



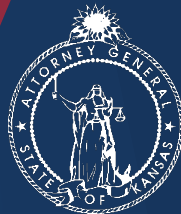
**KANSAS ATTORNEY GENERAL**  
**KRIS W. KOBACH**

# Opening Up Open Government

A Crash Course CLE in Kansas Open Meetings and Open Records

**Matt Bingesser**

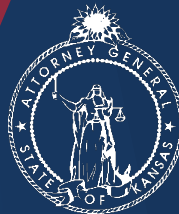
Administrative Counsel



---

# Kansas Open Meetings Act

K.S.A. 75-4317 *et seq.*



## Policy, Construction, Purpose

---

- ▶ K.S.A. 75-4317(a) - Meetings shall be open to the public because “a representative government is dependent upon an informed electorate. . . .”
- ▶ Law enacted for the “public benefit,” so construed broadly in favor of the public to give effect to its specific purpose of openness. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982)
- ▶ KOMA interpreted liberally and exceptions applied narrowly to carry out purpose



# Who is subject to KOMA?

---

- ▶ All legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds

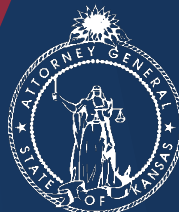
K.S.A. 75-4318(a)

- ▶ Examples of political and taxing subdivisions include:

1. Cities, counties and townships
2. School districts, community colleges
3. Watershed districts
4. Rural water districts
5. Drainage districts

- ▶ “Subordinate groups” - not defined; if created by a covered entity or the group has become an extension of a covered entity, most likely covered.

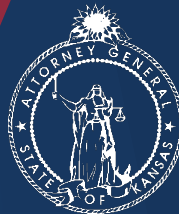
1. Nature of the group and not its designation which determines if it is subject to KOMA
2. Examples - school district advisory board, fire district advisory board
3. Dec 21, 2017 Decision Letter re: ESU (citing AGO 86-92) - it is the actual functions to be performed by the group and not the make-up of the group that determines whether group is a subordinate group. Factors - not formally constituted, no by-laws, no regular meetings, not required to maintain minutes, no officers, no term of office -not participate in the university decision making process by gathering info, evaluating options, and making recommendations to Faculty Senate or university trustees.



# Who is subject to KOMA?

---

- ▶ State bodies
  - State Legislature, its committees and subcommittees unless the rules state otherwise
  - State administrative bodies, boards and commissions
  - State Board of Regents
  - Supreme Court nominating commission
- ▶ Local Governments
  - Cities, counties and townships
  - School districts
  - Fire districts
  - District judicial nominating commission



# Who is not subject to KOMA?

---

- ▶ Any administrative body when exercising a “quasi-judicial” function - K.S.A. 75-4318(g)(1)
  1. Examples:
    1. Zoning boards for a specific property
    2. City grievance panels
    3. Civil service board hearings for a specific employee
    4. Hearing panels
  
- ▶ Hearings conducted under the Kansas Administrative Procedures Act (KAPA) - K.S.A. 77-523(f); K.S.A. 75-4318(g)(4)
- ▶ Judiciary
- ▶ Private organizations (Ex. Homeowners Association)
- ▶ Staff meetings of a covered entity, unless a majority of the public body is present.



# What is a meeting?

---

## ▶ Three Prong Test

- ▶ Any gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- ▶ By a majority of the membership of a public body or agency subject to the act
- ▶ For the purpose of discussing the business or affairs of the public body or agency

K.S.A. 75-4317a



# Discussion

---

- ▶ It is the discussion that triggers KOMA
  - ▶ Binding action or voting not necessary
  - ▶ Meeting includes all gatherings at all stages of the decision making process
  - ▶ Social gatherings
  - ▶ Retreats and meetings held in private
  - ▶ Educational conference/seminar





## “Serial communications”

---

- ▶ Interactive communications outside of a noticed meeting may be a meeting under KOMA if:
  - Collectively involve a **majority of the membership** of the public body or agency
  - Share a **common topic** of discussion
  - Are **intended** by any or all participants **to reach an agreement on a matter that requires binding action** to be taken by the public body or agency

K.S.A. 75-4318(f)

