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ATTORNEY GENERAL OPINION NO. 80-239

The Honorable Arnold Berman  
2612 Oxford Road  
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Lawrence, Kansas 66144

Re: State Departments; Public Officers, Employees--  
Kansas Open Meetings Act--Application to Kansas  
University Endowment Association

Laws, Journals and Public Information--Records Open  
to Public--Application of Public Records Law to Kansas  
University Endowment Association

State Institutions--State Educational Institutions;  
Management, Operation--Books and Records of Kansas  
University Endowment Association not subject to Act

Synopsis: The Kansas University Endowment Association is not  
subject to the Kansas Open Meetings Act, the Kansas  
Public Records Law or K.S.A. 76-721. The corporation  
is not an "agency" of the state of Kansas or a substan-  
tially controlled corporation within the meaning of  
these laws. Cited herein: K.S.A. 1979 Supp. 45-201,  
K.S.A. 75-4317, K.S.A. 1979 Supp. 75-4318, K.S.A. 76-308,  
76-718a as amended by L. 1980, ch. 295, 76-721, 5 U.S.C.A.  
§552, I.R.C. §170.

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Dear Senator Berman:

You request the opinion of this office concerning the legal status  
of the endowment associations incorporated in connection with the  
various educational institutions under the control of the Kansas Board

of Regents. Specifically, you inquire whether such corporations are private organizations or "public agencies" within the meaning of the Kansas laws governing open meetings and public records.

To answer your inquiry we must consider three separate statutes: K.S.A. 75-4317 et seq., the Kansas Open Meetings Act; K.S.A. 1979 Supp. 45-201 et seq., the Kansas public records law; and K.S.A. 76-721, an act relating to public access to financial records of corporations "substantially controlled" by such institutions. In addition, we must consider each endowment association separately and will do so in separate numbered opinions. Each apparently has a unique financial and operational relationship with its respective state-supported institution. We rely upon statutory references to the endowment associations as well as the corporate charters, bylaws and representations made by the associations as to the conduct of their business affairs.

We note in passing that this office has previously opined on a similar issue, namely, whether the endowment associations or other not-for-profit corporations associated with state colleges or universities were instrumentalities of the State of Kansas for purposes of the Kansas Public Employees Retirement System. Attorney General Opinion No. 62-8, Vol. III, Opinions of the Kansas Attorney General, 605 (1961-1962). The opinion concluded that the endowment associations were not "instrumentalities" of the state within the meaning of the public employees retirement statutes.

I.

According to its charter, The Kansas University Endowment Association (hereinafter KUEA) is a no stock, not-for-profit, private corporation organized under the corporation laws of the State of Kansas. It is a voluntary association of persons organized to aid the University by securing financial contributions which cannot otherwise be secured to the State. Its stated purpose is as follows:

"The purposes for which said Corporation is formed are the support of an educational undertaking, to-wit, the University of Kansas, and to that end to receive and hold in trust any property real and personal given, devised, bequeathed, given in trust, or in any other way made over to the said Corporation for the use or benefit of the University of Kansas, or of any student or professor therein as such, or of any department thereof, or for the carrying on at said institution of any line of work, teaching, or investigation, which the donor, grantor or testator may designate; to invest or disburse all moneys so received, and generally to care for, manage, administer and control all such property so received, and

to carry out the wishes and to see that the funds and property so received are applied to the uses specified by the donors; or, in case the gift, devise or bequest is a general one, then to such uses as may be agreed on by the Board of Trustees."

The corporation is presently under the control of a sixty-member board of trustees. The trustees serve without compensation, and no voting member of the Board serves by virtue of his or her public office or employment with the State of Kansas.

The management of the corporation is entrusted to an executive committee composed of officers of the corporation and other persons designated in the corporate bylaws. Included on the executive committee is the Chancellor of the University of Kansas who serves ex-officio without the right to vote. The executive committee has been entrusted with the power of the Board of Trustees with the following exceptions: The executive committee may not fill vacancies on the board, change membership of or fill vacancies on the committee, or amend the bylaws.

Some of the officers of the corporation are paid staff members of the corporation including the President, Secretary and Treasurer. Endowment association personnel are not public employees. Civil service laws, purchasing and budget laws and other management requirements which apply to the State or its universities have not been applied to endowment operations. No fiscal or other reports are required by the State and the transactions involving the endowments are not subject to audit by the Legislative Post Audit Division. For purposes of the federal tax laws the endowment associations are recognized as an organization for the benefit of a college or university receiving substantial support from contributions of private donors pursuant to Section 170(b)(1)(A)(iv). This distinguishes the endowments for purposes of the Internal Revenue Code from the university or college itself [§170(b)(1)(A)(ii)] or governmental units [§170(b)(1)(A)(v)].

