

Date: February 14, 2022
To: Chairwoman Bowers and the Senate Committee on Transparency & Ethics
From: City of Overland Park
Re: SB 386 – Opponent Testimony

The City of Overland Park respectfully submits this testimony in opposition to SB 386. The City fully supports the transparency promoted by the Kansas Open Records Act (KORA), but opposes SB 386 because it has the potential to create a burdensome unfunded mandate and severely limits the City's ability to recover the cost incurred to respond to open records requests.

The most troubling part of the bill is that it potentially requires local taxpayers to pay for the cost of redacting information from public records. Local governments are required to redact certain information (e.g. social security numbers, names of sex crime victims, etc.) and may redact other information (e.g. medical records, emergency security information, etc.). The Kansas Supreme Court has said that requestors are required to reimburse local governments and their taxpayers for the cost of staff time spent redacting such information because such redaction is included as part of K.S.A. 45-219(c)(1)'s phrase "actual cost of *furnishing copies*."¹ SB 386 would delete this phrase and replace it with the "actual cost of *copying*." That change arguably removes the basis for local governments to recoup the cost of staff time to redact records, thus creating an expensive unfunded mandate on local taxpayers who have to assume that cost.

In Overland Park, a significant portion of the time spent responding to large record requests is spent redacting closed information. For example, the City received a request for over 15,000 emails related to a matter that was the subject multiple lawsuits. Many of those emails contained information about juvenile victims and were subject to attorney-client privilege, so staff would've had to review and redact such information from the emails. If SB 386 had been law, then local taxpayers would have had to pay for staff to spend approximately 3 years reviewing those emails, rather than requiring the requestor to reimburse local taxpayers up front for that significant expense. By requiring advance payment, the KORA currently encourages requestors to narrow the scope of their requests to better target the information they're seeking without creating undue burdens on public agencies. Furthermore, it protects the requestor from receiving large amounts of information that may not be relevant to the real purpose of the request.

SB 386 also creates several other unfunded mandates. It would create a new requirement that local governments create copies visual and electronic media, and would prevent local governments from seeking reimbursement for the staff time required to search for records. For example, if a requestor requested a decades-old document located at the City's off-site storage facility, local taxpayers would have to assume the cost of staff required to conduct that search rather than the requestor.

Additionally, the bill would require that an agency only charge staff time at the lowest hourly rate of the person who is qualified to provide the records. This vague requirement ignores the fact that certain personnel may be "qualified" to provide a record, but doing so is not part of their job description or they aren't available. The ambiguity of this requirement is also ripe for litigation, as requestors could threaten litigation if they think some lower paid staff could have fulfilled the request. The KORA as currently written does not allow a public agency to charge unreasonable fees. The agency may only charge the

¹ *Data Tree, LLC v. Meek*, 279 Kan. 445, 465 (2005) ("Redaction of information in public records not subject to disclosure is an act that would be included in the "actual cost of furnishing copies." Nothing in the KORA requires or contemplates shifting any portion of the actual cost of furnishing copies of the requested records from the requester to the custodian of the records.").

actual cost of responding to a request. The City would submit that the current structure provides the proper balance of public access to the records without placing overly burdensome costs on the local taxpayers.

Finally, SB 386 purports to allow local governments to waive fees for a request if the request is in the “public interest” because it serves a primarily non-commercial understanding of governmental operations. This provision is completely unnecessary because cities like Overland Park already waive fees under certain circumstances when the request is in the public interest. In fact, by narrowly defining what constitutes a public interest, SB 386 would probably decrease the instances when public agencies waive such fees. Because this provision serves no purpose, its likely intent is to lay the groundwork for future legislation that *requires* waiver of fees in specific circumstances.

In summary, the Kansas Open Records Act as currently written strikes an appropriate balance that advances transparency without overburdening local taxpayers. For the stated reasons, the City of Overland Park respectfully requests that the Committee not advance SB 386 to the full Senate. Thank you for your consideration.