



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 81-253

John C. Herman,
Ellis County Attorney
P. O. Box 725
Hays, Kansas 67601

Re: State Departments; Public Officers, Employees --
Kansas Open Meetings Act -- Application of Act to
Non-Profit Corporation

Synopsis: Planned Parenthood of South-Central Kansas, Inc.,
a private, non-profit corporation, is not a legis-
lative or administrative agency of the state or
its political and taxing subdivisions and, thus,
is not subject to the requirements of the Kansas
Open Meetings Act (K.S.A. 75-4317 et seq.). Cited
herein: K.S.A. 1980 Supp. 23-501 23-502, K.S.A.
75-3734, 75-4201, 75-4317, K.S.A. 1980 Supp.
75-4318, 42 U.S.C.A. §300.

* * *

Dear Mr. Herman:

Planned Parenthood of South-Central Kansas Inc., is a non-
profit corporation incorporated under the laws of the State
of Kansas, and it is an affiliate of Planned Parenthood Feder-
ation of America, Inc. According to its articles of incor-
poration, the purposes of this organization are:

"A. To undertake, support, and/or promote:

"1. Family planning and maternal health.

"2. Assistance to couples in need of
medical advice on fertility problems.

- "3. Encouragement and assistance to prospective parents in having children only when they want them and have some assurance of being able to support them without public assistance.
 - "4. Investigation and scientific research touching upon and embracing the sociological, biological, medical, demographic and economic aspects of the foregoing.
 - "5. Collection, correlation and dissemination of information concerning all of the above listed objects and purposes and matters related thereto.
 - "6. Education of the general public with respect to all of the foregoing.
- "B. To support and promote, financially and otherwise, the programs and policies of 'Planned Parenthood Federation of America, Inc.,' and any successors thereof.
- "C. To receive and maintain a fund or funds for the furtherance of the aforementioned objects and purposes."

The corporation is governed by a voluntary, non-compensated citizens board of directors. Planned Parenthood receives approximately 70% of its funding through contributions and user fees. Approximately 30% of the organization's funding is dispensed by the State Department of Health and Environment under a federal grant pursuant to 42 U.S.C.A. §§300 et seq. The State Department of Health and Environment is authorized to dispense such federal funds pursuant to K.S.A. 1980 Supp. 23-501 and 23-502, which additionally authorize the Secretary of Health and Environment to establish centers to provide family planning services. These federal funds are available to any organization within the state which qualifies and provides the type of planning services afforded by Planned Parenthood. Indeed, similar grants are also provided to approximately 45 county health centers and 2 natural family planning centers, as well as Planned Parenthood of South-Central Kansas, Inc.

The Kansas Open Meetings Act was enacted in 1972, with amendment to various sections thereof in 1975, 1977, 1978 and 1980, and appears in the Kansas Statutes Annotated at 75-4317 et seq. The legislative declaration of policy underlying the law is set out in the first section thereof as follows:

"In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public."

The precise scope of the Act is prescribed by K.S.A. 1980 Supp. 75-4318(a), as follows:

"Except as otherwise provided by state or federal law . . . all meetings for the conduct of the affairs of, and the transactions 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, sub-committees, and other subordinate groups thereof . . . shall be open to the public . . ." (Emphasis added.)

Therefore, generally speaking, the Act applies to governmental bodies, as contrasted with non-governmental entities. Unfortunately, there is not always a clear dividing line between governmental and private entities. Two recent court decisions from other jurisdictions have considered the scope of open-meeting laws and have concluded that seemingly private organizations were subject to the provisions of their respective laws.

In New Press Publishing Co. v. Cape Coral Medical Center, 6 Med. L. Rptr. 1157 (Fla. Cir. 1981), a newspaper brought suit against a medical center seeking access to meetings of its directors. The Florida Circuit Court held that the private, non-profit medical center was subject to the provisions of the Florida Freedom of Information Act, because the medical center received public funds and was authorized to "act on behalf of a public health center." The Florida court emphasized that the medical center was authorized by the City of Cape Coral Health Authority to act as an agent of the Authority. This fact was significant in the court's decision, because §119.011(2) of the Florida Statutes subjects an entity to the provisions of the Florida Open Meetings Law if the entity is "acting on behalf of any public agency." As distinct from the language of the Florida Open Meeting Law, the Kansas Open Meetings Act states that an entity must be "of the state and political and taxing subdivisions thereof" and by its expressed terms does not encompass an entity which is merely acting on behalf of a public agency.

The Supreme Court of Arkansas considered the scope of the Arkansas Freedom of Information Act in North Central Asso. of Colleges and Schools v. Trout Brothers, 261 Ark. 378, 548 S.W. 2d 825 (1978). The court concluded that the association of schools was subject to the provisions of the Freedom of Information Act, because the organization was located in Arkansas and supported by public funds. Arkansas Statutes §§12-2803 et seq. provide that any organization will be subjected to the provisions of the Arkansas Freedom of Information Act, if (1) it is "in the state of Arkansas" and (2) "supported in whole or in part by public funds, or expending public funds." The Kansas Open Meetings Act (K.S.A. 75-4317 et seq.) provides somewhat more stringent requirements for an entity to be subject to the Act, in that it must not only be receiving or expending and supported by public funds, but also must be a part "of" a governmental entity.

