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ATTORNEY GENERAL OPINION NO. 87-188

Mr. Jim Pringle
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Re: State Departments; Public Officers and Employees --
Public Officers and Employees -- Open Public
Meetings; Bodies Subject Thereto; Cowley County
Developmental Services; Project Independence

Synopsis: A private, nonprofit corporation is subject to the
Kansas Open Meetings Act if it receives public
funds in its operations and acts as a governmental
agency in providing services to the public. As
Cowley County Developmental Services and Project
Independence meet both requirements, it is our
opinion that the boards of directors of these
organizations are subject to the Act. Cited
herein: K.S.A. 75-4317; 75-4317a; K.S.A. 1986
Supp. 75-4318.

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Dear Mr. Pringle:

As Cowley County Attorney, you have requested our opinion
concerning the applicability of the Kansas Open Meetings Act
(KOMA), K.S.A. 75-4317 et seq., to the board of
directors of Project Independence, a private, nonprofit
corporation managed by Cowley County Developmental Services
(CCDS).

In your letter of inquiry you have provided background information concerning CCDS and Project Independence. We understand that CCDS is a community-based agency licensed by the Department of Social and Rehabilitation Services (SRS) to serve mentally handicapped adults. You inform us that CCDS received and spent approximately \$1 million in 1986. Of that, 72.1 percent of the funds were received from government sources. Government funding, including a county-wide mill levy and SRS grants, is expected to provide more than 50 percent of the agency's revenue this year. Organized ten years ago by the Cowley County Board of Commissioners, CCDS is governed by a nine-member board of directors. Before March 1987, board members were appointed by the county commissioners. As a result of a new contract with the county commission, board members are now selected and appointed by existing board members.

Among the services CCDS provides is residential housing through group homes. These homes include an older home rented by CCDS and five homes constructed in 1981 with federal Department of Housing and Urban Development (HUD) funds. HUD insures the mortgage on the property and subsidizes the rent. These federally financed homes are owned and administered by Project Independence. A three-member board governs this private, nonprofit corporation. Vacancies on the board are filled by existing board members.

We understand from your letter that in 1981 CCDS took over the operation and management of Project Independence and continues to receive a monthly management fee from Project Independence. In January 1987, the CCDS board of directors hired a manager for the project. CCDS and Project Independence each pay half her salary. You also state that CCDS hires, supervises and pays the group home supervisors. In addition, the county commissioners recently approved the use of mill levy funds by the CCDS board to improve and expand its supervision of the homes.

We have been informed that, to be eligible for state funds, SRS guidelines for the residential housing program must be met. CCDS' license to run the homes and its budget are subject to annual SRS approval. Reports concerning the operation of the program are required to be submitted to SRS at least annually for review.

You ask whether the board of directors of Project Independence must comply with the KOMA. By its terms, the Act applies to

"all 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. . . ." K.S.A. 1986 Supp. 75-4318(a).

The above language sets forth a two-part test which must be met for a body to be included within the act's provisions: (1) the body is a legislative or administrative agency of the state or one of its political or taxing subdivisions, or is subordinate to such a body; and (2) the body receives, expends, or is supported in whole or in part by public funds, or, in the case of subordinate groups, by a parent or controlling body which is so supported. It is clear that the second prong of this test is met as Project Independence receives public funds, including federal monies from H.U.D. and county tax revenues through CCDS, to run the homes.

Receipt of public funds will not subject an entity to the provisions of the KOMA unless the first test is also met. See Attorney General Opinions No. 82-256 (Kansas Cosmosphere); 81-253 (planned parenthood); 81-94 (Hayden high school); 79-221 (private nursing home). The more difficult question is whether Project Independence is an administrative agency of the state. The term "public agency" is not defined in the Kansas open meetings law. However, prior Kansas Attorney General opinions have identified four criteria to be used in determining whether a body is a public agency:

"1) If the agency has the authority to make governmental decisions and act for the state, it is covered by an open meetings law. If it only collects information, makes recommendations or renders advice, it is not. McLarty v. Board of Regents, 231 Ga. 22, 200 S.E.2d 117, 119 (1973).

2) Does the agency have independent authority in the exercise of its

functions? Soucie v. David, 440 F.2d. 1067 (D.C. Cir. 1971).

3) Is the agency subject to governmental audits or otherwise have its business procedures supervised? Rocap v. Indiek, 539 F. 2d 174, (D.C. Cir. 1976).

4) Finally, one court has defined 'governmental agency' to include corporate instrumentalities that accomplish public ends, both governmental and proprietary. Ratan Public Service Co. v. Hobbes, 76 N.M. 535, 417 P. 2d 32 (1966)." Attorney General Opinions No. 84-10 pp. 2-3; 79-219 pp. 3, 4; 79-284 p. 3.