- ▶ Emails, calling trees, use of an agent (staff member)
  - Tip - DO NOT REPLY ALL, DO NOT FORWARD
  - AGO 2009-22 - Interactive communication requires a mutual or reciprocal exchange between members of a public body or agency subject to KOMA



# Notice

---

- ▶ KOMA does not require notice of meetings to be published in a newspaper or on a website
- ▶ Must request notice of meetings
- ▶ No formalities to requesting notice - can be verbal or written
- ▶ A request is valid for one fiscal year
- ▶ Must notify of expiration before terminating notice
- ▶ Presiding officer has duty to provide notice, but duty may be delegated
- ▶ Provide date/time/location where public body will meet to person requesting notice a “**reasonable time**” before meeting
- ▶ Group request for notice - provide to designated individual

K.S.A. 75-4318(b)



# Executive sessions

---

- ▶ Permits discussion of certain enumerated matters outside of public view
- ▶ An open meeting must be convened first and then **recess** into executive session
  - ▶ See AGO 2017-20 defining recess (suspension of an open meeting) and adjourn (ending an open meeting)
- ▶ Must be a formal motion seconded and carried; Complete motion recorded in the minutes K.S.A. 75-4319
  - ▶ Parts of the motion for executive session:
    - Justification (from the statute)
    - Statement of the subject(s) to be discussed (without revealing confidential information)
    - Time/place open meeting will resume
- ▶ There is no mechanism in the KOMA to extend an executive session or to end an executive session early
- ▶ No binding actions may be taken in an executive session, but a consensus is allowed
- ▶ If a consensus is achieved, an open and formal vote must be taken in open session



# Kansas Open Meetings Act

---

## ▶ Enforcement Action

- ▶ Any person, county/district attorney, or the attorney general may bring an action. K.S.A. 75-4320.
- ▶ The public body bears the burden of proof to sustain its action. K.S.A. 75-4320a(b).
- ▶ Except as otherwise provided by law, KOMA enforcement proceedings brought by a county/district attorney or the attorney general have precedence over all other cases and “shall be assigned for hearing and trial at the earliest practicable date.” K.S.A. 75-4320a(e).

## ▶ Remedies

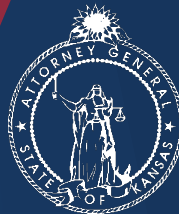
- ▶ Voiding action. K.S.A. 75-4320(a).
- ▶ Injunction, mandamus, or declaratory judgment can be brought by any person or by attorney general or county/district attorney. K.S.A. 75-4320a(a).



# Kansas Open Meetings Act

---

- ▶ Penalties. K.S.A. 75-4320.
  - ▶ Any member of a public body or agency who knowingly violates KOMA provisions or who intentionally fails to provide information required by K.S.A. 75-4318(b) (notice), shall be liable for payment of a civil penalty in a sum not to exceed \$500 for each violation.
  - ▶ Penalties are assessed against the individual, not the public body or agency. K.S.A. 75-4320(a).
  - ▶ Penalty of up to \$500 for each violation as determined by the district court in actions brought by the attorney general or county/district attorney. K.S.A. 75-4320(a).
  - ▶ Civil penalties recovered by attorney general paid to the attorney general's open government fund; civil penalties recovered by the county/district attorney paid to the general fund in county where proceedings instigated. K.S.A. 75-4320(b).



# Kansas Open Meetings Act

---

- ▶ Investigatory Authority. K.S.A. 75-4320b.
  - ▶ Filing a complaint.
    - ▶ Any complaint submitted to the attorney general must be on a form approved by the attorney general. The person submitting the complaint must attest to the facts under penalty of perjury. K.S.A. 75-4320e.
  - ▶ The attorney general and county/district attorney may:
    - ▶ Subpoena witnesses, evidence, records, documents or other material;
    - ▶ Take testimony under oath;
    - ▶ Examine or cause to be examined any records or other materials relevant to the alleged KOMA violations
    - ▶ Require attendance and take testimony under oath concerning the records or other materials
    - ▶ Serve interrogatories; and
    - ▶ Administer oaths and affirmations.



