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February 22, 1990

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ATTORNEY GENERAL OPINION NO. 90- 20

The Honorable Phil Martin
State Senator, 13th District
State Capitol, Room 504-N
Topeka, Kansas 66612

Re: Public Records, Documents and Information --
Records Open to Public -- Records of a Utility or
Other Public Service; Information Held by the
Department of Revenue Concerning Tax Exemptions and
Refunds

Synopsis: K.S.A. 1989 Supp. 45-221(a)(26) does not require
the Department of Revenue to disclose records
concerning a utility company's sales tax refund and
exemption information. Pursuant to K.S.A. 1989
Supp. 45-221(a)(1) and K.S.A. 79-3614, unless
subject to the exceptions cited therein, the
Department of Revenue has been legislatively
directed to refuse a request for disclosure of
information derived from returns filed or
investigations conducted under the Kansas
retailers' sales tax act. Cited herein: K.S.A.
17-7511; 40-2807; 45-217; K.S.A. 1989 Supp. 45-221;
K.S.A. 79-3234; 79-34,113; 79-3483; 79-3601;
79-3602; 79-3614.

* * *

Dear Senator Martin:

You request our opinion concerning certain information
requested by a utility, or their agent, from the Department of
Revenue. The agents of utility businesses have requested
disclosure of the percentage of exemptions approved by the

Department of Revenue together with the dollar amount of refunds. You specifically ask that we address:

"whether approved exemption percentages and refund information maintained by the Department of Revenue and supplied to public utilities for the purpose of exempting all or part of the energy usage billings of specific customers from sales tax must be disclosed by the Department of Revenue upon request for disclosure pursuant to K.S.A. 45-221(a)(26). In the alternative, and in the event such refund information is not within the scope of K.S.A. 45-221(a)(26), can the Department lawfully refuse to disclose sales tax exemption information filed on behalf of a consumer to a duly authorized agent of such consumer?"

Finally, does K.S.A. 45-221(a)(26) require a public utility to provide billing information for a specific customer to 1) an agent of such specific customer or 2) anyone so requesting such information."

K.S.A. 45-215 et seq. generally requires that records held, maintained, kept or in the possession of a public agency be open to the public. The Department of Revenue meets the definition of a public agency as set forth by K.S.A. 45-217(e)(1). Thus, unless otherwise prohibited or allowed by law, records held by that agency must be disclosed.

In addition to records that the law prohibits from disclosure, a public agency may decline to disclose records described in K.S.A. 1989 Supp. 45-221(a)(2)-(37). Disclosure of these types of records becomes a discretionary decision, and thus the record holder may decide whether or not to make these types of documents available for public inspection.

You cite K.S.A. 1989 Supp. 45-221(a)(26) and ask whether that statute requires the Department of Revenue to disclose information concerning approved tax exemption percentages and refund dollar amount information. K.S.A. 1989 Supp. 45-221(a)(26) sets forth an exception to mandatory disclosure and states:

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

. . . .

"Records of a utility or other public service pertaining to individually identifiable residential customers of the utility or service, except that information concerning billings for specific individual customers named by the requester shall be subject to disclosure as provided by this act." (Emphasis added).

K.S.A. 1989 Supp. 45-221(a)(26) provides for mandatory disclosure of certain information. We have been unable to locate case law or previous Attorney General opinions discussing K.S.A. 1989 Supp. 45-221(a)(26) or the exception set forth therein. However, the plain language of the statute indicates that the records it addresses are those "of a utility or other public service pertaining to individually identifiable residential customers of the utility or service." The records in question are in the possession of the Department of Revenue and pertain to a utility or service company's request for tax exemption or refunds. The exception noted in K.S.A. 1989 Supp. 45-221(a)(26) concerns billings for individual customers. Utility billing information for specific individual residential customers must be disclosed by a public agency which is subject to the KORA if the requestor names the individual residential customer and if no other law closes the records. If the Department of Revenue does not make, maintain, keep or possess records concerning utility billings of individual residential customers, K.S.A. 1989 Supp. 45-221(a)(26) does not apply.

It is our opinion that K.S.A. 1989 Supp. 45-221(a)(26) does not require the Department of Revenue to mandatorily disclose the refunds and percentage exemptions approved for those utility companies requesting such tax relief. Such information may be determined from a review of individual residential customer utility billings discussed under the exception set forth at K.S.A. 1989 Supp. 45-221(a)(26). However, the billing information is held by the utility company and is provided to the Department of Revenue only for the purpose of obtaining tax refunds or exemptions. If the requester names the individual customers, the utility company, if subject to the KORA, must disclose the billing information pursuant to K.S.A. 1989 Supp. 45-221(a)(26).