Thus, for the reasons noted, we do not find the foregoing cases persuasive here. Judicial pronouncements of other jurisdictions are of only limited assistance in determining the precise reach of the Kansas Open Meetings Act, because of fundamental differences in the nature of the entities intended to be included in the Kansas Act and the those covered by the open meeting laws of such other jurisdictions.

When determining the applicability of the Kansas Open Meetings Act to Planned Parenthood, we must consider the precise meaning of the language contained in the Kansas Act. While it is clear that each case must be decided upon its own merits, we note that the Attorney General has opined on two previous occasions concerning the applicability of our Act to seemingly private, non-profit organizations. The opinions differed as to whether these organizations were subject to the provisions of the Kansas Open Meetings Act.

In Opinion No. 79-221, the Attorney General concluded that a private nursing home is not a governmental body and, therefore, is not subject to the Kansas Open Meetings Act, even though it may receive public funds in its operation. The Attorney General determined that the private nursing home, while receiving public funds, exercises no administrative authority on behalf of the county or state. Rather, it hires its own employees and formulates its own policies and procedures, subject of course to compliance with required state and federal guidelines in order to be eligible for public funds.

However, in Opinion No. 79-284, we found that a non-profit corporation was subject to the Kansas Open Meetings Act where it (1) received public funds in its operation and (2) acted as a governmental agency in providing services to the public.

This opinion concerned McPherson County Diversified Services, Inc. (MCDS), which was supported by tax revenues and provided services to the developmentally disabled citizens of McPherson County. It was pertinent to our conclusion that McPherson County Commissioners confirmed all appointments to the board of directors of MCDS and MCDS was required to report back to the county concerning the handling of its funds and the types of services it provided. The opinion concluded that these activities constituted "governmental affairs of the kind which the Act intended to be open to public scrutiny." *Id.* at 3. Additionally, the opinion noted that MCDS was providing services that the county would be providing but for the existence of MCDS, and thus, MCDS was essentially acting in a governmental capacity.

While these opinions reach opposite results, they are reconcilable because of the differences in the relationships between the corporations and their respective governmental units. Hence, this office has recognized the following two-part test for determining whether an organization such as Planned Parenthood is to be governed by the Kansas Open Meetings Act: It must (1) receive public funds in its operations, and (2) be a legislative or administrative agency of the state or its political or taxing subdivisions.

With regard to the present question, since the federal funds received by Planned Parenthood pass through the State Treasury, Planned Parenthood is receiving public funds in its operations within the meaning of the Kansas Open Meetings Act. There can be little doubt that the funds deposited in the State Treasury pursuant to the mandate of K.S.A. 75-3734 are treated as other state moneys and under K.S.A. 75-4201 *et seq.*, qualify as public funds. Thus, the first prong of the two-part test is satisfied.

When applying the second part of the test, we note a recent law journal article which observed that "a concept fundamental to the application of the Act is the requirement that the legislative or administrative body be 'of' the state or political or taxing subdivisions." Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 W.L.S. 241, 252 (1981). As noted in Attorney General Opinion No. 79-284, *supra*, MCDS was "of" the county government, because the organization was providing services that the county government would normally provide and was legally responsible to, and substantially controlled by the county government. As previously noted, appointments to the board of directors of MCDS were confirmed by the McPherson County Commission, which leads to the obvious conclusion that the board's policies would be subject, to some degree, to the wishes of that County Commission. In the instant situation, though, the board of

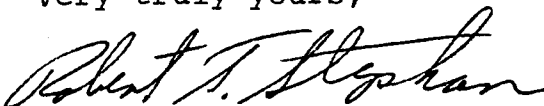
directors of Planned Parenthood is independent of any governmental appointments, and is free to formulate its own policies subject only to compliance with state and federal guidelines in order to receive public funds.


Moreover, it is apparent that MCDS, which receives all of its funding through tax revenues supplied by the County Commission, would cease to exist but for the continued approval and support of that Commission, while it is probable that Planned Parenthood, which receives only 30% of its revenues through public funding, would continue to exist and provide the services it now offers if its public funds were withdrawn. Thus, in regard to the requirement that an organization must be "of" the state or a political or taxing subdivision thereof, we think it crucial that the degree of control exercised by state government over Planned Parenthood is minimal when compared to the degree of control exercised by the County Commission over MCDS.

Admittedly, the position of Planned Parenthood is somewhat similar to that of MCDS in that Planned Parenthood provides services a local government agency might otherwise provide pursuant to K.S.A. 1980 Supp. 23-501 et seq. Indeed, the same services are currently provided in other counties by government agencies subject to the Kansas Open Meetings Act. However, Planned Parenthood provides these services on a contractual basis with the state and local community health centers. The mere fact that this corporation contracts with the county to provide services which the county would otherwise provide, does not extend the requirements of the Kansas Open Meetings Act to an essentially private entity. As stated in Open Meetings Profile: The Prosecutor's View, supra at 252: "A private corporation, by contracting to perform services for the State of Kansas or a political or taxing subdivision, does not subject its board of directors to public scrutiny under this Act." (Footnotes Omitted.)

Therefore, we conclude that Planned Parenthood of South-Central Kansas, Inc., even though it receives public funding in its operations, is essentially a private organization devoid of any meaningful statutory or procedural control by the state or local units of government, and is thus not a "legislative or administrative agency of the state or political or taxing subdivisions" within the meaning of the Kansas Open Meetings Act. (K.S.A. 75-4317 et seq.)

Very truly yours,


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Attorney General of Kansas


Bradley J. Smoot
Deputy Attorney General