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April 3, 1986

ATTORNEY GENERAL OPINION NO. 86- 48

The Honorable Roslind Scudder
Mayor, City of Newton
City Administration Building
P.O. Box 426
Newton, Kansas 67114-0426

Re: Laws, Journals and Public Information -- Records
Open to Public -- Definitions; Public Agency

State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Meetings of Public Agencies Open To Public

Synopsis: An entity created by action of a city, a county and a chamber of commerce (which is not itself subject to either the Kansas Open Records Act or the Kansas Open Meetings Act) may be subject to both such acts if certain requirements are met. In the case of the Kansas Open Records Act (KORA), K.S.A. 45-215 et seq., the entity must be supported by public funds in whole or in part. While an exception exists for the mere provision of goods or services, an entity which is established by a city and county and to which they appoint members, and which has the task of performing functions they assign, is a public agency for the purposes of KORA. Records concerning the prospective location of a business in the area may or may not be subject to disclosure, depending on whether the requirements of K.S.A. 1985 Supp. 45-221 have been met.

The Kansas Open Meetings Act (KOMA) applies if the entity is subordinate to a legislative or administrative agency of the state, and is

supported in whole or in part by public funds. In the case of an entity which has a majority of its members appointed by a city and a county, which is charged with the performance of duties which would otherwise be done by the units of government themselves, and which receives funding from such governments, the tests are satisfied and KOMA applies. Questions involving the prospective location of a business in the area may be discussed in executive session only as they concern the acquisition of real property or confidential data relating to the financial affairs of the business. Cited herein: K.S.A. 1985 Supp. 45-216; 45-217; 45-221; K.S.A. 75-4317; K.S.A. 1985 Supp. 75-4318; K.S.A. 75-4319.

* * *

Dear Ms. Scudder:

As Mayor of the City of Newton, you request our opinion regarding the application of the Kansas Open Records Act, K.S.A. 45-216 et seq., and the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., to the Jobs Development Council [Council], a joint program between the Newton Chamber of Commerce, the City of Newton, and Harvey County. The Council is a body comprised of 12 appointees, 4 of whom are selected by the chamber, 4 by the city and 4 by the county. You indicate that the appointees from the city and county are private citizens who are not members of the city council or board of county commissioners. You also indicate that the Council is intended to be a subdivision of the chamber board of directors not under the control of either the city or the county. The Council is presently funded entirely by the city.

The first question you pose concerns the status of the Council as a public agency for the purposes of the Kansas Open Records Act (KORA), K.S.A. 45-216 et seq. A public agency is defined in K.S.A. 45-217(e)(1), which states in relevant part:

"Public agency means . . . any other entity receiving or expending and supported in whole or in part by public funds"

The Council is a public agency because it receives \$44,000 per year from the City of Newton to fund economic development services.

Arguably, K.S.A. 45-217(e)(2)(A) might apply, which states that this definition does not include an entity "solely by reason of payment from public funds for property, goods or services of such entity." However, it appears that the legislative intent behind the KORA would not support this argument. The question was considered in Frederickson, Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act, 33 U. Kan. L.R. 205 (1985), in which the author conducted personal interviews with members of the legislature. Professor Frederickson noted:

"The Kansas [Open Records Act] . . . excludes from the definition of a public agency any entity otherwise included 'solely by reason of payment from public funds for property, goods or services of such entity.' According to legislators, this is designed to exempt vendors who merely sell goods or services to government, for example, the company that sells gravel to the city street department or the bottling company that maintains soft drink machines in the courthouse." 33 U. Kan. L.R. at 216.

It is our opinion that the Council falls under the definition rather than the exclusion, and is subject to the open records act. The relationship between the Council and the city and the county goes beyond that of a mere vendor-vendee of services.

Since the Council is a public agency, its records are public records. K.S.A. 45-217(f)(1) states:

"'Public record' means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency."

There is an expressed public policy of openness for inspection of public records. K.S.A. 45-216(a) states:

"It is declared to be the public policy of this state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and

applied to promote such policy."
(Emphasis added.)

See also Tew v. Topeka Police & Fire Civ. Serv.
Comm'n., 237 Kan. 96, 102 (1985).