# Kansas Open Meetings Act

---

- ▶ Consent Order. K.S.A. 75-4320d.
  - ▶ When the attorney general determines by a preponderance of the evidence after an investigation that a public body or agency has violated the KOMA, the attorney general may enter into a consent order instead of filing an enforcement action pursuant to K.S.A. 75-4320a.
  - ▶ The consent order may:
    - ▶ Contain admissions of fact;
    - ▶ Require completion of attorney general approved training;
    - ▶ Impose a civil penalty of up to \$250 for each violation;
    - ▶ Set forth an agreement to comply with the KOMA; and
    - ▶ Require submission of proof that the requirements of the consent order have been satisfied.



# Kansas Open Meetings Act

---

- ▶ Finding of Violation. K.S.A. 75-4320d.
  - ▶ When the attorney general determines by a preponderance of the evidence after an investigation that a public body or agency has violated the KOMA, the attorney general may issue a finding of violation instead of filing an enforcement action pursuant to K.S.A. 75-4320a.
  - ▶ A finding of violation may:
    - ▶ Contain findings of fact and conclusions of law;
    - ▶ Require the public body or agency to cease and desist from further violations of the KOMA;
    - ▶ Require completion of attorney general approved training;
    - ▶ Impose a civil penalty of up to \$500 per person for each violation;
    - ▶ Require compliance with the KOMA; and
    - ▶ Require submission of proof that the requirements of the consent order have been satisfied.

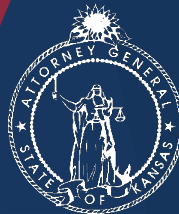




# Kansas Open Meetings Act

---

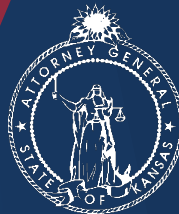
- ▶ District Court Enforcement of Consent Order or Finding of Violation. K.S.A. 75-4320d.
  - ▶ The attorney general may apply to the district court to enforce a consent order or a finding of violation. Before doing so, the attorney general shall make a demand of the public body or agency to comply with the consent order or finding of violation, and provide a reasonable opportunity to cure the violation.
  - ▶ District court order. If the district court finds that the attorney general did not abuse the attorney general's discretion in entering into the consent order or issuing the finding of violation, the district court shall enter an order that:
    - ▶ Enjoins the public body or agency to comply with the consent order or finding of violation;
    - ▶ Imposes a civil penalty not more than \$500;
    - ▶ Requires the public body or agency to pay the attorney general's court costs and costs incurred in investigating the violation; and
    - ▶ Any other remedy authorized by K.S.A. 75-4320a(a) that the court deems appropriate.
  - ▶ Attorney Fees.
    - ▶ The court may require the public body or agency to pay the attorney general's reasonable attorney fees.
    - ▶ The court shall require the public body or agency to pay the attorney general's reasonable attorney fees if the violation was not made in good faith and without a reasonable basis in fact or law.



# Kansas Open Meetings Act

---

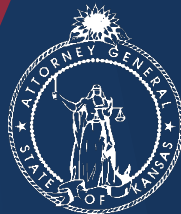
- ▶ Civil remedies to enforce act, consent order. K.S.A. 75-4320f.
  - ▶ The attorney general or county/district attorney may accept a consent judgment instead of filing an enforcement action pursuant to K.S.A. 75-4320a.
  - ▶ May include any remedy available to the district court but shall not include an award of reasonable expenses, investigation costs, or attorney fees.
  - ▶ The district court must approve the consent judgment and enter judgment before the consent judgment is effective.
  - ▶ A breach of the consent judgment is a violation of a court order and shall be subject to penalties as provided by law.



---

# Kansas Open Records Act

K.S.A. 45-215 *et seq.*



## Policy, Construction, Purpose

---

- ▶ “Public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy” - K.S.A. 45-216(a)
- ▶ KORA enacted in 1984; it replaced version enacted in 1957
- ▶ KORA provides the procedure for the public to view and make copies of public records
- ▶ KORA also defines and categorizes records
- ▶ Job of the records custodian is to find the balance between openness and protecting confidential information/right to privacy.



