



STATE OF KANSAS

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Attorney General

March 14, 1975

Opinion No. 75- 117

Representative William S. Southern
113th District
Representative Denny D. Burgess
60th District
2003 Washington - Box 831
Great Bend, Kansas 67530

Dear Representatives Southern and Burgess:

You inquire concerning the constitutionality of K.S.A. 46-215 through 279, relating to state governmental ethics. You ask whether the disclosure requirements set forth therein constitute an unconstitutional invasion of privacy and abridgment of privileged communications between certain professionals and their clients.

Campaign disclosure laws are common to many states, as well as the federal government. While these laws vary widely in the extent of disclosure and penalties involved, they are all based on the common premise that the public has a right to know about the financial interests of those involved in providing governmental services to them. In the wake of Watergate, the campaign disclosure laws have generally become more stringent and the penalties more severe. As a result, questions concerning freedom of association and the right to privacy are being broached. There can be little doubt that campaign ethics laws force disclosure of information that was formerly private in nature.

Advocates of ethics legislation maintain that the public and society have a right to know about the backgrounds of public servants. They maintain that disclosures make for a more informed electorate, lessen the influence of wealthy contributors, create greater accountability of public officials, and prevent corruption.

Therefore, a weighing of interests is necessary, the public right to know balanced against the individual's right to privacy. The vast majority of courts that have considered this question have

March 14, 1975

concluded that the public's right to know outweighs whatever encroachment has been made on the right to privacy by such legislation.

A right of privacy is well established and protected by the Constitution of the United States, See, Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539 (1963) and NAACP v. Alabama, 357 U.S. 449 (1958). However, the right is not absolute. The District Court for the Southern District of New York stated it thus:

"As the plaintiffs maintain, the vital relationship between the freedom to associate, protected under the First Amendment and privacy in one's associations is well established . . . But the right to such privacy is not an absolute right. There is no question that government has the power to adequately inform itself in order to protect its interests," Pichler v. Jennings, 347 F. Supp. 1068 (S.D. N.Y. 1972).

In Burroughs v. United States, 290 U.S. 534, 78 L. ed. 484 (1934), the United States Supreme Court considered a case involving alleged violations of the Federal Corrupt Practices Act, and upheld the power of Congress to require disclosure therein, as stated:

"Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied [I]t seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption." 290 U.S. at 548.

Several state courts have recently heard constitutionally based challenges to their ethics legislation. With but a single exception, these courts have upheld the various state laws; the Supreme Court of California, the single exception, has since upheld a more stringent disclosure law.

In County of Nevada v. MacMillen, 114 Cal. Rep. 345, 522 P.2d 1345 (1974); the California Supreme Court considered a law that is very similar to the Kansas Statutes. The Court, in a unanimous decision, upheld the constitutionality of the act, stating thus:

". . . the cases support our view that neither the right to privacy, nor the right to seek and hold public office, must

Representatives Southern and Burgess
Page Three
March 14, 1975

inevitably prevail over the right of the public to an honest and impartial government, Id. p. 1351.

Similarly, in a lengthy opinion, the Supreme Court of Washington upheld the Washington financial disclosure law. The court reaffirmed the basic proposition that the electorate has a right to know:

"It has been said time and time again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not sine qua non in regard to a socially effective and desirable continuation of our democratic form of representative government," Fritz v. Gordon, 83 Wash. 2d 275, 517 P.2d 911, app. dism. U.S. _____, 94 S. Ct. 2596, 41 L. ed. 2d 208 K.

The Court went on to explore the history of public disclosure legislation and the continuing trend towards broader and more effective laws. The Washington Court then proceeded to rule on the question whether the right to privacy had been unconstitutionally infringed, upholding the requirements thus:

"When the right of the people to know does not intrude upon intimate personal matters which are unrelated to fitness for public office . . . the candidate or office holder may not complain that his own privacy is paramount to the interest of the people," Id. p. 925.

It should be noted that Washington's legislation is more sweeping in its reach than the Kansas law and thus is considered to be more vulnerable to questions concerning invasion of privacy. In Illinois, the Supreme Court of that state upheld their Government Ethics Act which required financial disclosure. Addressing the issue of a possible invasion of privacy, the Court made this statement:

"We believe that the statute . . . reflects the compelling governmental interest

which is paramount to the rights of the individual, and that the statute is not overbroad as an unconstitutional invasion of privacy," Stein v. Howlett, 289 N.E.2d 409 at 413 (1972).

Each case involved disclosure requirements not substantially different from those of Kansas. These three cases constitute the most recent decisions rendered concerning the right to privacy as it is affected by compulsory financial disclosure laws for public officials. Each of the courts used a balancing test to decide the question and each reached the same conclusion: that the individual's right to privacy must give way to the overriding right of the public to be informed.

In considering the question as it relates to Kansas, the same balancing test must be used. The purpose of the statutes in question are not stated in their text. However, a review of the legislative history gives a clear indication to the purpose of the legislation. The 1973 legislature had before it a number of bills concerning campaign financing and disclosure of financial interests. These bills were referred to the Interim Committee on Elections due to the lack of time for study. From the beginning, this Committee saw its task as drafting legislation which would provide Kansas citizens with the type of information that is needed to vote intelligently. (See, Minutes of Committee on Elections, May 30, 1973). Throughout the summer and fall of 1973, the Committee heard testimony all which called for extensive change in the election laws of Kansas.

An inspection of the minutes of that committee indicate that one intention was to require candidates to broaden their base of support by limiting donations and requiring disclosure. The purposes of the Kansas legislation are similar to that of such legislation in other states. The legislature was aware that the new laws would, in some respects, intrude into the privacy of candidates but concluded that such intrusions were justified.

I must agree with both the courts of other jurisdictions and our legislature. An adequately informed electorate is essential to our form of government. This does involve some loss of privacy on the part of a public official, but such losses are outweighed by the gain to society as a whole.

Secondly, you inquire concerning the possibility that the laws may affect certain professional communications and thus violate certain ethical requirements of the person's profession. I am aware of no case in which a professional has been held to have acted unethically when merely conforming with legal requirements.

In County of Nevada v. MacMillen, 114 Cal. Rptr. 345, 522 P.2d 1345 (1974), the court stated thus:

"Plaintiffs have forcefully contended that this provision would constitute a gross invasion of privacy if interpreted as requiring businessmen to reveal their confidential customer lists, lawyers to name their clients, or physicians and psychiatrists to disclose their patients. We believe, however, that this problem has been rendered moot in practical effect by the clarifying amendment . . . [which] defined the term 'source of income' as the 'business entity or activity of the official which earned or produced the income.' . . . Thus, as we read it, the act, as amended, would not require disclosure of the names of the official's customers, clients, or patients. Instead, the official must only disclose the specified information regarding his own business entity or activity which produced the income. For example, a landlord would disclose the address and receipts from his apartment building, not the names of his tenants and the rents paid by each." 522 P2d at 1352-1353.

With but one exception, the listing of interests required by K.S.A. 46-229 is not specific as to clients, customers, patients and the like. It defines the term "substantial interest" as they are to be reported in the disclosure statement required by K.S.A. 46-247. Under K.S.A. 46-229(a), for example, the term "substantial interest" is defined to include the ownership by an individual or spouse of a "legal or equitable interests exceeding five thousand dollars (\$5,000) or five percent (5%) of any business, whichever is less." [Emphasis supplied.] The term "business" is defined at K.S.A. 46-230 as follows:

"'Business' means any corporation, association, partnership, proprietorship, trust, joint venture, and every other business interest, including ownership or use of land for income."

Thus, only entities are required to be disclosed, in the main, under this subsection, and no relationship with a particular individual is required to be identified under this subsection. Similarly, under subsection (b), there must be listed only the receipt of income from "any business or combination of businesses." There appears no basis for the conclusion that the disclosure of gifts or honoraria under subsection (c) would compromise any professional relationship. The disclosure of the position of officer or director of any business required by subsection (d) is similarly inoffensive. Subsection (c) states thus:

"If an individual's compensation is a portion or percentage of each separate fee or commission paid to a business or combination of businesses, such individual has a substantial interest in any client or customer who pays fees or commissions to such business or combination of businesses from which fees or commissions such individual received an aggregate of one thousand dollars (\$1,000) or more in the preceding calendar year."

This subsection does require disclosure of particular client, patient, and customer relationships.

It is clearly settled that there exists a demonstrable public interest in the financial and business dealings and interests of public officials. A candidate's claim of personal privacy cannot prevail over that clear public interest. Yet, concern is expressed whether such disclosure may intrude upon the personal and private affairs of private citizens other than public officers and candidates, such as their customers, business partners, clients, patients and the like. It may be argued that a candidate voluntarily surrenders a claim to privacy regarding many of his or her business affairs by deciding to enter public life, but that the candidate, e.g., may not waive the privacy of third parties.

The nature of the constitutionally guaranteed right of privacy is an evolving one. In Stanley v. Georgia, 394 U.S. 559 (1969) a case involving confiscation of allegedly pornographic films in the defendant's home, the Court stated the general principle thus:

"[F]undamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy." 394 U.S. at 564.

In that case, accordingly, the Court held that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. at 586. Further, in Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court again stated:

"If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 438.

Once a public interest in particular information is established, however, the public's right to disclosure thereof does not depend on the consent of any individual. Thus, if there exists a public interest in disclosure of the financial and business interests of a candidate or public officer, that interest may not be frustrated by the withholding of consent by third parties who are parties to financial and business transactions and interests required to be disclosed. In such an instance, the public and governmental interest in disclosures must prevail over not only the candidate's right of privacy, but over privacy of those who are necessarily identified in the disclosure of the candidate's financial and business interests.

There appears to be no reported judicial support for the proposition that categorical disclosure requirements such as those included in the 1974 act, violate any constitutionally protected right or expectation of privacy on the part of third parties who deal with persons subject to the act.

Representatives Southern and Burgess

Page Seven

March 14, 1975

Although we have found no authority upon which to conclude categorically that disclosure of substantial interests as defined by K.S.A. 46-229 intrudes upon any constitutionally protected zone or expectation of privacy of those persons who might be identified by such disclosure, we share your concern for the protection of personal and confidential relationships which might be jeopardized by disclosure. For example, if a practicing psychiatrist becomes subject to the disclosure requirements, it may become necessary for him to identify certain persons who stand in a doctor-patient relationship with that person. This relationship is equally a personal one as an economic one, and it is questionable whether the public interest served by disclosure is materially served by such disclosure, in view of the competing interest in protecting such patients from the stigma or suspicion which may attach, albeit unjustifiably, with the disclosure of that information. On the face of the matter, there may be little public interest in the disclosure of such information. On the other hand, there may be a justifiable public interest in requiring the disclosure by the same psychiatrist of substantial business relationships, including consultant relationships, with business entities. These two instances are mentioned merely by way of illustration, to suggest, first, the lack of any legal basis for a conclusion that the required disclosure of any "substantial interest", as defined by K.S.A. 46-229(e), is unconstitutional as a categorical invasion of privacy, and secondly, the need for legislative consideration of possibly more strictly defined terms, so as to avoid the compromise of traditionally confidential relationships.

Yours very truly,



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