



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

October 25, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-3299

ATTORNEY GENERAL OPINION NO. 79-246

Ms. L. Patricia Casey
Appeals Chief
Department of Human Resources
Second Floor, 424 South Kansas
Topeka, Kansas 66603

Re: Labor and Industries--Employment Security Law--
Confidentiality of Records

Synopsis: K.S.A. 1978 Supp. 44-714(f) requires that information compiled in the course of administering the Employment Security Law is confidential and may not be disclosed in any manner which would reveal the identity of an individual claimant or employing unit, except that disclosure is authorized to the extent necessary for the presentation of a claim, or to public employees if such information is necessary to the performance of official duties. K.A.R. 50-4-1 also attempts to govern by regulation the disclosure of such information, and to the extent that it extends or restricts the circumstances where disclosure would be permissible, it is inconsistent with the statute and is void as a matter of law.

* * *

Dear Ms. Casey:

You inquire whether Attorney General Opinion No. 76-10 should be amended so as to be consistent with Kansas Administrative Regulation 50-4-1 which, though promulgated in 1965 and in effect at the time the opinion was written (1976), was not considered in the opinion. Attorney General Opinion No. 76-10 interprets K.S.A. 1978 Supp. 44-714(f), a provision of the Kansas Employment Security Law, as follows:

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"Information assembled in the administration of the Kansas Employment Security law, K.S.A. 44-701 et seq., is confidential, but by law access thereto is permitted to any person who is a public employee, i.e., an employee of the State of Kansas, of any city incorporated under the laws of this state, or any employee of any county, township, school district, or other political subdivision, when engaged in and necessary for the performance of the public duties of such public employee."

(Synopsis, Attorney General Opinion No. 76-10.)

The statute, K.S.A. 1978 Supp. 44-714(f), requires that "[i]nformation . . . shall, except to the extent necessary for the proper presentation of a claim, be held confidential, and shall not be published or be open to public inspection (other than to public employees in the performance of their official duties) in any manner revealing the individual's or employing unit's identity." This specific statutory language provided the basis for the conclusion in the prior opinion (76-10) that the legislature intended that the information assembled in the administration of the act should be in some measure confidential. Attorney General Schneider concluded that this "information is confidential to all the world, save and except public employees, who are permitted access to and are authorized to use such information only for the performance of their public duties, i.e., the duties of their employment, and for no other purpose." We believe that conclusion to be a sound one.

That opinion did not, however, address the administrative regulations regarding the disclosure of information compiled in the administration of the act. K.S.A. 1978 Supp. 44-714(a) authorizes the secretary of human resources to issue regulations, as follows: "It shall be the duty of the secretary to administer this act; and the secretary shall have power and authority to adopt, amend, or rescind such rules and regulations . . . as he or she deems necessary or suitable to that end." Pursuant to this grant of authority, the secretary has issued K.A.R. 50-4-1, which provides:

"No disclosure of information obtained at any time from workers, employers, or other persons or groups in the course of administering the state public employment service program shall be made directly or indirectly, except as authorized by this regulation. Disclosure of any such information is authorized in the following cases for the following purposes:

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"(a) Employment service functions. To individual applicants and employers to the extent necessary for the efficient performance of recruitment, placement, employment counseling, and other employment service functions.

"(b) Benefit claimants. To any properly identified claimant for benefits or payments under a state, territorial, or federal unemployment compensation or training allowance law or to his duly authorized representative, information which directly concerns the claimant and is reasonably necessary for the proper presentation of his claim.

"(c) Unemployment compensation and similar agencies. To any officer or employee of any agency of the federal government or of a state or territorial government lawfully charged with the administration of a federal, state, or territorial unemployment compensation or training allowance law, but only for purposes reasonably necessary for the proper administration of such law.

"(d) Public assistance agencies. To any officer or employee of any agency of the federal government or a state or territorial government lawfully charged with the administration of a law providing for old age assistance or other public assistance work relief, pension, retirement, or other benefit payments, but only for purposes reasonably necessary for the proper administration of such law.

"(e) General information. To applicants, employers, and the public, general information concerning employment opportunities, employment levels and trends, and labor supply and demand, provided such release or publication does not include information identifiable to individual applicants, employers, or employing establishments.

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"(f) Authorization by commissioner. To individuals, organizations, and agencies or for purposes other than as specified in (a), (b), (c), (d), or (e) above if such disclosure will not impede the operation of, and if not inconsistent with the purposes of, the public employment service program and is authorized in writing in individual cases by the commissioner."

The issue, then, is whether the disclosures authorized by the administrative regulations are consistent with the statute. To the extent that such disclosures are inconsistent with the statute, they would, in our opinion, be unlawful. In 2 Am.Jur.2d Administrative Law, §300, the general rule regarding an agency's power to promulgate regulations is stated thus:

"Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. A rule or regulation which is broader than the statute empowering the making of rules, or which oversteps the boundaries of interpretation of a statute by extending or restricting the statute contrary to its meaning, cannot be sustained."