## What is a “public agency?”

---

- ▶ The state
- ▶ Any political or taxing subdivision of the state, or any office, agency or instrumentality thereof, or
- ▶ Any other entity receiving or expending or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision
- ▶ Instrumentality - not defined in KORA; if created by a covered entity or the group has become an extension of a covered entity, most likely covered

K.S.A. 45-217(i)(1)



# What is a “public agency?”

## Instrumentality

---

- ▶ Not defined in KORA; if created by a covered entity or the group has become an extension of a covered entity, most likely covered
- ▶ “A thing used to achieve an end or purpose, or a means or agency through which a function of another entity is accomplished.” *State of Kansas v. Great Plains of Kiowa County, Inc.*, 308 Kan. 950 (2018)

\*\*See disclaimer



## Public Record Defined

---

- ▶ Any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of:
  - Any public agency
  - **Any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions, activities, programs or operations of any public agency**
- ▶ Includes written records, photographs, computer data, and email

K.S.A. 45-217(j)

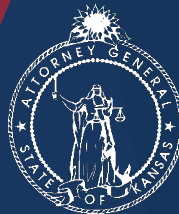


# Public record defined

---

- ▶ Does not include:
  - Records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds
    - Private person - if someone is an officer or employee of a public agency and is acting pursuant to their official duties, they are not a private person
  - Records made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state
  - Records not in existence at time of request
- ▶ Do not need to create records in order to fulfill a request

K.S.A. 45-217(l)





## KORA requirements for public agencies

---

- ▶ Appoint a Freedom of Information officer to assist with KORA requests
- ▶ Display, distribute or otherwise make available a brochure describing requester rights, public agency responsibilities and procedures for inspecting or obtaining copies of public records
- ▶ Include the name/title of records custodian, fees and office hours available for anyone to make a request

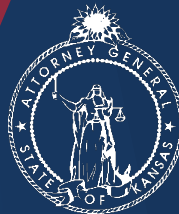
K.S.A. 45-226 and K.S.A. 45-227



## Who may make a request?

---

- ▶ Any person may make a request
- ▶ The person need not be a resident
  - *But see McBurney v. Young*, US Sup. Ct., April 2013 (Not a violation of privileges and immunities clause to limit access to public records to citizens of Commonwealth of Virginia)
- ▶ The person need not provide a reason for their request



## Responding to the request

---

- ▶ The request must be “acted upon” as soon as possible, but not later than the end of the 3<sup>rd</sup> business day following date request is received - K.S.A. 45-218(d)
  
- ▶ The three acceptable responses:
  1. The record is provided (in the form requested, if possible)
  2. The request is under review and the records, if permitted, will follow
  3. The request is denied, with a detailed explanation for the denial

*Telegram Publishing Co., Inc. v. Kansas Department of Transportation*, 275 Kan. 779, ¶ 4 (2003)



# Form of the Request

---

The public agency may require:

- ▶ The request to be in writing
- ▶ Only the requester's name and address
- ▶ Proof of identification
- ▶ Written certification that the requester will not use names and addresses obtained from the records to solicit sales or services

\*\*See disclaimer



## Example - 3 Business Days

---

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
November 1	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	December 1	2	3	4

\*\*See disclaimer



# Allowable fees and charges

---

- ▶ Public agency may only recover actual costs to provide the requested records
- ▶ These costs include staff time to retrieve, review and redact information from a record
- ▶ Fees may be estimated and collected before the records are provided

K.S.A. 45-218(f) and K.S.A. 45-219

- ▶ Executive Order 18-05 - The Office of the Governor and all Executive Branch departments, agencies, boards, and commissions under the jurisdiction of the Office of the Governor shall not assess any charge or fee for the copying of documents responsive to an open records request made by any resident of Kansas under the Kansas Open Records Act, up to and including the first one hundred (100) pages of such documents. All residents of Kansas making such a request shall be informed of this policy in the initial response to their request.



# Kansas Open Records Act

---

- ▶ The attorney general and a county/district attorney have jurisdiction to enforce the provisions of the KORA.
- ▶ Any complaint submitted to the attorney general must be on a form approved by the attorney general. The person submitting the complaint must attest to the facts under penalty of perjury. K.S.A. 45-252.



# Kansas Open Records Act

---

- ▶ Investigative authority. K.S.A. 45-228(a).
  - ▶ The attorney general and county/district attorney may:
    - ▶ Subpoena witnesses, evidence, records, documents or other material;
    - ▶ Take testimony under oath;
    - ▶ Examine or cause to be examined any records or other materials relevant to the alleged KOMA violations
    - ▶ Require attendance and take testimony under oath concerning the records or other materials
    - ▶ Serve interrogatories; and
    - ▶ Administer oaths and affirmations.

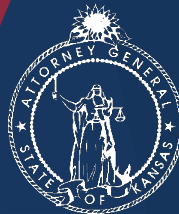




# Kansas Open Records Act

---

- ▶ Any public agency that “knowingly” violates KORA provisions or intentionally fails to furnish information as required by the act shall be liable for the payment of a civil penalty not to exceed \$500 for each violation. K.S.A. 45-223(a).
- ▶ Cases seeking a civil penalty may only be brought by attorney general or county/district attorney. K.S.A. 45-223(a).



# Kansas Open Records Act

---

## ▶ Procedure

- ▶ Enforcement actions may be brought by any person, the attorney general, or a county/district attorney. K.S.A. 45-222(a).
- ▶ Venue is the district court of any county in which the public records are located. K.S.A. 45-222(a).
- ▶ Court review matter *de novo*, and may (on its own motion or on the motion of either party) review records in camera before reaching a decision. K.S.A. 45-222(b).
- ▶ Attorney general or county/district attorney may issue subpoenas, take testimony under oath, examine relevant documentary material, require attendance and take testimony under oath concerning such documentary material, and serve interrogatories. K.S.A. 45-228(a)-(e).
- ▶ Civil remedies to enforce act. Court may enforce purposes of KORA through injunction, mandamus or other appropriate order. K.S.A. 45-222(a).
- ▶ Enforcement actions shall be assigned for hearing and trial at the earliest practicable date. K.S.A. 45-222(e).



# Kansas Open Records Act

---

- ▶ Consent Order. K.S.A. 45-251(a)(1).
  - ▶ When the attorney general determines by a preponderance of the evidence after an investigation that a public agency has violated the KORA, the attorney general may enter into a Consent Order instead of filing an enforcement action pursuant to K.S.A. 45-222.
  - ▶ A consent order may:
    - ▶ Contain admissions of fact;
    - ▶ Require completion of attorney general approved training;
    - ▶ Impose a civil penalty of up to \$250 per person for each violation;
    - ▶ Set forth an agreement to comply with the KORA;
    - ▶ Require submission of proof that the requirements of the Consent Order have been satisfied; and
    - ▶ Be signed by (i) All members of a public agency that is a governing body; (ii) the head of the public agency for a public agency that is not a governing body; and (iii) any other person required by the attorney general.



# Kansas Open Records Act

---

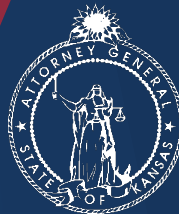
- ▶ Finding of Violation. K.S.A. 45-251(a)(2).
  - ▶ When the attorney general determines by a preponderance of the evidence after an investigation that a public agency has violated the KORA, the attorney general may issue a Finding of Violation instead of filing an enforcement action pursuant to K.S.A. 45-222.
  - ▶ A finding of violation may:
    - ▶ Contain findings of fact and conclusions of law;
    - ▶ Require the public agency to cease and desist from further violations of the KORA;
    - ▶ Require compliance with the KORA;
    - ▶ Require completion of attorney general approved training;
    - ▶ Impose a civil penalty of up to \$500 against the public agency for each violation; and
    - ▶ Require submission of proof that the requirements of the finding of violation have been satisfied.



# Kansas Open Records Act

---

- ▶ District Court Enforcement of a Consent Order or Finding of Violation. K.S.A. 45-251(c).
  - ▶ The attorney general may apply to the district court to enforce a consent order or a finding of violation. Before doing so, the attorney general shall make a demand of the public agency to comply with the Consent Order or Finding of Violation, and provide a reasonable opportunity to cure the violation.



# Kansas Open Records Act

---

- ▶ Consent Judgment. K.S.A. 45-253.
  - ▶ The attorney general or a county/district attorney may resolve a KORA violation by accepting a consent judgment instead of filing an enforcement action pursuant to K.S.A. 45-222.
  - ▶ The consent judgment may include any remedy available to the district court but shall not include an award of reasonable expenses, investigation costs or attorney fees.
  - ▶ The district court must approve the consent judgment and enter judgment before the consent judgment is effective.
  - ▶ A breach of the Consent Judgment is a violation of a court order and shall be subject to penalties as provided by law.
  - ▶ The Consent Judgment may contain a stipulation concerning production of records subject to permissible redactions.



