



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

October 9, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 149

Jerry Williams
Lenexa City Attorney
Gage & Tucker
P.O. Box 25830
Overland Park, Kansas 66210

Re: Laws, Journals and Public Information -- Records
Open to Public -- Correspondence Received by
Members of Public Bodies

Synopsis: A letter from a private attorney to a city councilmember in the possession of a public agency is a public record. Such a record, however, is not subject to mandatory disclosure as it falls within one of the exceptions listed in the Kansas Open Records Act, correspondence between a private individual and a public agency. Therefore, the public agency has discretion whether to make the letter available to the public. Cited herein: K.S.A. 45-215; 45-216; 45-217; 45-221, as amended by L. 1987, ch. 176, § 4.

*

*

*

Dear Mr. Williams:

As City Attorney for the City of Lenexa, you request our opinion on a matter concerning the Kansas Open Records Act (KORA), K.S.A. 45-215 et seq.

We are informed that a member of the Lenexa City Council received a letter from an attorney who is counsel for a

private corporation. The letter states that certain actions by the councilmember have harmed the corporation by interfering with prospective or actual business advantage. The councilmember is told to "cease and desist" such actions or face possible litigation. The actions complained of appear to have occurred while the councilmember was acting in the councilmember's official capacity. The councilmember has submitted the letter to your office requesting review and defense in any potential litigation pursuant to the Tort Claims Act. You ask whether this letter may or must be released to the public upon request.

The KORA provides that public records of public agencies must "be open for inspection by any person. . . ." K.S.A. 45-216(a). City offices, including the city attorney's office, are public agencies as that term is defined in the KORA. K.S.A. 45-217(e). A "public record" is "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency." K.S.A. 45-217(f)(1). The definition of "public record" also provides:

"'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. . . ." K.S.A. 45-217(f)(2).

This exception does not apply as the document in question concerns a public official and appears to relate to the expenditure of public funds. Thus, the letter is a public record as it is recorded information in the possession of a public agency.

Not all public records, however, are required to be open for public inspection. K.S.A. 45-221(a)(1), as amended by L. 1987, ch. 176, § 4, provides that records, the disclosure of which is prohibited or restricted by law, are not subject to disclosure under the KORA. In addition, K.S.A. 45-221(a)(2)-(36), as amended, lists records which the public agency has discretion to keep confidential. We are not aware of any state or federal law which prohibits disclosure of the letter received by the councilmember. However one of the exceptions to mandatory disclosure listed in the act is applicable:

"(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

.

(14) Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual." (Emphasis added). K.S.A. 45-221, as amended by L. 1987, ch. 176, § 4.

The letter written by the corporation's attorney to the councilmember constitutes correspondence not required to be disclosed to the public. We note, however, that the discretion is lost and the letter must be made available to the public if it is discussed in an open meeting. K.S.A. 45-221(a)(14), as amended. See Attorney General Opinions No. 85-156; 82-16.

In summary, based on the facts presented to us, the letter from a private attorney to the Lenexa City councilmember is a public record as it is recorded information in the possession of a public agency. This record, however, is not subject to mandatory disclosure as it falls within one of the exceptions listed in the Kansas Open Records Act, correspondence between a private individual and a public agency. Therefore, the public agency has discretion whether to make the letter available to the public.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Rita L. Noll
Assistant Attorney General