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February 23, 1979

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ATTORNEY GENERAL OPINION NO. 79- 21

Mr. Richard E. Brown
Legislative Post Auditor
Mills Building
Topeka, Kansas 66612

Re: Legislature--Legislative Post Auditor--Access
to Records

Synopsis: The Legislative Post Auditor may obtain access to records in the custody of community junior colleges which constitute "education records," as defined in 20 U.S.C. §1232g, the Family Educational Rights and Privacy Act of 1974, without obtaining consent of the eligible students or parents. The provisions of said federal statute do not constitute a specific prohibition imposed by federal law that precludes such access under K.S.A. 1978 Supp. 46-1106(g).

* * *

Dear Mr. Brown:

You have requested our review of the legal issues discussed in Attorney General Opinion No. 78-372, issued November 22, 1978. The principal question addressed by that opinion was whether the Legislative Post Auditor has authority under K.S.A. 1978 Supp. 46-1106(g) to obtain access to certain student records maintained by community junior colleges. That opinion concluded in essence that, absent compliance by the Legislative Post Auditor with conditions and restrictions imposed by provisions of 20 U.S.C. §1232g, the Family Educational Rights and Privacy Act of 1974 (sometimes referred to as the Buckley Amendment), such authority did not exist.

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As noted in the prior opinion, the pertinent portion of that federal statute is subsection (b) (1), which reads in relevant part, as follows:

"No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information. . . .) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

. . . .

"(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. . . ."

Also as stated in the prior opinion, the Secretary of Health, Education and Welfare has adopted regulations to implement this Act. With respect to the above-quoted statutory provision, 45 C.F.R. §99.31 states, in pertinent part, as follows:

"(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is--

. . . .

"(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure."

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In order not to unduly burden this opinion with repetition of relevant language in the prior opinion, suffice it to say that we concur with the conclusion in the prior opinion that K.S.A. 1978 Supp. 46-1114(b) mandates "disclosure of the kind of information sought to be obtained for the purpose of the audit now under consideration," and that the effective date (April 8, 1974) satisfies the requirements of the previously-quoted provisions of 20 U.S.C. §1232g(b)(1)(E). However, we do not concur with the conclusion reached in the prior opinion that a 1977 amendment to K.S.A. 1978 Supp. 46-1106 effectively nullifies the Legislative Post Auditor's right to disclosure of the desired information.

The amendment in question added to this statute a new subsection (g), the pertinent portion of which reads as follows:

"In the discharge of the duties imposed under the legislative post audit act, the post auditor shall have access to all books, accounts, records, files, documents, correspondence, confidential or otherwise, of any person or state agency subject to the legislative post audit act or in the custody of any such person or state agency. . . . Nothing in this subsection shall be construed to supersede any specific prohibition imposed by federal law."

It is the last sentence of the foregoing quoted language which prompted the conclusion in the prior opinion that the provisions of the Family Educational Rights and Privacy Act constituted a specific prohibition against disclosure of individually identifiable education records which, by the terms of the referenced Kansas statute, prevented the Post Auditor from having access to these records without obtaining consent of the eligible student or parent. We believe this conclusion to be in error for two reasons.

First, we think it questionable whether the pertinent provisions of the Family Educational Rights and Privacy Act constitute a prohibition against the disclosure of this information. Read literally, the Act merely provides for the termination of federal financial assistance to an educational agency or institution which discloses the prescribed records and information in contravention of the provisions of §1232g(b)(1). Further, it should be noted that this "penalty" is somewhat discretionary by virtue of subsection (f) of that statute, which directs that financial assistance shall be terminated only after the Secretary of Health, Education and Welfare determines that "compliance cannot be

secured by voluntary means." Thus, strictly speaking, an educational agency or institution is not legally constrained from ignoring the provisions of this section, albeit we assume the potential consequences of doing so (i.e., the termination of federal financial assistance to such agency or institution) operate to prevent, as a practical matter, the release of the designated records and information except in accordance with the provisions of subsection (b)(1).

More important to our disagreement with the prior opinion, however, we do not view this federal statute as constituting a specific prohibition in a federal law which would be superseded by the authority granted to the Post Auditor by K.S.A. 1978 Supp. 46-1106(g). In reaching a contrary position, the prior opinion concluded that, pursuant to 20 U.S.C. §1232g(b)(1), access to individually identifiable "education records," as defined by 20 U.S.C. §1232g(a)(3), "is available only upon consent of the eligible student or parent." That, in our view, is an erroneous conclusion.

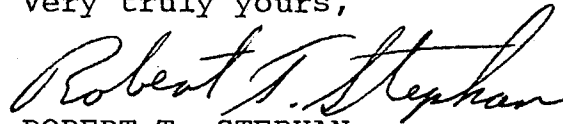
Assuming arguendo that the federal statutory provision in question does, in fact, constitute a prohibition against the release of personally identifiable information in a student's education records, it is not an unqualified prohibition of such disclosure. Such information may be disclosed with the consent of the eligible student or parent and, pertinent to our discussion here, absent such consent, such information may be disclosed to the persons and organizations identified in subparagraphs (A) through (I) of 20 U.S.C. §1232g(b)(1). As noted previously, we agree with the finding made in the prior opinion that the Legislative Post Auditor satisfies the criteria prescribed by subparagraph (E) thereof, entitling him to access to the desired records and information.

Therefore, it is our opinion that the last sentence of K.S.A. 1978 Supp. 46-1106(g) does not preclude the Legislative Post Auditor from obtaining directly the desired information from the files and records of community junior colleges. Rather than being specifically precluded from access to individually identifiable student education records without consent of the eligible student or parent, the Legislative Post Auditor is specifically authorized, by reading in conjunction the provisions of K.S.A. 1978 Supp. 46-1106(g) and 20 U.S.C. §1232g(b)(1), to have access to such student records without obtaining student or parental consent. Our determination in this regard is enhanced by the previously quoted regulations of the Secretary of Health, Education and Welfare that permit disclosure of such records to state officials under conditions satisfied by the Legislative

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Post Auditor. To the extent that its findings and conclusions are contrary to this opinion, we hereby disapprove of Attorney General Opinion No. 78-372.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk