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August 22, 1979

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ATTORNEY GENERAL OPINION NO. 79- 179

The Honorable Michael G. Glover
State Representative, Forty-Fourth District
1719 West 20th Terrace
Lawrence, Kansas 66044

Re: University of Kansas--Rights and Responsibilities
of Students and the University--When Dormitory
Inspection May be Legally Made by University
Personnel

Synopsis: University of Kansas personnel may search any residence hall room if notice is given in accordance with the twenty-four hour notice requirement referenced in the residence hall contract. Emergency searches are permitted without such notice where there is "imminent danger" to life, health, safety or property. Unreasonable searches, not in compliance with these contractual provisions, may give rise to legal rights and remedies pursuant to the United States Constitution, federal civil rights law and Kansas tort laws, in addition to any legal recourse from breach of the residence hall contract.

* * *

Dear Representative Glover:

You request our opinion concerning the legality of dormitory room inspections (searches) made by University of Kansas personnel during the 1979 spring vacation. Specifically, you ask: "Does the University have the right to randomly check rooms without notice to students and without presence of eminent [sic] danger to health or safety?"

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Your question presents a variety of legal issues sounding in the law of contracts, torts and landlord-tenant, as well as, the United States Constitution. We have endeavored to ascertain the facts of the search you referenced in your request and have based our conclusions on information submitted by the office of the University legal counsel.

The facts as presented to this office, are as follows: During the 1979 spring break period at the University of Kansas, Lawrence campus, J.R.P. dormitory staff made room check searches of all dorm rooms in the residence hall. Most, if not all, rooms checked were locked and most students of the hall were not present. No notice of the search was posted or otherwise given to dorm residents. The search was made ostensibly for reasons of safety and protection of University property following complaints by students that an electric alarm clock was ringing in one room and that inordinate amounts of heat were developing in another. A notice posted prior to spring break advised dormitory residents that all electrical appliances were to be unplugged. We are advised that during the room search certain contraband was discovered in plain view of the staff. No disciplinary action was taken and no criminal charges were filed. However, students were asked to remove the illegal or unauthorized items. Names of students involved were not revealed to the public or press, and there were no references made to this incident on the individuals' permanent student records.

Based on the above facts we will briefly discuss the following:

1. The Fourth Amendment to the United States Constitution prohibiting unreasonable searches and seizures and the exclusion of evidence in criminal prosecution where such evidence is obtained illegally;
2. The law regarding right to privacy and unauthorized intrusion upon seclusion, as recognized by Kansas tort law and federal civil rights law;
3. The Kansas Residential Landlord-Tenant Act and the common law of trespass; and
4. The Student Code of Rights, Privileges and Responsibilities, the University of Kansas student dormitory contract and respective contractual obligations of the University and students.

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Needless to say, an exhaustive study and presentation on such broad and diverse areas of the law are not necessary or possible. Therefore, we have confined our discussion to the fundamental legal issues and framed our conclusions without elaborate discussion.

First, no contraband observed in the University residence hall has been offered as evidence in a criminal prosecution or University disciplinary proceeding. Thus, we are not asked to determine the admissibility of evidence obtained during the J.R.P. dormitory room search and express no opinion in this regard. However, we are constrained to note that the constitutional right relevant to dormitory searches is the right to be free from unreasonable searches and seizures. The Fourth Amendment to the United States Constitution reads in pertinent part:

"The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause" (U. S. Const. 4th Amend.)

The United States Supreme Court has established that students are "persons" under the Constitution [see, e.g., Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969)], and student dormitory rooms have been extended the protection of the Fourth Amendment. Morale v. Grigel, 422 F.Supp. 988 (D. N.H. 1976); Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975); Commonwealth v. McCloskey, 217 Pa. Super 432, 272 A.2d 271 (1970). It has further been held that a dwelling is protected whether or not it is occupied at the time of the search and seizure. See, e.g., Roberson v. United States, 165 F.2d 752 (6th Cir. 1948); Cola v. United States, 22 F.2d 742 (9th Cir. 1927). Thus, courts have held that a student has a reasonable expectation of privacy in his dormitory room. See, e.g., Morale v. Grigel, supra; Commonwealth v. McCloskey, supra.

And we would mention in passing, for the benefit of University students and staff alike, searches of student dormitory rooms are permitted by the United States Constitution when reasonable, and evidence of a crime discovered in the conduct of a lawful search is admissible in a criminal prosecution. However, although searches of University dorm rooms for health and safety violations or in cases of emergency are generally permissible, the mere fact that the search was conducted for purposes other than the discovery of criminal evidence "does not automatically obviate the requirements of the Fourth Amendment." Morale v. Grigel, supra at 997.

