STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

October 7, 1976

ATTORNEY GENERAL OPINION NO. 76-316

Mr. Charles Hamm
General Counsel, Legal Division
Department of Social and
Rehabilitation Services
State Office Building
Topeka, Kansas 66612

Re: Social Welfare--Records--Confidentiality

Synopsis: Confidential client files maintained pursuant to K.S.A. 39-713b may not be disclosed to the Legislative Post Auditor for the conduct of audits pursuant to K.S.A. 1975 Supp. 46-1101, as amended by ch. 232, § 2, L. 1976, or pursuant to K.S.A. 46-1108, as amended by ch. 232, § 4, L. 1976.

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Dear Mr. Hamm:

You advise that the Legislative Division of Post Audit has begun a comprehensive audit of the Department of Social and Rehabilitation Services and its Division of Mental Health and Retardation Services. The audit will include a financial affairs and transactions component pursuant to K.S.A. 1975 Supp. 46-1106, as amended by ch. 232, § 2, L. 1976. The program component of the audit is to be conducted pursuant to K.S.A. 46-1108, as amended by ch. 232, § 4, L. 1976, at the direction of the Legislative Post Audit Committee for the purpose of determining "whether the programs and activities of a State agency, or a particular program or activity, is being efficiently and effectively operated . . . ." K.S.A. 46-1108, as amended by ch. 232, § 4, L. 1976. Again, at the direction of the Legislative Post Audit Committee, the Post-Audit Division will seek access to both the public and confidential client files which

are maintained by the Department of Social and Rehabilitation Services. We have been furnished a summary of the Audit Guide and Specifications for this Comprehensive Audit, dated September 21, 1976, by the Legislative Division of Post Audit.

You advise that questions have arisen concerning the privacy of confidential client files of the Department, maintained pursuant to K.S.A. 39-713b. By letter of September 23, 1976, from Dr. Richard Brown, Legislative Post Auditor, to Dr. Harder, Secretary of Social and Rehabilitation Services, Dr. Brown has proposed steps designed to safeguard the confidentiality of these files and information therein. It is proposed that only audit team members, the Legislative Post Auditor, Deputy Post Auditor and the Director of Administration would have access to information regarding individual clients, that all access to information extracted from confidential files would be kept under locked security during the audit and returned to the Department after the audit, and that no information would be disclosed in written or verbal form which would allow identification of individual clients, except as required by K.S.A. 1975 Supp. 46-1106(d) and (e), as amended by ch. 232, § 2, L. 1976.

Prior to a 1975 amendment, 42 U.S.C.A. § 602, relating to aid to needy families under the Social Security Act, provided in part thus:

> "(a) A state plan for aid and services to needy families with children must . . .
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> * * *
>
> (9) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children . . . ."

This provision was amended, effective August 1, 1975, by P.L. 94-88, to provide in pertinent part thus:

> "(9) provide safeguards which restrict the use of disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part . . . . (B) any investigation, prosecution, or criminal or civil proceeding, conducted in

> connection with the administration of any such plan or program, and (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need; *and the safeguards so provided shall prohibit disclosure, to any committee or a legislative body, or any information which identifies by name or address any such applicant or recipients*." [Emphasis supplied.]

This provision was implemented by regulation, 45 C.F.R. 205.50 (a)(1)(i)(A), (B), (C), in which it was construed to prohibit "disclosure to any committee or legislative body (Federal, State or Local) of any information that identifies by name and address any such applicant or recipient . . . ." However on February 12, 1976, the Social and Rehabilitation Service of the U.S. Department of Health, Education and Welfare issued action transmittal SRS-AT-76-23(APA), to state administrators, concluding that disclosure of information concerning applicants for and recipients of financial assistance is permitted to a committee or legislative body upon proper request and certification that the information is requested for specified purposes.

In addition, we have been furnished a letter of April 9, 1976, from Under Secretary Marjorie Lynch, of the U.S. Department of Health, Education and Welfare, to Mr. Tom Jensen, President of the National Conferences of State Legislatures, stating that 45 C.F.R. 205.50(c) refers only to elected members of legislative bodies and committees, and not to agencies which are created, appointed or employed by a federal, state or local legislative body.

We are concerned here, however, with the general assistance program of the State of Kansas, which is solely state-supported and is administered entirely by the state. In this regard, K.S.A. 39-713b is of overriding importance. It provides in pertinent part thus:

> "From and after January 1, 1974, the secretary shall maintain two (2) files of the cases; one (1) shall be the public file, which shall contain the approval and financial data needed, and the other shall be the case record file containing the case history and confidential personal or family

> data which is obtained in the course of assisting the client. *The confidential case record files shall be kept by the secretary and they may be available only to the officers and employees of the secretary.*" [Emphasis supplied.]