Examination of the above criteria in Attorney General Opinion No. 79-219 led to our conclusion that area agencies on aging which were private, nonprofit corporations not affiliated with local governments were covered by the KOMA. We stated that, while the state department provided funding and approved the agencies' plans, the local agencies themselves had considerable influence over the program. "In essence, the area agencies do a great deal of the state department's work, at least on a local level. This would seem to constitute 'governmental affairs' of the kind that the Act intended to be open to public scrutiny. . . ." (p. 4).

In Attorney General Opinion No. 79-284, we were asked whether the board of directors of McPherson County Diversified Services, Inc., was subject to the KOMA. MCDS, a nonprofit corporation which operated almost totally on moneys derived from tax revenues, provided social services to the developmentally disabled citizens of McPherson County. In concluding that the entity was subject to the KOMA, we noted that the board was required to report to the county commission concerning the handling of its funds and the types of services it provided. We also stated:

"MCDS provides programs which would otherwise have to be offered by the state or one of its political and taxing subdivisions, if they were to be offered at all. This would seem to constitute "governmental affairs" of the kind which the Act intended to be open to public

scrutiny, since the way in which such tax-supported programs are run would be of keen interest to many citizens." Attorney General Opinion No. 79-284, p.3.

We recently opined in Attorney General Opinion No. 87-143 that Three Rivers, Inc., a private, nonprofit corporation, was subject to the KOMA. Three Rivers operates the Three Rivers Independent Living Resource Center, a rural center for independent living for disabled persons. We stated:

"Three Rivers, Inc. meets the first test as it operates as an administrative agency. The Independent Living Resources Center must meet state guidelines and be approved by the state. The actual operation of the Center, however, rests with the Board of Directors. In providing services for disabled persons, it appears that Three Rivers is carrying on an activity that would otherwise be handled by a governmental subdivision." (p.4).

After examining the above-listed factors and our prior opinions, we conclude that Project Independence meets the first test as it operates as, and is managed by, an administrative agency. CCDS is a public agency subject to the KOMA as it meets both tests. First, it receives public funds, including public funds in connection with the group homes. Second, in providing services to the mentally handicapped, including managing the group homes, CCDS is carrying on an activity that would otherwise be handled by a governmental subdivision. Project Independence, therefore, also meets the second test as it is performing a governmental function through its group homes. Project Independence contracts with CCDS to manage these homes which must meet state guidelines and be approved by the state. Since both tests are met, it is our opinion that Project Independence must comply with the provisions of the KOMA.

The facts in the present situation are different from those in Memorial Hospital Ass'n, Inc. v. Knutson, 239 Kan. 663 (1986). In that case Memorial Hospital Association, a nonprofit corporation, operated Memorial Hospital. The hospital and surrounding property were owned by the county and leased to the Association by the Board of Trustees of Memorial Hospital. The Trustees, appointed by the county commissioners, received the county mill levy funds designated

for hospital maintenance and capital improvements and determined how the funds were to be spent for these purposes. 239 Kan. 664-65. The Kansas Supreme Court ruled that, while the Trustees were required to comply with the KOMA, the Association was not subject to the act. The court noted that a specific statute, K.S.A. 19-4611, allowed the Board of Trustees to lease the county hospital property. The Court also found that the Association was not controlled by, or advisory to, the county commission or the Trustees. In addition, the public funds received by the Association (which amounted to about five percent of its gross revenues) were spent for maintenance and capital improvements as determined by the Trustees. 239 Kan. at 672. Therefore, the court concluded:

"Where the board under 19-4611 leases the hospital property to another, the lessee is not subject to the open meetings requirement of the KOMA if the lessee: (1) has no governmental decision-making authority to expend public funds, and (2) is an independent entity which by contract agrees to provide hospital services under a lease of hospital property from a board of trustees." 239 Kan. at 672.

The boards of directors of CCDS and Project Independence are administrative agencies of the state as they perform governmental functions and spend public funds. While Memorial Hospital Association received only five percent of its revenues from the mill levy, over 70% of CCDS' budget is from public moneys. In Memorial Hospital Association the public funds were used only for maintenance and capital improvements. The decisions concerning these funds were made by the Trustees, a public body subject to the KOMA. CCDS and Project Independence, however, directly receive public moneys to provide services for the mentally handicapped. In making decisions concerning the use of such funds, they are performing a governmental function.

The boards of CCDS and Project Independence are also different from Memorial Hospital Association in that the court found that the Association was an independent entity not subject to any governmental control. In the present case the residential housing project must meet SRS guidelines, SRS must approve the budget, and program reports must be submitted to the state. The facts concerning the boards of directors of

CCDS and Project Independence are distinguished from the facts in the Memorial Hospital Association case. Clearly, CCDS and Project Independence are administrative bodies which receive and expend public funds.

In summary, a private, nonprofit corporation is subject to the Kansas Open Meetings Act if it receives public funds in its operations and acts as a governmental agency in providing services to the public. As Cowley County Developmental Services and Project Independence meet both requirements, it is our opinion that the boards of directors of these organizations are subject to the Act. Cited herein: K.S.A. 75-4317; 75-4317a; K.S.A. 1986 Supp. 75-4318.

Very truly yours,



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