



STATE OF KANSAS

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November 23, 1987

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ATTORNEY GENERAL OPINION NO. 87-169

Mr. Robert J. Watson
City Attorney
City Hall - 8500 Santa Fe Drive
Overland Park, Kansas 66212

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings --
Executive Sessions; Personnel Matters; Independent
Contractors

Synopsis: The "personnel matters" exception to the open meetings law, K.S.A. 75-4319(b)(1), pertains to employees of public agencies. Independent contractors hired by public bodies are not employees. Therefore, discussions concerning the qualifications of persons and firms in selecting independent contractors cannot take place in an executive session but must be held in an open meeting. Cited herein: K.S.A. 75-4317; K.S.A. 1986 Supp. 75-4318; K.S.A. 75-4319.

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Dear Mr. Watson:

As City Attorney for the city of Overland Park, you request our opinion concerning the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq. Specifically, you ask whether the city council or a committee of the council may recess into executive session on the basis of personnel matters to discuss the selection of attorneys, engineers, architects, and other independent contractors.

The KOMA requires meetings of public bodies, such as city councils, to be open to the public. K.S.A. 1986 Supp. 75-4318(a). A public body may, however, recess into a closed meeting to discuss the six subjects listed in the act. K.S.A. 75-4319(b)(1) provides that an executive session may be called to discuss "[p]ersonnel matters of non-elected personnel" The question before us is whether persons and firms who contract with the city to perform services as independent contractors are considered "personnel" for purposes of the personnel matters exception to the KOMA.

K.S.A. 75-4317(a) provides that "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 Kansas Supreme Court has discussed this statute as follows:

"Obviously, the intent behind the statute [K.S.A. 75-4317(a)] is to protect the public. In Johnson v. Killion, 178 Kan. 154, 158-59, 283 P.2d 433 (1955), this court stated: "It is fundamental that where a statute is designed to protect the public, the language must be construed in the light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out." See also Smith v. Marshall, 225 Kan. 70, 75, 587 P.2d 320 (1978)." State ex rel. Murray v. Palmgren, 321 Kan. 524, appeal dismissed 459 U.S. 1081, 103 S.Ct. 562, 74 L.Ed.2d 927 reh. denied 459 U.S. 1229, 103 S.Ct. 1238, 75 L.Ed.2d 471 (1982).

In Memorial Hospital Ass'n, Inc. v. Knutson, 239 Kan. 663, 669 (1986), the court said:

"The KOMA is remedial in nature and therefore subject to broad construction in order to carry out the stated legislative intent."

Therefore, the presumption of the KOMA is in favor of openness and exceptions to the KOMA are narrowly construed. See Tacha, The Kansas Open Meetings Act: Sunshine on the Sunflower State?, 25 U. Kan. L. Rev. 169, 175 (1977). The exceptions to the KOMA permitting certain subjects to be discussed behind closed doors were enacted on the basis that in certain instances the interests involved in preserving

confidentiality outweigh the public's right to know. See Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 Washburn L.J. 241, 274 (1981). The purpose of the "personnel matters of non-elected personnel" exception is to "protect the privacy of employees, saving personal reputations and encouraging qualified people to select and remain in the employ of government." (Emphasis added.) Smoot and Clothier at 275. See Tacha at 195.

This office has issued two opinions concerning the personnel matters provision. In Attorney General Opinion No. 81-39 we opined that a public body may recess into executive session to discuss individual employees, but that "[d]iscussions concerning groups of employees which do not infringe upon the individual are beyond the purposes for which the exception for personnel matters was created." We recently stated in Attorney General Opinion No. 87-10 that "the personnel exception to the open meetings law pertains to matters concerning employees of public agencies." (p. 3). We concluded that persons appointed to public boards and committees are public officers and not "personnel" so that discussions concerning the qualifications of candidates for such appointed positions cannot take place in an executive session but must be held in an open meeting.

The term "independent contractor" has been defined in Kansas as follows:

"An independent contractor is generally described as one who, in exercising an independent employment, contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the results or product of his work." Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, Syl. ¶3 (1984).

An "employee" is generally described as a person in the service of another for hire, where the employer has the power or right to control or direct the employee in the material details of how the work is to be performed, and payment is by the hour rather than by the job. See McCarty v. Great Bend Board of Education, 195 Kan. 310, 311-12, (1965); Jones v. City of Dodge City, 194 Kan. 777 (1965).

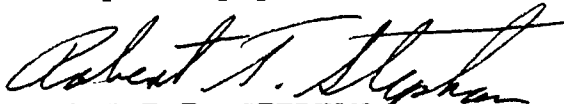
The term "personnel" includes "employees." While independent contractors are not "employees," the question is whether they


are "personnel" for purposes of the KOMA. We think they are not. In Attorney General Opinion No. 87-10 we stated:

"It is a fundamental rule of statutory construction that 'ordinary words are to be given their ordinary meaning' State v. Haug, 237 Kan. 390, 391 (1985); State v. Gibson, 8 Kan.App.2d 135, 137 (1982). 'Personnel' is defined in Webster's Third New International Dictionary 1687 (1964) as 'a body of employees employed in some service' (Emphasis added). See Hernandez v. Frohmiller, 204 P.2d 854, 860 (Ariz. 1949). In State v. Hernandez, 556 P.2d 1174, 1175 (N.M. 1976), the court stated: "'Personnel" refers to a body of persons, such as a body of employees" (pp. 2-3).

As noted earlier, exceptions to the KOMA are interpreted narrowly. The ordinary meaning of the term "personnel" is employees. Given the clear distinction in Kansas law between independent contractors and employees, we must conclude that the term "personnel" does not include independent contractors for purposes of the KOMA. Therefore, public bodies can not use the personnel matters exception to discuss behind closed doors the qualifications of persons and firms in selecting independent contractors.

Very truly yours,


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ATTORNEY GENERAL OF KANSAS


Rita L. Noll
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