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"[S]earches motivated by something other than the prospect of obtaining evidence of crime [are] subject to the general Fourth Amendment standard of reasonableness." Picha v. Wielgoes 410 F.Supp. 1214, 1220 (N.D. Ill. 1976). Accord, Camera v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967).

And, consent to administrative searches authorized under the terms of the residence hall contract does not constitute a waiver of constitutional rights. Morale v. Grigel, supra.

Second, "[t]he right of privacy, as an independent and distinctive legal concept has two main aspects: the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and the constitutional right of privacy which protects personal privacy against unlawful governmental invasion." Annot., 43 L.Ed. 2d 870, 875-76. The general law of the right of privacy, as a matter of tort law, is generally left to the law of the states. Katz v. United States, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967).

Kansas has long recognized the individual right to privacy. See, e.g., Kunz v. Allen, 102 Kan. 883 (1918). Its courts have adopted the analysis of the right to privacy contained in the Restatement of Law, Second, Torts §652A et seq. See also Monroe v. Darr, 221 Kan. 281 (1977); Dotson v. McLaughlin, 216 Kan. 201 (1975); Froelich v. Adair, 213 Kan. 357 (1973). The right of privacy relevant to this discussion, invasion of privacy by intrusion upon seclusion, was first recognized by the Kansas Supreme Court in 1973 in Froelich v. Adair, supra. That court held that "one who intentionally intrudes, physically, or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man." Id. at Syl., para. 2. Monroe v. Darr, supra, is the latest word from the Kansas Supreme Court on this matter. There, the court stressed an invasion of privacy action is primarily concerned with compensation for injured feelings or mental suffering of the injured party. 221 Kan. at 285. The Court held a plaintiff in a privacy suit can recover without proof of special damages and is not required to show general damages in specific amounts, but such a plaintiff is required to introduce some evidence to show he suffered anxiety, embarrassment or some other form of mental anguish. Id. at 286. See, also, Manville v. Borg-Warner Corporation, 418 F.2d 434 (10th Cir., 1969); and Westerbeke, Survey of Kansas Law: Torts, 27 K.L.R. 321 (1979).

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However, during the spring of 1979 when the University of Kansas dormitory room inspection took place, the State of Kansas and its agents were immune from suit based on tort or implied contract pursuant to K.S.A. 1978 Supp. 46-901 (repealed 1979). The University of Kansas and its employees were thus protected by this immunity while acting within the scope of delegated authority. Therefore, even if the inspection of J.R.P. dorm rooms was held to be a violation of the common law right to privacy, individual plaintiffs would not recover damages against the University.

In the future, however, University officials must be mindful of the legal ramifications of such inspections. The 1979 Kansas Legislature enacted the Kansas Tort Claims Act (L. 1979, ch. 186), which allows governmental entities to be liable for any negligent or wrongful act or omission of their employees. It has not yet been judicially determined whether the state would be liable under the Act for an unreasonable search of student dorm rooms. However, the listed exceptions to liability (New Section 4 of the Act) do not specifically except such tortious conduct. Likewise, it remains a possibility that recovery for such an intrusion could be sought pursuant to federal civil rights law.

Under some circumstances, there can be such a gross abuse of privacy as to amount to abridgement of fundamental constitutional guarantees. Baker v. Howard, 419 F.2d 376 (9th Cir. 1969). The close relationship between the right of privacy and the Fourth Amendment's prohibition of unreasonable searches and seizures has been recognized by the United States Supreme Court. See, e.g., Katz v. United States, supra at 581; Camera v. Municipal Court of San Francisco, supra at 935. Therefore, it is possible that any activity by University officials, deemed governmental intrusion, may subject the State, the University and the particular official to liability for depriving a student of a constitutional right.

School officials are entitled to a qualified good faith immunity from liability for damages under federal civil rights law, and the courts have held that a school official is liable to a wronged student under 42 U.S.C. §1983, only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed. 2d 214, 225 (1975).

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We have no evidence that University officials were not acting in good faith in the room search of J.R.P. dormitory. Thus, we must conclude that even if the search is deemed unreasonable and violative of the Fourth Amendment, we do not believe that the University and its officials would be liable in damages under federal law.

