



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88-27

The Honorable Martha Jenkins
State Representative, Forty-Second District
State Capitol, Room 180-W
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
Public Officers and Employees -- Open Public
Meetings; Bodies Subject Thereto; Handicapped
Education and Living Programs, Inc.

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
Handicapped Education and Living Programs, Inc.
meets both requirements, it is our opinion that the
board of directors of this organization is subject
to the act. Cited herein: K.S.A. 75-4317;
75-4317a; K.S.A. 1987 Supp. 75-4318.

* * *

Dear Representative Jenkins:

As State Representative for the Forty-Second District, you
request 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 Handicapped Education and Living
Programs, Inc. (HELP).

You have provided background information concerning HELP, a
private, nonprofit corporation. We understand that HELP is a
community-based organization licensed to provide services to

handicapped persons in Leavenworth County. In addition, HELP's vocational and training programs are certified by the United States Department of Labor. In 1987 HELP received and spent approximately \$660,625. Of that, sixty-nine percent of the funds were received from government sources. Government funding, including a county-wide mill levy, state aid, grants from the Department of Social and Rehabilitation Services (SRS) and Kansas Department of Transportation, and funds from the Kansas Department of Health and Environment (KDHE), is expected to again provide approximately sixty-nine percent of the organization's revenue this year. HELP contracts with SRS to provide services for a certain number of persons in order to receive the grants, and contracts with Leavenworth county to receive mill levy funds.

HELP is governed by a board of directors composed of not less than seven nor more than nine members. According to the by-laws, there may be one member from the county commission and one member from the city commission. Board members are appointed by existing board members upon recommendation by the agency advisory council, except that representatives from the county and city commissions are appointed by their respective commissions.

HELP provides services to handicapped persons in Leavenworth county in several areas. A preschool is available for developmentally delayed children, educational programs for adults teach independent living skills and work skills, and in June residential housing will be offered. KDHE and SRS license the preschool and food service programs. SRS also licenses the adult day programs. To obtain licensure, HELP's programs must meet KDHE and SRS guidelines and be approved. KDHE and SRS annually inspect the facilities for the preschool and adult day programs. HELP must submit monthly and quarterly reports concerning the state funds they receive.

You ask whether the board of directors of HELP must comply with the KOMA. By its terms, the KOMA 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. 1987 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, the parent or controlling body is so supported. It is clear that the second prong of this test is met as HELP receives public funds, including state monies and county tax revenues.

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 HELP 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 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).

In Attorney General Opinion No. 87-188 we recently opined that the boards of directors of Project Independence and Cowley County Diversified Services are administrative agencies subject to the KOMA as they spend public funds and perform a governmental function through their group homes. We noted the Supreme Court's decision in Memorial Hospital Ass'n, Inc. v. Knutson, 239 Kan. 663 (1986), and distinguished the case as follows:

"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 Independent 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." (pp. 5-6)

After examining the above-listed factors and our previous opinions, we conclude that HELP is a public agency subject to the KOMA as it meets both tests. First, it receives public funds. Second, in providing services and programs for developmentally delayed children and mentally handicapped adults, HELP is carrying on an activity that would otherwise be handled by a governmental subdivision. We also conclude that the present situation is distinguished from Memorial Hospital Association for the same reasons as stated in Attorney General Opinion No. 87-188.

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 Handicapped Education and Living Programs, Inc. meets both requirements, it is our opinion that the board of directors of this organization is subject to the Act.

Very truly yours,


ROBERT T. STEPHAN
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