# Kansas Open Records Act

---

## ▶ Penalties

- ▶ Civil penalties recovered by attorney general are paid to state general fund; civil penalties recovered by county/district attorney are paid to general fund in county where proceedings instigated. K.S.A. 45-223(b).
- ▶ Costs and attorney fees
  - ▶ Court “shall” award costs and reasonable attorney fees against defendant if it finds agency’s denial of access to the public record was not in good faith and without reasonable basis in law or fact; includes appeal proceeding. K.S.A. 45-222(d).
  - ▶ Court “shall” award costs and reasonable attorney fees against plaintiff if it finds the action was not in good faith and without a reasonable basis in law or fact; includes appeal proceeding. K.S.A. 45-222(e).






# KANSAS ATTORNEY GENERAL


## KRIS W. KOBACH



- Home
- Public Safety
- Fraud & Abuse
- Victim Services
- Open Government
- Licensing Programs
- File a Complaint
- Media & Resources
- About the Office



**Download the  
"Kansas – A Friend AsKS"  
Youth Suicide Prevention App**



### Kansas – A Friend AsKS

The Attorney General's Office has launched a mobile app, as a new tool to prevent youth suicide by providing information about warning signs and direct access to help for youth in Kansas.

[LEARN MORE →](#)

### Latest News

- [Kansas AG calls on U.S. Supreme Court to reverse lower court decision](#)  
*April 10, 2024*
- [AG Kobach: Kansas Legislature votes to eliminate state fee for concealed carry permit](#)  
*April 05, 2023*
- [AG Kobach thanks legislators for overriding veto regarding Fairness in Women's Sports Act](#)  
*April 05, 2023*
- [AG Kris Kobach, coalition warn asset managers over ESG investments](#)  
*March 31, 2023*

### Upcoming Events

- [Crime Victims Compensation Board Meeting](#)  
*Topeka | April 13, 10:00 AM*
- [Kansas Fights Addiction Act Grant Review Board](#)  
*Topeka | April 14, 9:00 AM*
- [Human Trafficking Advisory Board](#)  
*Topeka | April 18, 1:30 PM*
- [Crime Victims Compensation Board Meeting](#)  
*Topeka | May 11, 10:00 AM*
- [Kansas Fights Addiction Act Grant Review Board](#)  
*Topeka | May 12, 9:00 AM*

### Quick Links

-  [Roofing Registration](#)
-  [Concealed Carry](#)
-  [Consumer Protection](#)
-  [Gang Free Kansas](#)
-  [Human Trafficking](#)





# KANSAS ATTORNEY GENERAL

## KRIS W. KOBACH



- Home
- Public Safety
- Fraud & Abuse
- Victim Services
- Open Government
- Licensing Programs
- File a Complaint
- Media & Resources
- About the Office

[Home](#) > [Open Government](#)

## OPEN GOVERNMENT


An open and transparent government is essential to the democratic process. The Office of the Attorney General is dedicated to making the Kansas government more accessible to the public.

Under Kansas law, citizens have the right to access public records and observe many meetings where decisions are made that affect our state.

The Kansas Open Records Act (KORA) and the Kansas Open Meetings Act (KOMA) dictate what meetings and records are open to the public.

### Quick Links


 [File a KOMA-KORA Complaint](#)

 [County/District Attorneys File Annual Reports](#)

 [Open Government Resources](#)

 [Enforcement Actions](#)

 [Request a Presentation](#)

 [KORA Training Videos](#)

### Upcoming Training

[More →](#)

### Complaint Reports

### Open Government

- [Resources](#)
- [Training](#)
- [File a Complaint](#)
- [Enforcement Actions](#)
- [File Annual Reports](#)
- [Open Government Training Advisory Group](#)



# Questions?

---

- ▶ Matt Bingesser, Administrative Counsel  
[Matt.Bingesser@ag.ks.gov](mailto:Matt.Bingesser@ag.ks.gov)  
785.296.8495