Third, it should be observed that the Kansas Legislature has explicitly exempted educational institutions from the Kansas Residential Landlord and Tenant Act. K.S.A. 58-2541(a). Thus, any claims by student dorm residents alleging tortious conduct by the University would be governed by common law principles. Probably the most likely cause of action in this type of situation would be based on the law of trespass. However, we are not aware of any Kansas case declaring that entrance by University officials into student dormitory rooms amounts to civil trespass.

Fourth, administrative inspections, under certain circumstances, may also involve questions regarding the housing contract between the University and the student. Most universities will reserve the right to enter dormitory rooms to inspect the room to determine compliance with provisions of applicable multiple dwelling unit laws, for improvements or repairs, or under conditions of emergency where imminent danger to life, safety, health, or property is reasonably feared. The University of Kansas, for example, has a provision in its dormitory contract which reads: "The University has the right to assign, re-assign, adjust occupancy of rooms and enter rooms when necessary. The right of a student to privacy is respected (see Student Rights, Responsibility, and Conduct Code of the Student Senate)."

Article 19 of the Student Rights, Responsibility, and Conduct Code of the Student Senate states:

"Students have the same rights of privacy as any other citizen and surrender none of these rights by becoming members of the academic community. These rights of privacy extend to residence hall living. Nothing in the institutional relationship or residential hall contract shall expressly or impliedly give the institution or residence hall officials authority to consent to a search of a student's room by police or other government officials."

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Article 21 of that code states:

"When the institution seeks access to a student room in a residence hall to determine compliance with provisions of applicable multiple dwelling unit laws for improvement or repairs, the occupant shall be notified of such action not less than twenty-four hours in advance. There may be entry without notice in emergencies where imminent danger to life, safety, health, or property is reasonably feared." (Emphasis added.)

The Code of Student Rights, Responsibility, and Conduct has been approved by the Chancellor of the University of Kansas and is subject to amendment by the Student Senate with the approval of the Chancellor. The privacy provisions of the Code and their guarantees have been incorporated into the student housing contract. Thus, in the absence of emergency circumstances, the University must give the student residents twenty-four hours notice. Should the University fail to do so, such could constitute a breach of the contract entitling students to legal remedies.

It is our view that the entry and inspection of the room with the ringing electric alarm clock and the room which showed evidence of overheating was eminently reasonable to protect the safety of students and staff in the residence hall and to protect public and private property. The inspection of these rooms was indeed conducted under emergency circumstances and thus, twenty-four hour notice required by the student code and residence hall contract was not necessary.

However, while we have no reason to believe that University officials did not act in good faith in checking all other locked rooms in search of problems, we believe that these additional searches exceeded the bounds of the University's contractual authority. Obviously, if the nature of the problem discovered in one room necessarily indicates that similar problems are occurring in other individual rooms, an extended search may be in order. But, the discovery of an electric alarm clock and an obstruction of a heat vent in two rooms does not provide evidence of an increased probability of danger in other rooms. Such events are isolated incidents which do not necessarily imply that similar dangers are present elsewhere. In our opinion, a greater degree of certainty as to "imminent danger" is required before University officials may unlock the door of a private room and conduct an "emergency" search.

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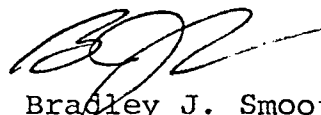
Notwithstanding the foregoing conclusion, we know of no actual damages suffered by any resident or his property as a result of the search. Therefore, we know of no claims made against the University or University personnel for the search. In addition, any allegation of breach of contract which might have justified a student in avoiding the obligations of his dorm contract, would be highly improbable since the term of the residence hall contracts in question has now expired. Thus, we do not foresee any liability accruing to the University or its officials from the events of last spring. In the future, however, we would suggest that, if the University believes that administrative searches may be necessary during vacation periods, it might proceed by posting a notice twenty-four hours before the students leave so that such room checks may be made. Administrative inspections with twenty-four hours notice have been deemed reasonable in other jurisdictions. See, e.g., State v. Kappes, 26 Ariz. App. 567, 550 P.2d 121 (1976). To avoid possible liability for tort or contract violations, Kansas colleges and universities would be wise to follow such a procedure.

In summary, University of Kansas personnel may search any residence hall room if notice is given in accordance with the twenty-four hour notice requirement referenced in the residence hall contract. Emergency searches are permitted without such notice where there is "imminent danger" to life, health, safety or property. Unreasonable searches, not in compliance with these contractual provisions, may give rise to legal rights and remedies pursuant to the United States Constitution, federal civil rights law and Kansas tort laws, in addition to any legal recourse from breach of the residence hall contract.

Very truly yours,



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