See 1 Am.Jur.2d, Administrative Law, §§72, 95; 73 C.J.S. Public Administrative Bodies and Procedure, §94; 1A, Sands, Sutherland Statutory Construction, §31.02 (4th ed., 1972) and State, ex rel., v. Columbia Picture Corporation, 197 Kan. 448 (1966).

Subsection (a) of the regulation authorizes disclosure to individual applicants as well as to "employers to the extent necessary for the efficient performance of recruitment, placement, employment counseling, and other employment service functions." As the statute, K.S.A. 1978 Supp. 44-714, requires confidentiality "except to the extent necessary for the proper presentation of a claim . . . [and] (other than to public employees in the performance of their official duties)" we are of the opinion that a disclosure to an employer, for any purpose other than as necessary for the presentation of a claim, would be contrary to the statute. The Kansas Supreme Court, in its syllabus (paragraph 2) in State, ex rel., v. Columbia Pictures Corporation, supra, noted:

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"The power to adopt rules and regulations is administrative in nature, not legislative, and to be valid, [they] must be within the authority conferred. An administrative rule and regulation which goes beyond that which the legislature has authorized, or which violates the statute, or which alters, extends, limits, or attempts to breathe life into the source of its legislative power, is void." 197 Kan. at 448.

As the statute does not authorize disclosure for activities such as recruitment, placement or employment counseling, words to that effect in subsection (a) exceed the scope of the statute, and are void.

Subsection (b) of K.A.R. 50-4-1 is essentially a restatement of the statutory language which permits disclosure "to the extent necessary for the proper presentation of a claim." Therefore, there is no conflict with the statute nor an issue as to its validity.

Subsections (c) and (d) of K.A.R. 50-4-1 relate to public employers to whom disclosure is authorized under the statute. The statute would permit disclosure to any public employee to the extent necessary for the performance of his or her official duties. These subsections of the regulation would, however, further restrict disclosure to only those public employees "charged with the administration of a federal, state or territorial unemployment compensation or training allowance law," as provided in subsection (c), or who are "charged with the administration of a law providing for old age assistance or other public assistance work relief, pension, retirement or other benefit payments," as stated in subsection (d). In our opinion subsections (c) and (d) are unduly restrictive and, to the extent they conflict with the plain language in the statute and Attorney General Opinion No. 76-10, they are void. In State, ex rel., v. Columbia Pictures Corporation, supra, the Court noted that it was within the power of the Kansas State Board of Review

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"to make and adopt reasonable rules and regulations deemed necessary, not inconsistent with the laws of this state, for enforcing the provisions of the Act. [But] [t]he power granted is not the power to make rules and regulations which supersede existing laws enacted by the constituted lawmaking body, nor amend any law enacted The authority to declare the public policy of this state is vested in the Legislature, not in an administrative board" 197 Kan. at 454-55.

Subsection (e) of the regulation authorizes disclosure of general information to anyone, "provided such release or publication does not include information identifiable to individual applicants, employers, or employing establishments." In our judgment, this requirement is consistent with the language and tenor of K.S.A. 1978 Supp. 44-714(f). The statute does not preclude entirely the disclosure of information. It simply requires that, with the exceptions already noted, information shall not be disclosed in any manner which would reveal the identity of a claimant or an employing unit.

Subsection (f) of the regulation authorizes disclosure "to individuals, organizations, and agencies or for purposes other than as specified in (a), (b), (c), (d) or (e) above if such disclosure will not impede the operation of, and if not inconsistent with the purposes of, the public employment service program and is authorized in writing in individual cases by the commissioner." Like subsection (a) of the regulation, we believe that subsection (f) is an unwarranted extension of disclosure. Subsection (f) would give the secretary complete discretion to reveal information identifiable to individuals or employers" if not inconsistent with the purposes of the public employment service program." The statute does not vest any such discretion in the secretary to breach the rule of confidentiality provided for in the act. Therefore, we are compelled to conclude that subsection (f) of K.A.R. 50-4-1 also is void as being inconsistent with the plain and unambiguous language of the statute.

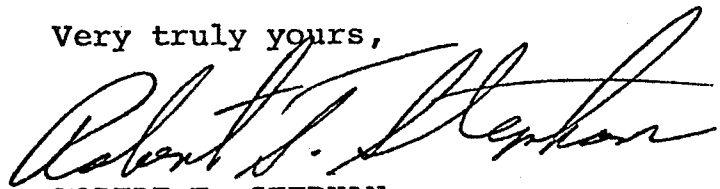
Further, in our opinion, the specific statutory provision for the confidentiality of such information supersedes the general rule requiring free access to public records, set out in K.S.A. 1978 Supp. 45-201, the Public Records Act. That Act provides in pertinent part:

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"All official public records of the state . . . which records by law are required to be kept and maintained, except . . . records specifically closed by law, shall at all times be open for a personal inspection by any citizen" K.S.A. 1978 Supp. 45-201. (Emphasis added.)

In sum, it is clear that the statutory provisions of K.S.A. 1978 Supp. 44-714(f) control the disclosure of information compiled in the course of administering the Employment Security Law. As subsections (a), (c), (d) and (f) of K.A.R. 50-401 do not comply therewith, for the reasons already noted, they are void and lack the force and effect of law.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk