STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 19, 1982

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

ATTORNEY GENERAL OPINION NO. 82- 247

The Honorable Michael J. Peterson
State Representative, Thirty-Third District
731 Ann Avenue
Kansas City, Kansas 66101

Re: State Departments; Public Officers, Employees -- Open Meetings Act -- Executive Recess; Attorney-Client Privilege

Synopsis: K.S.A. 1981 Supp. 75-4319(b) authorizes legislative and executive bodies or agencies subject to the Kansas Open Meetings Act to conduct an executive session or recess for the purpose of "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship." However, the attorney-client privilege may not be invoked if the attorney is not present, or if persons, other than the attorney and his or her agents, are parties to the communication. Moreover, the communication must be confidential in character and be so regarded by the governmental body or agency. Cited herein: K.S.A. 60-426, 75-4317, K.S.A. 1981 Supp. 75-4319.

* * *

Dear Representative Peterson:

You inquire of this office regarding a provision of the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., which authorizes executive recesses for "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship." You do not offer a specific question, but rather desire general advice on the scope of this exception to the Act.

Separating the language of the exception for purposes of discussion amplifies two points: First, there must be a

"consultation with an attorney for the body or agency." In Kansas Attorney General Opinion No. 78-303, the Attorney General concluded that the exception to the Kansas Open Meetings Act was inapplicable unless the attorney was present for the consultation. Members of boards or agencies subject to the Act are simply not allowed to discuss legal issues concerning the body among themselves under the guise of this privilege, unless the attorney is a party to the consultation.

Second, the executive recess is permitted only when the communication "would be deemed privileged in the attorney-client relationship." Simply stated, not every word spoken by an attorney or in an attorney's presence is a privileged communication. Essentially, the privilege is statutorily recognized at K.S.A. 60-426 where exceptions to the privilege are delineated.

Kansas case law further clarifies the limits of the privilege. Of particular note is Fisher v. Mr. Harold's Hair Lab, Inc., 215 Kan. 515, 519 (1974). There the Kansas Supreme Court concluded that a communication made between a client and his attorney was not a protected professional confidence when made in the presence of third parties. In regard to the presence of third parties, the statute [K.S.A. 60-426(c)], recognized that the presence of agents for the attorney (clerks and stenographers) would not remove the privilege. See also Kan. Att'y Gen. Op. No. 78-303.

Further, the nature of the communication, as well as the parties to it, is significant. To illustrate, one need look only as far as the case of Pickering v. Hollabaugh, 194 Kan. 804 (1965), where the Kansas Supreme Court, quoted Cranston v. Stewart, 184 Kan. 99 (1959), saying:

> "'In order for a communication from a client to his attorney to be confidential and to impose upon the attorney the duty of not disclosing the same it must be of a confidential character, and so regarded, at least by the client, at the time, and must relate to a matter which is in its nature private and properly the subject of confidential disclosure.
>
> "'Where an attorney serves merely as a scrivener to draft and put in legal form a contract for the transfer of title to real estate, communications concerning the drafting of the contract or the contract itself are not privileged.' (Syl. 2 and 3. See, also, Hutton v. Hutton, 184 Kan. 560, 337 P.2d 635.)"

Since exceptions to the general policy favoring open meetings will be construed narrowly [see, e.g., Illinois News Broadcasters Ass'n. v. City of Springfield, 22 Ill.App.3d 226, 317 N.E.2d 288 (1974) referring to the Illinois open meetings law], legislative and administrative bodies or agencies would be well-advised to exercise the right to an executive recess for attorney-client communications very judiciously. It should be used only when the attorney is a party and should not be used when persons other than agents of the counselor are present. In addition, the nature of the communication should "be of a confidential character" and so regarded at least by the governmental body or agency. The mere presence of an attorney does not, in itself, make the consultation privileged. See Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 W.L.J. 241, 276 (1981) and authorities cited therein.

In summary, K.S.A. 1981 Supp. 75-4319(b) authorizes legislative and executive bodies or agencies subject to the Kansas Open Meetings Act to conduct an executive session or recess for the purpose of "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship." However, the attorney-client privilege may not be invoked if the attorney is not present, or if persons, other than the attorney and his or her agents, are parties to the communication. Moreover, the communication must be confidential in character and be so regarded by the governmental body or agency.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Bradley J. Smoot
Deputy Attorney General

BJS:hle