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August 3, 1983

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ATTORNEY GENERAL OPINION NO. 83-118

The Honorable E. Francis Gordon
Senator, First District
P. O. Box 63
Highland, Kansas 66035

Re: Public Health -- Food, Drugs and Cosmetics --
Donors of Free Food; Immunity from Liability

Synopsis: 1983 Senate Bill No. 28, enacted as L. 1983, ch. 202, provides a limited legislative grant of immunity to a donor of free food to a charitable or non-profit organization which subsequently distributes the food to the public. Except in cases where injury is a direct result of the negligence, recklessness or intentional misconduct of the donor, no liability shall attach. However, the law is restricted to a good-faith donor of canned or perishable food, with the former term defined to mean food which is commercially processed and prepared for human consumption. Food which is processed by an individual in their home, even if by accepted methods of canning, cannot be considered as commercially processed unless the individual normally engages in the sale of such canned goods for profit. Cited herein: L. 1983, ch. 202.

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Dear Senator Gordon:

As Senator for the First District, you request our opinion on the interpretation to be given to a phrase which appears in 1983 Senate Bill No. 28. Now codified in the session laws as L. 1983, ch. 202, the enactment provides partial immunity for both the donors of free food and the agencies which distribute it to the needy members of the public. While earlier attempts toward this end were found to be constitutionally

defective by this office (see Attorney General Opinion Nos. 80-187, 81-87), the measure as enacted is distinguishable from these previous bills, and thus no constitutional issue is presented here. Your inquiry goes rather to the meaning of a definition found at Section 1(a)(1), namely that for "canned food."

The definition states as follows: "'Canned food' [means] any food commercially processed and prepared for human consumption." Together with the term "perishable food," the phrase is used in the grant of immunity to donors which appears in Section 1(b), to-wit:

"All other provisions of law notwithstanding, a good faith donor of canned or perishable food, which complies with K.S.A. 65-655 et seq., and amendments thereto, at the time it was donated and which is fit for human consumption at the time it is donated, to a bona fide charitable or not for profit organization for free distribution, shall not be subject to criminal or civil liability arising from an injury or death as a direct result of the negligence, recklessness or intentional misconduct of such donor." (Emphasis added.)

Your inquiry stems from the way in which the grant of immunity is initially restricted, *i.e.*, a donor must act in good faith and must contribute canned or perishable food, as those terms are defined specifically in the act. Under the statutory rule of construction that the express mention of one or more items excludes by implication any others (expressio unius est exclusio alterius), any food which does not fit under the definition of either canned or perishable is not subject to the grant of immunity provided to donors. Southwestern Bell Telephone Co. v. Miller, 2 Kan.App.2d 558 (1978). It accordingly remains to determine whether food which is prepared by individuals in their homes, using accepted methods of canning and preserving, comes under the definition of "canned food" quoted above.

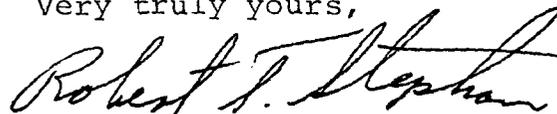
In construing statutes, it is the duty of this office, as it is with a court, to give effect to the purpose and intent of the legislature as determined from the plain wording of the statute. Kansas State Board of Healing Arts v. Dickerson, 229 Kan. 627 (1981). Effect should be given, if possible, to the entire statute and every part thereof, as it is presumed that the legislature does not intend to use words which are mere surplusage. Arduser v. Daniel International Corp., 7 Kan.App.2d 225 (1982), American Fidelity Insurance Co. v. Employers Mutual Casualty Co., 3 Kan.App.2d 245 (1979). Additionally, words are to be given their natural and ordinary meaning. Stephens v. Van Arsdale, 227 Kan. 676 (1980).

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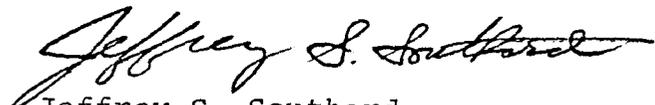
In the present case the key word is "commercially", which word is inserted in the definition so as to modify the phrase "processed and prepared." Together with the related adjective "commercial," this term has been frequently interpreted by courts. In all of the cases which we examined, courts agreed that the use of such terms covers business, financial profit, the buying and selling of goods and services, and so forth. For example, in Locke v. State, 516 S.W.2d 949, 953 (Tex. Civ. App. 1974), the phrase "commercially exhibit" was read to mean activity for consideration, while in Champion Ventures, Inc. v. Dunn, 567 P.2d 724 (Wyo. 1977), an oil well was found to be a "commercial producer" if it could be operated for profit. Application of these interpretations here would have the effect of differentiating between food processed for sale, i.e., "commercially," and that which was processed for one's own use. Although either type of product could subsequently be donated, in our opinion only the former would be covered by the immunity contained in 1983 Senate Bill No. 28. To find otherwise, and thus include food processed in private homes, even if by accepted methods of blanching, pressure-cooking and so forth, would have the effect of negating a part of the statute, a result which we are not prepared to reach in the absence of compelling reasons.

In conclusion, 1983 Senate Bill No. 28, enacted as L. 1983, ch. 202, provides a limited legislative grant of immunity to a donor of free food to a charitable or non-profit organization which subsequently distributes the food to the public. Except in cases where injury is a direct result of the negligence, recklessness or intentional misconduct of the donor, no liability shall attach. However, the law is restricted to a good-faith donor of canned or perishable food, with the former term defined to mean food which is commercially processed and prepared for human consumption. Food which is processed by an individual in their home, even if by accepted methods of canning, cannot be considered as commercially processed unless the individual normally engages in the sale of such canned goods for profit.

Very truly yours,



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RTS:BJS:JSS:hle