Your second question is whether the Department of Revenue may lawfully refuse to disclose sales tax exemption and refund information filed on behalf of the customer when that information is requested by a duly authorized agent of that

customer. We do not have specific information concerning the exact nature of the agency relationship in question. However, we note that an agency relationship may be general or limited. Thus, while an entity may be authorized to act on behalf of a principal concerning some interests, the principal may not have authorized the agent to act on their behalf in all matters. The principal in this case is a utility company which may already have copies of and could supply the information requested by the agent. Thus, it may be that the utility principal has not authorized the agent to act on their behalf in requesting this information. Assuming that the principal has authorized the agent to act on their behalf in requesting the records in question, we will examine whether the Department of Revenue must disclose such records to the principal or his agent.

As noted in your letter to this office, K.S.A. 79-3601 et seq. provides for an exemption from sales tax requirements for certain property. As you discuss, public utilities may claim a retail sales tax exemption and request refunds from taxes previously paid pursuant to K.S.A. 79-3602(m)(2). Once an exemption is received, the Department of Revenue works with the utility to determine whether a refund of previously paid tax money should be made, and if so, the amount of such refund and the percentage of exemption permitted. You indicate that certain utilities have used an agent to obtain such exemptions and refunds. You also state that certain utilities believe that they have received unequal treatment. Thus, those utilities or their agents request information concerning exemptions given to other utilities. This is not therefore a case of an agent obtaining information related to a principal. Rather, the issue is whether information relating to exemptions and refunds for all utilities are open.

K.S.A. 79-3601 et seq. results in the creation of records including returns or investigation documents. K.S.A. 79-3614 provides that:

"All information received by the director from returns filed under this act, or from any investigations conducted under the provisions of this act, shall be confidential, except for official purposes, and it shall be unlawful for any officer or employee of such director to divulge any such information in any manner, except in accordance with a proper judicial order, or as provided in K.S.A. 74-2424, and amendments thereto. The post auditor shall have access to all such information in accordance with and

subject to the provisions of subsection (g) of K.S.A. 46-1106, and amendments thereto. Nothing in this section shall be construed to prohibit the disclosure of the taxpayer's name, social security number, last known address and total tax liability, including penalty and interest, from sales tax returns to a debt collection agency contracting with the secretary of revenue pursuant to K.S.A. 75-5143, inclusive." (Emphasis added).

We have not examined the records, information or documents in question. However, the statute clearly provides that information received by the director from returns filed under the act or from investigations conducted under the act is required to remain confidential except for the purposes and pursuant to exceptions cited in K.S.A. 79-3614. Thus, information must be closed if it is received from the utility company and filed under this act. Information concerning whether an exemption was given, the percentage of such an exemption, and the dollar amount of refund allowed may arguably not be information received by the director from returns filed under this act. Rather, such information may be characterized as information from the director to the entity paying the taxes.

The Department of Revenue has characterized this information as the result of investigation, and maintains that K.S.A. 79-3614 provides confidentiality for such information. The notification to the public utility of exemption percentages and refund amounts appears to be the result of a determination made by a public agency. That decision by the Department of Revenue results from information received by the director. The issue therefore becomes whether information or records used to make or resulting from a determination by the Department of Revenue is subject to mandatory or discretionary disclosure, or rather, if K.S.A. 79-3614 prohibits disclosure.

The Department of Revenue possesses and generates many records. The legislature has concluded that much of this information should not be made available to the public. For example, K.S.A. 79-3234 prohibits and limits dissemination of income tax information, K.S.A. 79-34,113 prohibits dissemination of motor vehicle fuel tax information, K.S.A. 17-7511 closes corporate tax returns, K.S.A. 40-2807 limits dissemination and disclosure of insurance company tax reports and returns, and K.S.A. 79-3483 discusses dissemination of special fuel tax reports and returns. Most of these statutes prohibit disclosure of tax related information. These

statutes generally discuss not only records, but also the information itself. Thus, there is a clear legislative trend to limit the dissemination of tax information related to taxation investigations and decisions.

K.S.A. 79-3614 generally prohibits disclosure of certain retail sales tax information, but provides an exception. This exception allows disclosure of certain information to a debt collection agency. Such information includes the total tax liability and penalty and interest. This type of information is analogous to the exemption status and refund amounts determined by the Department of Revenue. The total tax liability must consider exemption percentages and refund amounts. Apparently the legislature felt it necessary to provide for the limited release of conclusions reached by the director. While the language of the statute lacks clarity in this regard, it is our opinion that the intent of the legislature was to limit the disclosure of information and decisions concerning retail sales taxes. The exemption status and refund amounts result from investigation conducted by the Department of Revenue and can be characterized as the type of information K.S.A. 79-3614 mandatorily closes.

Therefore, it is our opinion that, pursuant to K.S.A. 79-3614, the disclosure of information received by the director from returns filed under K.S.A. 79-3601 et seq. or investigations conducted under the act should not be disclosed. It appears that such information includes exemptions allowed or refund amounts permitted and therefore, unless one of the exceptions cited in K.S.A. 79-3614 is applicable, the Department of Revenue may refuse to disclose the refunds and percentage exemptions approved by that agency.

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



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