However, simply because an agency is subject to KORA, not all of its records are automatically open. The KORA provides two categories of records which need not be open to public inspection. The first category involves data which is entirely excluded from the act. K.S.A. 45-217(f)(2) states in relevant part:

"'Public record' shall not include records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds" (Emphasis added.)

This provision excludes from public review those records belonging to the chamber which are not related to the Council, as well as those records belonging to Council members which are not related to the business of the Council.

The second category of records which need not be open to public inspection are statutory exceptions, found in K.S.A. 45-221. The first relevant exception appears in K.S.A. 45-221(a)(20), which includes "[n]otes, preliminary drafts, research data in the process of analysis, . . . memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed" The intent of the legislature in providing this exception is to "protect an agency's internal predecisional deliberations from early disclosure." Frederickson, 22 U. Kan. L.R. at 249. This exception furthers uninhibited dialogue by allowing proposals, opinions and supporting research protection from public review. 33 U. Kan. L.R. at 249-50.

Preliminary proposals and research data involving prospective industrial entities would fall under this exception. However, the exception is limited by the language of the statute.

"[t]his exception shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting." K.S.A. 45-221(a)(20).

A discussion of the open meetings appears infra.

A second relevant exception involves the proposed location of an industry or business. K.S.A. 45-221(a)(30) exempts

"Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the state" (Emphasis added.)

The purpose of this exception is to protect companies from speculators, competitors and adverse publicity. 33 U. Kan. L.R. at 260. This exception only applies to the proposed location of such companies.

The protection from disclosure regarding these industrial prospects is limited. The interests of the Council in promoting dialogue and considering policies and proposals, and the interests of companies in warding off speculators and competitors must be balanced with the policy of openness. When these specific interests are no longer recognized by the KORA as subject to non-disclosure, the general policy of openness must prevail.

In light of the above, it is our opinion that records concerning businesses with which you have communicated are not subject to public scrutiny to the extent that decisions, offers, or policies have not yet been made by the Council. However, at any time after these records have been cited in an open meeting or listed on an agenda of an open meeting, the information is open to public inspection. Regarding prospective locations of businesses, as long as no previous disclosure is made regarding that business' local interest, confidentiality may be maintained. However, if the business or the Council releases information which discloses the business' interest in relocating in the area, then prospective sites must be disclosed upon request.

At the outset, we may state that while the Kansas Open Meetings Act (KOMA), K.S.A. 75-5317 et seq., does not apply to the Newton Area Chamber of Commerce, the same may not be true about the Council and its subcommittees. The chamber does not meet the tests discussed below which trigger the KOMA. Accordingly, separate analysis of the chamber is not necessary.

The scope of the KOMA is defined in K.S.A. 75-4318(a) as follows:

"[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"

In determining whether a particular entity falls within this definition, the Kansas Supreme Court has adopted the following test, which was enunciated in Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 Washburn L.J. 241, 256-57 (1981):

"'First, the group of people meeting together must be a "body or agency" within the meaning of the Act. Second, the group must have legislative or administrative powers or at least be legislative or administrative in its method of conduct. Third, the body must be part of a governmental entity at the state or local level, whether it is the governing body or some subordinate group. Fourth, it must receive or expend public funds or be a subordinate group of a body subject to the Act. Finally, it must be supported in whole or in part by public funds or be a subordinate group of a body which is so financed.' 20 Washburn L.J. at 256-57." State ex rel. Murray v. Palmgren, 231 Kan. 524, 535 (1983).

In our opinion, the Council meets this test. The structure of the Council is very similar to an entity considered in Kan. Atty. Gen. Op. No. 84-10. There, we concluded that a board of trustees was subject to the KOMA when it was comprised of 10 representatives of various city and county units, 8 representatives of local private sector organizations, and 12 representatives elected at large by

residents of low-income residential areas. The Council is a body comprised of persons appointed (in part) by governmental units, and so the first part of the test is met.

The second element, regarding legislative or administrative powers, is satisfied insofar as the Council is conducting a program which would otherwise be done by a governmental entity. This "but-for" analysis was illustrated in Kansas Attorney General Opinion No. 85-49, in which it was opined that a board of hospital directors, created as a not-for-profit corporation to manage a county-owned hospital, was subject to the KOMA.

