



**STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL**

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December 23, 2024

Kevin Schmidt
Americans for Prosperity Foundation
151 South Whittier, Suite 2600
Wichita, KS 67207

RE: KORA Complaint – Kansas Department of Commerce
Our File Number CV-22-002343

KORA Complaint – Kansas Department of Commerce
Our File Number PP-24-000201

Dear Mr. Schmidt:

Our office has received two KORA complaints from you on behalf of Americans for Prosperity Foundation. We will address each complaint in turn below.

**KORA Complaint – Department of Commerce
Our File Number PP-24-000201**

On August 28, 2024, our office received your KORA complaint alleging the Department of Commerce (department) violated the Kansas Open Records Act (KORA).¹ Specifically, you alleged that on January 5, 2024, you submitted a KORA request to the department seeking: “1) All quarterly reports prepared for the chairperson of the Senate Committee on Commerce or the House Committee on Commerce, Labor, and Economic Development pursuant to the APEX Act. [and] 2) All annual reports prepared for the Office of the Governor, Senate Committee on Commerce, Senate Committee on Assessment and Taxation, House Committee on Taxation, or the House Committee on Commerce, Labor, and Economic Development pursuant to the APEX Act.” You further alleged that you received an e-mail response from the Department of Commerce on January 9, 2024, but received no further response from the department. As a remedy, you asked to receive responsive records² and “request[ed] the Attorney General’s Office open an investigation into how Commerce responds to KORA requests—including AFPP’s request at issue here and a previous request that is the subject of another, outstanding KORA complaint number CV-22-0023436.”

This KORA authorizes the Attorney General to review and resolve alleged violations of the Act.³

¹ K.S.A. 45-215 *et seq.*

² In a follow-up email to our office, you advised us that the department provided records responsive to his request on August 29, 2024.

³ See K.S.A. 45-222, 45-223, 45-228, 45-251, and 45-253.

We have carefully reviewed your complaint. We also discussed this matter with counsel for the Department of Commerce. Because the concerns you identify in this complaint are similar to your KORA complaint against the department in file number CV-22-002343, we have taken those matters together and will address our comprehensive determination below. We now consider this matter closed.

**KORA Complaint – Department of Commerce
Our File Number CV-22-002343**

On December 13, 2022, we received your KORA complaint submitted online to our office the same day. In your complaint, you alleged that the Kansas Department of Commerce violated the Kansas Open Records Act (KORA).⁴ Specifically, you alleged that on November 10, 2021, you submitted a KORA request to the department requesting a variety of records related to the STAR Bonds program, including all emails regarding the STAR Bond financing program sent to or from the Secretary of Commerce, the Chief of Staff, and the Chief Counsel for the period from January 1, 2021, to September 1, 2021. As a remedy, you would like to receive the requested records, and for this office to investigate how the department responds to KORA requests.

On January 6, 2023, we wrote you informally resolving your complaint. Notably, we explained that we discussed this matter with Department of Commerce General Counsel Robert North. Mr. North explained the department's efforts to respond to Americans for Prosperity Foundation's KORA request, and stated the department was in the process of reviewing a final batch of potentially responsive records, and it anticipated delivering the same to you no later than January 13, 2023.

On January 18, 2023, you emailed this office to follow up on your original KORA complaint. In your email, you articulated dissatisfaction with the department "withholding an unknown number of records under K.S.A. 45-221(a)(20) and K.S.A. 45-221(a)(25) without providing any specifics." Accordingly, we re-opened your complaint and proceeded to review these concerns.

Our investigation included reviewing copies of records responsive to Americans for Prosperity Foundation's KORA request in unredacted form pursuant to K.S.A. 45-228(a) and (b).⁵ Regrettably, the department had not retained its files and records relevant to Americans for Prosperity Foundation's KORA request, and so in order to respond to our inquiry, the department essentially was required to re-respond to Americans for Prosperity Foundation's original KORA request by relying upon the Kansas Office of Information Technology Services to search for and collect responsive email communications, and then re-review the communications for privilege or