The KUEA does not receive an appropriation of public funds by the state legislature and does not receive a portion of the University of Kansas' budget. Association expenses are provided by income from the short-term investment of gifts given the Association or from income generated by the Watkins Fund, a bequest to the Association for this purpose. KUEA holds title to its office facility and receives and pays its own operating expenses.

The endowment association is title holder to all properties and funds managed by the Association except for those few properties or funds given directly to the State of Kansas, the Board of Regents or the University. Gifts given the State or its agencies are managed by the Association pursuant to contract. In addition, the KUEA manages the permanent university fund (moneys to which the Board of Regents holds title) under contract with the Board of Regents. The permanent university fund, administered by the Board for the benefit of the University of Kansas pursuant to K.S.A. 76-308, is invested by the Kansas University Endowment Association pursuant to K.S.A. 76-718a, as amended by L. 1980, Ch. 295. Investment of these funds is limited by this section as follows:

"Such investing agents shall invest and reinvest moneys in such funds in:

"(a) Time deposit, open accounts for periods of not less than thirty (30) days, or certificates of deposit for periods of not less than ninety (90) days, in commercial banks or trust companies located in Kansas, or

"(b) United States treasury bills or notes with maturities as the investing agent shall determine, or

"(c) Insured savings and loan associations to the extent of the insurance provided by the F.S.L.I.C."

There are no rules or regulations of the University or the Board of Regents which direct the internal operations or investment practices or activities of the Association. The legal relationship between the Association and the University is essentially one of trustee to beneficiary, except in those limited cases where a contract is involved.

In sum, the relationship between the State of Kansas and university endowment corporations is based upon mutual interests and contractual obligations authorized by statute. In State ex rel. Fatzer v. State Armory Board, 174 Kan. 369 (1953), the Kansas Supreme Court reasoned that a corporate body established by statute to construct armories, and then lease them to the State Adjutant General, was not an arm of the State solely by virtue of the lease arrangement. And in Murray v. State Board of Regents, 194 Kan. 686 (1965), the Supreme Court refused to allow actions of the Kansas State University Endowment Association to estop the condemnation of land by the University. Plaintiffs in this case had argued that the condemnation by the Board of Regents was improper,

because the University had initially requested the Endowment Association to acquire access to the real estate in question by lease; hence, it was urged that the Endowment Association was the agent of the University and that the University was estopped to interfere with the terms of the lease by seeking condemnation. In rejecting this argument the Court held that the University could acquire land only by condemnation, and since it had no power to lease or purchase it could not impart such authority to the Endowment Association through the agency theory asserted by plaintiffs. The necessary implication is that the Endowment Association could become an "agent" by contract in circumstances where the University itself had statutory authority to act, but the association was not an administrative agent of the University for all purposes and at all times.

In this context we now consider each of the pertinent statutory provisions to determine if it was the legislature's intent to include university endowment corporations within the scope of these laws.

## II.

The Kansas Open Meetings Act, K.S.A. 75-4317 et seq., applies to a broad range of public agencies. However, the agencies to which it applies are not specifically listed, rather the statute defines a class of bodies or agencies and in order to be subject to the Act the entity in question must come within the statutorily defined class. Specifically, K.S.A. 1979 Supp. 75-4318 provides in pertinent part:

"[A]ll meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot. . . ."

To be subject to the Act the body or agency in question must:  
(1) Be a legislative or administrative body of the state or a political or taxing subdivision; (2) receive or expend public funds; (3) be supported in whole or in part by public funds; or (4) be a subordinate body or agency of a body or agency described by the first three elements above listed. Stated another way, the Act establishes both a functional test and a public funding test.

In applying these elements of the statute, this office and courts of other jurisdictions have looked to a variety of facts and have not

refused to apply this or similar public access statutes merely on the basis of a private corporate charter. In Kansas Attorney General Opinion No. 79-284, this office advised that a privately organized not-for-profit corporation is subject to the Kansas open meetings law where the corporation receives public funds and acts as a governmental agency in providing services to the public. On a previous occasion the Attorney General had opined that a private non-profit nursing home corporation was not a public agency subject to the Act even though the nursing home receives public funds. See Kansas Attorney General Opinion No. 79-221.

The Supreme Court of Arkansas, in construing an open meetings statute virtually identical to the Kansas law, determined the state committee of the North Central Association of Colleges and Schools, a private non-profit corporation, to be subject to that state's open meetings laws. North Central Association of Colleges and Schools v. Troutt Brothers, 548 S.W.2d 825 (Ark., 1977). The Association under consideration there was the state branch of an accrediting organization which received funding from public sources, used state-owned offices in the performance of its duties and whose office secretary was paid by the State of Arkansas. While recognizing that the educators who served on the board did so without compensation, the court reasoned that the policies and decisions of the state committee had "a great impact on students and parents" and were "matters of great public concern."