We believe that the Council is a part of, or subordinate to, a governmental entity. You have indicated that appointees are not members of the city council or the county board of commissioners. This is not dispositive, however. The City of Newton and Harvey County combined will appoint 8 of 12 council members. This indicates that governmental units, which are themselves subject to the act, maintain control in the decision making process. Further evidence of subordination appears in the contract between the council and the city. Paragraph 3(c) states that the Council shall be responsible for

"[Submitting] to the City the annual budget, the annual funding requests, and the quarterly financial reports as approved by the Board of Directors of the Chamber, and an annual performance report and financial audit."

While the Council is clearly not under the total control of the city or county, in our opinion it is persuasive that a majority of the Council are appointed by a governmental entity. Hence, for the purposes of KOMA, it is a subordinate group.

The funding issue need not be discussed in detail. It is sufficient to note that the Council will receive \$44,000 from the City of Newton to support its operation.

In summary, it is our opinion that the guidelines approved by the Kansas Supreme Court indicate that the Council is subject to the act. We find further support for the opinion in the language of the act itself. A declaration of policy is set forth in K.S.A. 75-4317(a), which states:

"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."

This legislative purpose would be defeated if an organization was allowed to form under the guise of a separate private entity, yet do governmental business using public funds. Were the entity truly a private enterprise, then the presence of public funding itself would create legal difficulty, as the financial support would in essence be a gift of taxpayers money.

However, it is clear that not all chamber committees are attached to the Council. Each must be considered on a case-by-case basis, using the same analysis as used in determining the applicability of the act to the Council. Some guidelines will be helpful in deciding the issue.

1. If a committee is subordinate to the Council, it is subject to the act. This is consistent with the preceding section regarding the Council.
2. If a committee is comprised of a majority of a quorum of Council members, the meeting must be open to the public. In Kansas Attorney General Opinion No. 84-103, it was held that a joint meeting between governing bodies of various governmental units would be subject to the act if a majority of a quorum of any of the entities were present, as this would constitute a meeting of that governmental entity.
3. If neither of the above guidelines are met, and the committee does not participate in the decision making process by making recommendations to the Council, then the committee may meet behind closed doors. See Kansas Attorney General Opinion No. 84-81, in which an advisory committee of a school district board was subject to the act because it participated in the conduct of the affairs of the governing body.

Finally, you have specifically inquired whether executive sessions may be used to discuss industrial prospects. The conditions under which closed meetings may be used appear in K.S.A. 75-4319. Subject matters which may be discussed in

private are limited by K.S.A. 75-4319(b), which states in relevant part:

"No subjects shall be discussed at any closed or executive meeting, except the following:

. . . .

"(4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;

. . . .

"(6) preliminary discussions relating to the acquisition of real property."

In determining whether data relating to financial affairs or trade secrets is confidential and proper for executive session, we are guided by Southwestern Bell Tel. Co., v. Kansas Corporation Commission, 6 K.A.2d 444 (1981). The Kansas Court of Appeals held that, in deciding whether to publicly disclose information in this category, the following should be considered:

"First, [the Commission] should determine whether the information is a trade secret or confidential commercial information. In considering this matter, the burden is on the party seeking to prevent disclosure. Second, the Commission should weigh the competing interests. In doing so, it should consider, inter alia, the financial or competitive harm to the party seeking to prevent disclosure; whether disclosure will aid the Commission in its duties; whether disclosure serves or might harm the public interest; and whether alternatives to full disclosure exist." 6 K.A.2d at 456-57.

It is clear that identification of an industrial prospect is not a subject for closed meetings. Only trade secrets and confidential financial data are proper subject matters for non-disclosure, and then the two-part test listed above must be considered.

The second relevant subject matter for a closed session, regarding the acquisition of real property, parallel the analysis relating to the Kansas Open Records Act, ante.

In conclusion, it is our opinion that as the Council is subject to the KOMA, it may use executive sessions only in limited areas, among which is the protection of trade secrets and confidential financial data of industrial prospects, or when discussing preliminary matters relating to the acquisition of real property.

Very truly yours,

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ATTORNEY GENERAL OF KANSAS

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