*

<sup>25</sup> K.S.A. 2016 Supp. 21-5506.

<sup>26</sup> *Id.*

<sup>27</sup> K.S.A. 2016 Supp. 21-5604.

<sup>28</sup> *Id.*

<sup>29</sup> *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918 (2013), quoting *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 564–65 (2012) (internal citations omitted).

as defined by subsection (h) of K.S.A. 65-425, and amendments thereto, shall examine persons who may be victims of sexual offenses cognizable as violations of K.S.A. 21-5503, 21-5504, 21-5506 or 21-5604, and amendments thereto, using Kansas bureau of investigation sexual assault evidence collection kits or similar kits approved by the Kansas bureau of investigation, for the purposes of gathering evidence of any such crime.

The plain language of K.S.A. 2016 Supp. 65-448 provides that the victim may request a sexual assault examination and collection of a sexual assault kit for the purpose of gathering evidence of the enumerated crimes.<sup>30</sup> Also, any law enforcement officer with the written consent of the reported victim may make the request.<sup>31</sup> We conclude that, pursuant to K.S.A. 2016 Supp. 65-448, only the victim or a law enforcement officer with written consent of the victim may request a sexual assault examination and collection of a sexual assault kit.

### **Payments for an Examination**

Second, you ask who is responsible for the payment of such examination and evidence collection and whether the responsible party can refuse to pay for a sexual assault examination.

To answer your question, we look to the language in K.S.A. 2016 Supp. 65-448(c) which provides:

The fee chargeable for conducting an examination of a victim as herein provided shall be established by the department of health and environment. Such fee, including the cost of the sexual assault evidence collection kit shall be charged to and paid by the county where the alleged offense was committed, and refusal of the victim to report the alleged offense to law enforcement shall not excuse or exempt the county from paying such fee. The fee for conducting an examination of a victim as herein provided shall not be charged or billed to the victim or to the victim's insurance carrier. Such county shall be reimbursed such fee upon the costs being paid by the defendant as court costs assessed pursuant to K.S.A. 28-172a, and amendments thereto.

Again, the plain language of the statute unequivocally provides that the county where the alleged offense was committed shall be responsible for the payment of such examination and evidence collection.<sup>32</sup> The county is the responsible party to pay the debt, and the statute does not provide any justification for a county's refusal to pay for the sexual assault examination and collection of a sexual assault kit pursuant to K.S.A. 2016 Supp. 65-448.<sup>33</sup>

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<sup>30</sup> K.S.A. 2016 Supp. 65-448(a).

<sup>31</sup> *Id.*

<sup>32</sup> K.S.A. 2016 Supp. 65-448(c).

<sup>33</sup> *Id.*

Even refusal of the victim to report the alleged offense to law enforcement does not excuse or exempt the county from paying for such examination and evidence collection.<sup>34</sup>

However, the statute does allow the county to seek reimbursement from the defendant for the costs paid by the county as a court cost in the criminal prosecution.<sup>35</sup> The ultimate responsible party, therefore, is the criminal defendant convicted of at least one of the sexual offenses listed in K.S.A. 2016 Supp. 65-448.

### **Victim Confidentiality**

Third, you ask what information may the county request to verify the validity of an invoice for payment of a sexual assault examination and collection of a sexual assault kit pursuant to K.S.A. 2016 Supp. 65-448. This question requires a balancing between the victim's privacy and the county's need to ensure proper billing.

The victim has at least two privacy interests that require protection. First, the victim's name, address or other privacy information may need to be protected to provide for the safety of the victim of a sexual offense and his or her family and to protect them from potential intimidation and retaliation. This right to protection is listed in the Bill of Rights for Victims of Crime.<sup>36</sup>

Second, the victim's individually identifiable information is required to be protected by the medical care facility, which has an obligation under the Health Insurance Portability and Accountability Act<sup>37</sup> to ensure that individually identifiable information is not disclosed without a written authorization from the individual or, alternatively, the opportunity for the individual to agree or object.<sup>38</sup>

Because the fee chargeable for conducting an examination and the cost of the sexual assault evidence collection kit is capped by statute to the fee established by the Kansas Department of Health and Environment, the county cannot reasonably argue that it needs the individually identifiable information to ensure proper billing. The established fee is the fee no matter what other services the victim is provided by the hospital or medical care facility. Because the county is not responsible for anything but the established fee for the sexual assault examination and the sexual assault evidence collection kit under K.S.A. 2016 Supp. 65-448, it does not need the victim's individually identifiable information.

Thus, we conclude that in order to verify the validity of an invoice, the county may request non-individually identifiable information associated with the victim to establish that a sexual assault examination was conducted and a sexual assault kit was collected

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<sup>34</sup> *Id.*

<sup>35</sup> K.S.A. 2016 Supp. 65-448(c).

<sup>36</sup> K.S.A. 2016 Supp. 74-7333(a)(7).

<sup>37</sup> Pub. L. No. 104-191 (1996).

<sup>38</sup> Health Insurance Portability and Accountability Act of 1996, § 101(a) *et seq.*, 42 U.S.C.A. § 1181 *et seq.*; 45 C.F.R. §§ 164.508, 164.510.

pursuant to K.S.A. 2016 Supp. 65-448. The county may also request information to establish the alleged sexual offense was committed in such county.

### **Authorized Destruction**

Fourth, you ask whether the provision in K.S.A. 2016 Supp. 65-448(b) that requires sexual assault collection kits to be destroyed after five years is “in line” with changes in law regarding the statute of limitations.

K.S.A. 2016 Supp. 65-448(b) provides:

All sexual assault kits collected that are not released to law enforcement shall be sealed by either the sexual assault nurse examiner program or the facility that provided the examination and kept for five years in the evidence storage facilities of the Kansas bureau of investigation. After five years, such kits shall be destroyed by the Kansas bureau of investigation.

The statute of limitations for crimes is found in K.S.A. 2016 Supp. 21-5107 and provides the law on when a prosecution of the crime must commence or be barred from prosecution. Currently, a prosecution for rape or aggravated criminal sodomy may be commenced at any time.<sup>39</sup> For criminal sodomy, indecent liberties with a child, aggravated indecent liberties with a child, incest, and aggravated incest, a prosecution must commence as follows:

- (1) When the victim is 18 years of age or older shall be commenced within 10 years or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later; or
- (2) when the victim is under 18 years of age shall be commenced within 10 years of the date the victim turns 18 years of age or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later.

Whether K.S.A. 2016 Supp. 65-448 is “in line” with the statute of limitations is not a question of law but a question of policy which is not within our authority to opine.<sup>40</sup> We therefore decline to provide an opinion on this question.

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<sup>39</sup> K.S.A. 2016 Supp. 21-5107.

<sup>40</sup> K.S.A. 75-704; *See also, State v. Spencer Gifts, LLC*, 304 Kan. 755, 765 (2016) (internal citations omitted) (“questions of public policy are for legislative and not judicial determination, and where the legislature does so declare, and there is no constitutional impediment, the question of the wisdom, justice, or expediency of the legislation is for that body and not for the courts.”).

## Consent

Fifth, you ask if a parent can consent to a sexual assault examination of a minor. Further you ask if a parent can consent to a sexual assault examination of a minor even if the minor does not consent. Because your other questions have been limited to interpreting K.S.A. 2016 Supp. 65-448, we presume this question is similarly limited. Also, because your facts include a parent, we will presume the minor is an unemancipated minor under the age of 18 years.

As a general rule, Kansas law requires a minor seeking nonemergency medical care to obtain the consent of a parent or guardian because a minor is presumed not to have the capacity to give informed consent necessary for medical assessment or treatment.<sup>41</sup> A minor is defined as any person under the age of eighteen, except persons sixteen years or older who have been married<sup>42</sup> or have been emancipated.<sup>43</sup>

There are a number of condition-specific statutory exceptions to the general rule.<sup>44</sup> K.S.A. 2016 Supp. 65-448 is a statutory exception to the general rule. Subsection (a) of the statute provides, in pertinent part:

A minor may consent to examination under this section. Such consent is not subject to disaffirmance because of minority, and consent of parent or guardian of the minor is not required for such examination.<sup>45</sup>

In your first scenario, the minor consents and a parent affirms the consent to a sexual assault examination and collection of evidence. We believe K.S.A. 2016 Supp. 65-448 does not prohibit this scenario.

Under the clear language of K.S.A. 2016 Supp. 65-448(a), the legislature has determined that, in this instance, a minor is competent to give consent for a sexual assault examination. The law authorizes a victim who happens to be a minor to consent to a sexual assault examination.<sup>46</sup> After all, a medical examination of the body of a person is a technical invasion of privacy, battery, or trespass, regardless of its result, unless the person or some authorized person consents to it.<sup>47</sup> Parental consent under K.S.A. 2016

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<sup>41</sup> See *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 205 Kan. 292 (1970); and K.S.A. 38-122 which provides, "A parent may give consent to the performance upon his or her child of a medical, surgical or post mortem procedure by a physician licensed to practice medicine or surgery."

<sup>42</sup> K.S.A. 38-101.

<sup>43</sup> K.S.A. 38-108.

<sup>44</sup> *E.g.*, K.S.A. 38-123 (unmarried pregnant minor), 38-123b (hospital, medical or surgical treatment or procedures where parent or guardian is not immediately available), 59-2949 (inpatient mental health services), 65-2892 (sexually transmitted disease care), 65-2892a (drug or alcohol treatment), K.S.A. 2016 Supp. 65-448 (sexual assault examination), and 65-6704 (abortion).

<sup>45</sup> K.S.A. 2016 Supp. 65-448(a).

<sup>46</sup> *Id.*

<sup>47</sup> *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 205 Kan. 292, 298 (1970).

Supp. 65-448(a) is not required but it also is not prohibited.<sup>48</sup> Based on a plain reading of the statutory language, a parent may affirm consent to a sexual assault examination and collection of evidence if the minor consents.

In your second scenario, the minor does not consent and a parent attempts to consent to a sexual assault examination and collection of evidence. Again, the Legislature has determined a minor, without further qualification, to be competent to exercise control of his or her body in this instance. The grant of authority for self-determination includes the right to accept or refuse a sexual assault examination and collection of evidence. Based on the plain language of the statute, we conclude a parent is without authority to give consent over the objection of the minor.

In summary, we conclude that a minor, by statute, is competent to give or refuse consent for a sexual assault examination and collection of a sexual assault kit for the purpose of gathering evidence of the enumerated crimes.

### **Notice**

Sixth, you ask whether, pursuant to K.S.A. 2016 Supp. 65-448(a), the hospital or medical care facility is required to give notice that a minor victim has undergone an examination when the alleged assailant is the victim's parent or guardian.

The law provides that "[t]he hospital or medical [care] facility shall give written notice to the parent or guardian of a minor that such an examination has taken place."<sup>49</sup> Since the language of the statute is clear and unequivocal and provides no exception, the answer to your question is yes.<sup>50</sup>

Sincerely,

Derek Schmidt  
Kansas Attorney General

Athena E. Andaya  
Deputy Attorney General

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<sup>48</sup> We presume the purpose of the language, "and consent of parent or guardian of the minor is not required for such examination," is to bar a parent or guardian alleged to be the assailant from preventing collection of evidence of the alleged sexual assault.

<sup>49</sup> K.S.A. 2016 Supp. 65-448(a).

<sup>50</sup> *Id.*