For the reasons stated herein we believe the Kansas courts would not consider the KUEA to be subject to the Kansas Open Meetings Act. (1) This corporation is not created by law or administrative decree. It does not report to or recommend action to any state agency. It does not exercise any authority of the state of Kansas except to invest certain funds pursuant to contract. Indeed, one such contract between the Kansas Board of Regents and the KUEA providing for the investment of the permanent university fund states:

"It is further understood and agreed that the Kansas University Endowment Association, by the assumption of such ministerial duties set forth in this agreement, shall at no time be considered an agency of the State of Kansas, and shall at all times retain its separate and distinct entity from the State of Kansas, in accordance with its charter and By Laws." Agreement, June 30, 1975.

(2) The State of Kansas, the Kansas Board of Regents and the University of Kansas have no authority to direct the business activities of the corporation. The State does not make appointments to, or remove persons

from, the corporate management bodies. State officers or employees do not direct the corporate board of trustees, the executive committee or the executive director. Although the goals and interests of the KUEA and those of the University may be similar, even identical, cooperation between an essentially private organization and a public agency does not subject the former to the statutory limitations of the latter.

(3) The KUEA does not receive public funds. Income, derived from investment of moneys where title is vested in the state and investment services are performed by the corporation, is nominal and is the contractual quid pro quo for the services rendered. Corporate contractors who perform services for the State of Kansas do not subject their boards of directors to the open meetings law by entering into contracts with the state. The Kansas Open Meetings Act has not been interpreted to apply to truly private entities whose association with the state or its political and taxing subdivisions is based on "arms-length" contractual obligations. For example, the fact that a building contractor performs the service of constructing a new hospital or office building for the State for which he receives a considerable sum of tax dollars does not subject his corporate board of directors to public scrutiny under K.S.A. 75-4317 et seq.

(4) The KUEA owns its office facilities, pays its own employees, provides for the costs of its activities, including telephone, mailing and travel expenses. Basically, KUEA operates independently of government support.

In short, we do not believe the KUEA meets the public funds test, that is, it is not receiving or expending public funds and is not supported in whole or in part by such funds. Likewise, we do not believe the KUEA is a legislative or administrative body of the state or a "subordinate group" thereof. Although no single factor is determinative of this issue, all the indicia suggest that the State and the University lack sufficient legal authority to direct or control the activities of the corporation. Although the association between the University and the endowment corporation may be a practical bond of common interests, there is an insufficient legal nexus to establish KUEA as a subordinate administrative arm of the State or the University for purposes of the Kansas Open Meetings Act.

### III.

The Kansas Public Records Act, K.S.A. 1979 Supp. 45-201 et seq., provides in pertinent part as follows:

"All official public records of the state, counties, municipalities, townships, school districts, commissions,

agencies and legislative bodies, which records by law are required to be kept and maintained, . . . shall at all times be open for a personal inspection by any citizen, and those in charge of such records shall not refuse this privilege to any citizen."

In order to find the KUEA to be required to allow public inspection, we would have to find that the corporation was an "agency" of the state and that the records sought are required by law to be kept and maintained as official public records. For essentially the same reasons discussed above, we are constrained to view the KUEA as a private corporation, separate and distinct from the state of Kansas, and not an agency thereof.

The federal courts have considered whether private corporations associated with the U.S. government may be subject to the Freedom of Information Act, 5 USCA §552a (1976). The federal act, unlike the state law, provides a definition of "agency." However, the two pieces of legislation share a common purpose, i.e., public access to the papers of government, and both require application of their terms to a particular set of facts. In Lombardo v. Handler, 397 F.Supp.792, 546 F.2d 1043, cert. denied 431 U.S. 932, 53 L.Ed.2d 248, 97 S.Ct. 2639 (1975), the U.S. District Court for the District of Columbia declared that the National Academy of Sciences was not an agency within the meaning of the FOIA. The court held that FOIA was not intended to cover private entities which merely contract with government to conduct studies. The court based its conclusion in part upon the lack of delegation of any governmental authority to the Academy. However, in another federal law case, the Court of Appeals for the District of Columbia determined the Federal Home Loan Mortgage Corporation to be an "agency" within the meaning of FOIA. Rocap v. Indiek, 539 F.2d 174 (D.C. 1976). Although the corporation did not receive congressional appropriations and was not subject to congressional budget restraints, it was chartered solely under federal law, its board of directors were all federal employees and its operations were extensively controlled by statute. In addition, the FHLM Corp. was constrained by close government supervision including federal auditing and reporting requirements. But see, Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523 (N.Y. 1977).

The Kansas Public Records law has not been interpreted regarding the scope of the Act's application to private non-profit corporations or quasi-governmental entities. But we have little trouble construing the Kansas law as excluding the Kansas University Endowment Association.



A recent case from the state of Connecticut is most illustrative. In Board of Trustees of Woodstock Academy v. Freedom of Information Commission, \_\_\_\_\_ A2d \_\_\_\_\_, 42 C.L.J. 1 (Vol. 4, May 22, 1980), the Connecticut Supreme Court held a nonprofit corporation which operated a secondary school for the benefit of a municipality to be subject to that state's freedom of information law. Specifically, the court found the Academy to be a "public agency" as that term was used in the Connecticut law. In making this determination, the court relied heavily on federal cases, some of which as previously cited herein, for establishing criteria the Court labeled a "functional equivalent test" used to determine FOIA cases where the "public versus private" issue was presented.

The criteria relied on by the Connecticut court included:

"(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government." Id. at 1.

In finding the Woodstock Academy subject to the state's public access law, the Court stated:

"Since Woodstock Academy performs a basic governmental function in providing public education at a secondary school level, is nearly entirely (over ninety-five percent) publicly financed, has its operations examined and certified by the state board of education so as to be eligible for reimbursement for tuition fees by local towns and for other statutory benefits, and is an entity created by statute for the sole purpose of maintaining a public school for the benefit of the inhabitants of Woodstock and other towns in the vicinity, it must be considered a public agency for purposes of this state's FOIA. Each of the four factors of functional equivalence is amply in evidence in the circumstances of this case."

Applying these criteria to the Kansas University Endowment Association, the result is as different as the differences between the two education-related corporations.

The Honorable Arnold Berman  
Page Ten  
November 4, 1980

(1) Title to the vast majority of funds managed by the Association are held by the corporation. Relatively small amounts are legally titled to the State of Kansas or its recognized agencies. But in all cases the source of these funds is private. They come to the corporation pursuant to gifts and bequests from private donors rather than by appropriation of state tax dollars. Investment of such funds could hardly be said to be a government function. (2) As previously noted, the endowment association is in no way dependent upon the state of Kansas for the operational financing of its activities. (3) As also noted, the actual control of the corporate entity is in the hands of persons who are not employed or directed by the State or the University. (4) The endowment association is not a creature of government, was not created by statute and does not exercise the powers of government.

In short, we do not believe the Kansas Legislature intended a private corporation, whose legal relationships with the state are so few, to be considered a government agency for purposes of public records. Even were we to find the public records law applicable to the KUEA, the question of which records of the association are required to be "kept and maintained" remains. Without knowing the precise records sought we cannot opine as to any right of access, yet we are constrained to note that there are apparently no statutes which specifically require records of the KUEA to be "kept and maintained."

#### IV.

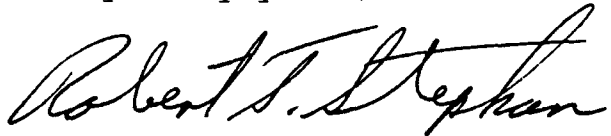
Finally, we consider the application of K.S.A. 76-721 which provides:

"The board of regents, or any state educational institutional (sic) with the approval of the board of regents, may enter into contracts with any party or parties including any agency of the United States or any state or any subdivision of any state or with any person, partnership or corporation if the purpose of such contract is related to the operation or function of such board or institution. If such contract is with a corporation whose operations are substantially controlled by the board or any state educational institution, such contract shall provide that the books and records of such corporation shall be public records and shall require an annual audit by an independent certified public accountant to be furnished to the board of regents and filed with the state agency in charge of post auditing state expenditures."

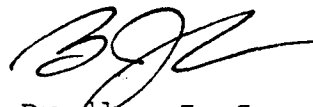
We observe at the outset that this Act does not require access directly, but requires contracts between the University and a substantially controlled corporation to provide by its terms for public access. In the case of KUEA no such contractual provision exists. Such is consistent with our view that the KUEA is not a "substantially controlled" corporation. As noted, the University does not appoint trustees or executive committee members. Nor does it attempt to control corporate operations or management. Financing of corporate investments and operational expenses are not derived from university or government sources. In sum, the KUEA is designed to aid the university but is not established or managed in such a way that we may declare as a matter of law that it is substantially controlled by the University of Kansas. We call attention to Kansas Attorney General Opinion No. 80-118, which declared the Kansas University Athletic Corporation to be a corporation "substantially controlled" by the university. The factual contrasts between the organizational structure, management and financing methods of the two corporations are obvious and critical. Such differences of fact require opposite conclusions regarding application of the law.

In sum, the Kansas University Endowment Association is not subject to the Kansas Open Meetings Act, the Kansas Public records law or K.S.A. 76-721. The corporation is not an "agency" of the state of Kansas or a substantially controlled corporation within the meaning of these laws.

Very truly yours,



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RTS:BJS:phf