

Toni Wheeler, City Attorney, City of Lawrence
Lawrence City Hall, Fourth Floor
6 E. Sixth St.
Lawrence, KS 66044

Kim Murphree, Records Department, Lawrence Police Department
5100 Overland Drive
Lawrence, KS 66049

Friday, April 19, 2024

Dear Ms. Wheeler and Ms. Murphree:

I am writing to encourage the City of Lawrence and Lawrence Police Department to reconsider the decision to close records in the investigation into the death of Carter Tolbert, call for service No. L20053817.

As you may know, on Feb. 27, 2024, Lawrence Times reporter Maya Hodison filed a request under the Kansas Open Records Act (KORA) for “records pertaining to the investigation into case L20-11-220 DG, the death of Carter Tolbert, on Nov. 22, 2020.” The request sought a variety of records, including audio or video recordings using body-worn cameras (BWCs) or in-vehicle cameras (IVCs).

Although the city provided blotter-type information in response to Ms. Hodison’s request, it otherwise denied the request primarily on the basis that the requested records constitute “criminal investigation records” under K.S.A. 45-217(e). The city claimed denial was justified because disclosure would not be in the “public interest” under K.S.A. 45-221(a)(10)(A).

But that exemption is inadequate to deny the request here not only because there is an open question as to whether the records were created in connection with “investigating ... violations of criminal law” as required for (a)(10)(A) to be applicable, but also because there is little question that disclosure of the requested records would, in fact, promote the public interest.

Many of the requested records are not actually “criminal investigation records”

Curiously, although the city largely relied on the “criminal investigation records” exemption to deny Ms. Hodison’s request, the city also advised that the circumstances surrounding Carter’s death “did not result in the creation of full KSOR (Kansas Standard Offense Report).”

The city's decision not to file a KSOR in this case is hugely significant because it strongly suggests that no violation of criminal law related to Carter's death was ever reported. If no violation of law was reported, the records law enforcement generated in response to Carter's death are not "criminal investigation records" under KORA because they were not "compiled in the process of preventing, detecting or investigating violations of criminal law ..." K.S.A. 45-217(e)(2).

Given the lack of a KSOR, there is a strong argument to be made that every requested record — other than BWC and IVC, which are expressly defined as "criminal investigation records" regardless of circumstances under K.S.A. 45-217(e) and K.S.A. 45-254 — is not related to investigating any "violation[] of criminal law." As such, other than BWC/IVC recordings, it seems to the Times that K.S.A. 45-221(a)(10)(A) is unavailable here because records law enforcement made in response to Carter's death fail to meet KORA's definition of "criminal investigation records."

Disclosure is in the "public interest" because these circumstances beg questions about police bias

Even if (a)(10) were available for every record requested, the city would be hard-pressed to show that disclosure, including of BWC and IVC recordings, would not advance the public interest. As a district judge in Sedgwick County wrote in what still is probably the most recent KORA cases to go to hearing in this state, "Whether the police department conducted itself appropriately in the investigation is a matter of public interest because the community at large has an expectation that criminal investigations will be performed properly, professionally, and without bias towards any group." Memorandum decision, *Wichita Eagle and Beacon Co. v. City of Wichita*, p. 14, Sedgwick County District Court Case No. 17-CV-2745 (2021).

Here, where a white adult male was the last person to see a Black toddler alive, the question is whether law enforcement's decision not to charge anyone in connection with Carter's death was reasonable. The public is entitled to know the answer to that question. Meanwhile, the city is in a unique position to resolve questions about fairness in its favor simply by disclosing the requested records.

Moreover, the benefits of disclosure go far beyond potentially absolving the city for its decision not to investigate Carter's death. Indeed, the city has the opportunity to abate at least some of the catastrophic grief from which Carter's mother, Ilene Tolbert, continues to suffer.

As you may know, Ms. Tolbert made a KORA request last summer for records related to her son's death. But like Ms. Hodison, Ms. Tolbert was denied access under K.S.A. 45-221(a)(10). The city suggested that if Ms. Tolbert wanted to see the records she had requested, her only recourse would be "civil litigation."

If this outcome stands, a bereaved mother, unable to bear the financial and emotional costs of litigation, will be asking "why" for the rest of her days. This police department — with self-prescribed objectives to "Promote police conduct that is responsive and sensitive to the needs of the community" and "Require a professional

work ethic and professional work product by officers engaged in routine police duties, and preliminary and follow-up investigations” — should not be one of the reasons Carter’s mother is left asking “why.”

K.S.A. 45-219 is inapplicable here

Finally, the city’s reliance on K.S.A. 45-219 to deny access to BWC and IVC recordings is misplaced. In the Sedgwick County case referenced above, as here, the city attempted to justify denial of BWC/IVC recordings based on K.S.A. 45-219, which provides in pertinent part “A public agency shall not be required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices ...”

But the district court deconstructed that argument in short order, writing: “[W]hat has been requested ... is digital footage computer data ... K.S.A. 45-219(a) is inapplicable because the records at issue do not involve ‘radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices.’ It involves computer data ...

“The City’s application of K.S.A. 45-219(a), as argued here, would lead to absurd results ... K.S.A. 45-219(a) does not exempt the city from producing the records sought and the [plaintiff] is not limited to a physical in person viewing of the footage requested.” Id. at p. 15-16.

Given this well-reasoned ruling under highly similar circumstances, it seems unlikely that the city’s reliance on K.S.A. 45-219 is meritorious.

Conclusion

According to its policies, this police department values “the responsibility of all employees to be accountable to the department and the community for all his/her actions.” This is an admirable objective, and its achievement begins with transparency.

To further that objective, we respectfully reiterate that the Lawrence Police Department should reconsider its decision in regard to the records Ms. Hodison has requested, and we ask that the City of Lawrence intervene as necessary to ensure this happens.

Thank you for your consideration,


Mackenzie E. Clark
Founder of The Lawrence Times