Any person who shall knowingly and willfully violate this or any other provision of this section is subject to prosecution for a misdemeanor offense. The confidentiality imposed by this section is absolute and unqualified. It is suggested that the statutory mandate of the Legislative Post Audit Division entitles it to access to these records. The Legislative Post Auditor is given some express authority to require access to records. K.S.A. 1975 Supp. 46-1106, as amended by ch. 232, § 2, states in pertinent part thus:

> "(f) The post auditor, in the discharge of the duties imposed under this act, may require state agencies to preserve and make available their accounts, records, documents, vouchers, requisitions, payrolls, cancelled checks or vouchers and coupons, and other evidence of financial transactions."

It may be argued, further, that access to such confidential data is necessary to permit the Post Auditor to satisfy the direction of the Post Audit Committee to determine, in this instance,

> "whether the programs and activities of a state agency, or a particular program or activity, is being efficiently and effectively operated. . . ."

In my judgment, the general statutory charge of the Post Auditor, acting either with or without the express direction of the Post Audit Committee, does not entitle the audit staff of the Post Audit Division to intrude upon the express confidentiality with which the Legislature has seen fit to cloak the confidential client files in the custody of the Secretary of Social and Rehabilitation Services relating to general assistance clients.

In other states, access of legislative auditors and post auditors to confidential records is expressly assured by statute. *See, e.g.,*

R.C.Montana 1947, § 79-2314. In addition, such provisions may be accompanied by protective mandates that confidentiality of data shall be maintained by such other agencies. We have no such provisions in Kansas.

The Secretary of Social and Rehabilitation Services is required by K.S.A. 79-708c(c) to advise the governor and the legislature "on all social welfare matters covered in this act," *i.e.* K.S.A. 39-701 *et seq*. This provision, however, does not authorize the disclosure of any information which is declared to be confidential under the act. Moreover, the Secretary may not by regulation authorize the disclosure of any information which is declared by statute to be confidential, for any such regulation is, to that extent, beyond the authority vested in the Secretary.

K.A.R. 1976 Supp. 30-4-12B(4) states thus, in pertinent part, regarding confidential information:

> "*Unless otherwise prohibited by law*, the agency is required to release confidential information when the purpose of such release is directly related to (a) the administration of the SRS program; (b) an investigation or criminal or civil proceeding being conducted in connection with the administration of the program, or (c) the reporting to the appropriate law enforcement officials the intention of a client to commit a crime. Further, the agency is required to release confidential information concerning ADC, ADC-FC, and EA clients under certain circumstances as specified in 42 U.S.C.A. 602(a)(9), as amended effective August 1, 1975, herein adopted by reference." [Emphasis supplied.]

If K.S.A. 39-713b imposes absolute confidentiality, as it does, the Secretary is powerless to qualify that confidentiality by regulation. The caveat "[u]nless otherwise prohibited by law" is controlling in this instance, for disclosure is indeed prohibited by a clear and unambiguous statute which mandates unqualified and absolute confidentiality. If there is some canon of statutory interpretation which warrants interpretive qualification of this provision, it is for the courts to discover and apply it. Even if disclosure were not absolutely prohibited by law, and disclosure were sought to be justified as being "directly related to . . . the administration of the SRS program," it is highly questionable whether the justification would be sound. The legislative post-auditor has

has no responsibility whatever for the administration of the program. Certainly, that officer is *interested* in the administration, as a result of his official duties. However, if disclosure is sought to some person or officer, public or private, merely because of their interest in the program or any aspect thereof, it is certainly questionable whether disclosure is justified as being related, either directly or indirectly, to the administration of the program itself. A party seeking information regarding an identified and particular client or recipient may doubtless claim a similar interest in the "administration" of the program as it affects that client or recipient. The legislative post-auditor's interest is, of course, of a general nature, but the elasticity of the criterion that disclosure be related somehow to the "administration" of the program provides questionable security for such client information. The legislature heretofore has been highly protective of the confidential nature of this information, and if it chooses to qualify this confidentiality, the grounds for disclosure should be enumerated with some specificity.

Subsection 1143.4 of the Department's Kansas Public Assistance Manual contains language substantially similar to that quoted above, insofar as it is pertinent to this question. The same observations apply to it, and in my judgment, neither provision supports disclosure.

Accordingly, I can but conclude that disclosure of confidential files is absolutely prohibited by K.S.A. 39-713b, and I must conclude that unless and until the Legislature sees fit to provide for disclosure under particularized circumstances, the absolute and unqualified confidentiality imposed by that provision must be respected, and there exists no other authority for release of such information to the Post Auditor.

Yours very truly,

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CURT T. SCHNEIDER
Attorney General

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