⁴ K.S.A. 45-215 *et seq.*

⁵ See K.S.A. 45-228(a), "In investigating alleged violations of the open records act, the attorney general or county or district attorney may: ... (3) examine or cause to be examined any records or other documentary material of whatever nature relevant to such alleged violations;" and (b) "If a public agency claims in writing that any records or documents, or any portion thereof, obtained by the attorney general or a county or district attorney pursuant to subsection (a) are exempt from disclosure for any reason, the attorney general or a county or district attorney shall not further disclose that record or document, nor the contents thereof, unless ordered to do so by a district court enforcing the open records act in connection with such record or document. Such records and documents in the possession of the attorney general or a county or district attorney shall not be subject to a request for inspection and copying under the open records act and shall not be subject to discovery, subpoena or other process."

exemptions from disclosure, so that the department could demonstrate to us which responsive records it had provided Americans for Prosperity Foundation, and which records it declined to disclose under K.S.A. 45-221(a)(20) and 45-221(a)(25).⁶

The KORA establishes a procedure that permits the public to obtain access to or copies of public records. It also provides that all public records are required to be open unless otherwise required by the Act. K.S.A. 45-221(a) provides that a public agency has the discretion to determine whether certain records, or information contained in the records, should be released. K.S.A. 45-221(a)(1) – (55) establishes certain exemptions to disclosure; these exemptions are discretionary, not mandatory. If a public agency asserts one of these exemptions to disclosure, the next step in the process is to consider whether it can redact the records. Under the KORA, if the records contain a mix of information—some of it open, but other parts that are closed by law—the public agency is required to redact the record to eliminate the closed information and provide the remaining portions of the public record.⁷

K.S.A. 45-218(d) provides in part that “[I]f the request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester not later than the end of the third business day following the date that the request for the statement is received.” In your January 18, 2023 email to Mr. Blasi, you requested this statement. There is no requirement that the written statement be detailed or provide an explanation for asserting the particular exemption(s) to disclosure. All that is required is a written statement that cites the specific provision of law the public agency is relying on to deny the KORA request. Therefore, Mr. Blasi’s January 20, 2023 response was consistent with the KORA.

Having reviewed the department’s response, including the records it provided you, we find the department’s actions were consistent with the KORA—with one exception, which we will address below. K.S.A. 45-221(a)(20) provides that a public agency shall not be required to disclose “[n]otes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited in an open meeting or in an agenda of an open meeting.” We asked the department what steps it took to determine whether any records containing information subject to this exemption could be redacted. The department explained that, based on the nature of the discussion reflected in the subject records—discussions surrounding unfunded grant proposals and notes, opinions, and proposed policies or actions concerning the same—redaction was not possible. Moreover, the request included communications to or from the department’s chief counsel, which necessarily returned records containing attorney work product or privileged information.⁸ Following our review, we agree with this assessment.

⁶ Additionally, the department explained the attorney who originally responded to Americans for Prosperity Foundations KORA request and began working on the department’s response to our inquiry left employment with the department before the department’s response to our office was complete.

⁷ See K.S.A. 45-221(d).

⁸ See K.S.A. 45-221(a)(25).

In the process of responding to our inquiry, Mr. North noted he discovered an additional group of documents should have been provided to you that were not provided in the department's response to your request. We have confirmed these records have been mailed to you.

Because the department did not provide all records responsive to Americans for Prosperity Foundation's November 10, 2021 request, the department violated the KORA.

The KORA provides a broad range of remedies to help ensure that a public agency does not ignore its provisions. Ultimately, our goal is to ensure compliance with the law. The department acknowledged its mistake in failing to provide all responsive documents to Americans for Prosperity Foundation, but it was only through the investigation of your complaint that this mistake was discovered. Moreover, while our investigation did not determine the department intentionally delayed or prolonged its response to your request, we are concerned with the department's internal procedures for responding to KORA requests that caused the delay in this matter. While we decline to pursue formal enforcement action, we will work with the department to ensure it takes steps to review its internal KORA procedures to ensure that no other individual experiences the same difficulties.

Although we will continue to monitor this matter to ensure the department takes the appropriate remedial action, we now consider your complaint closed.

Thank you for bringing these matters to our attention. It is important for the public to help this office ensure that public agencies comply with the public policy set out in the KORA "that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."⁹

Thank you for contacting the Attorney General's Office.

Sincerely,



Amber Smith
First Assistant Attorney General
Open Government Enforcement Unit

CC: Robert North, Chief Counsel
Kansas Department of Commerce

⁹ K.S.A. 45-216(a).