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ATTORNEY GENERAL OPINION NO. 91- 50

The Honorable Anthony Hensley
State Representative, 58th District
2226 Virginia Ave.
Topeka, Kansas 66605-1357

Re: Laws, Journals and Public Information -- Records Open to Public -- Certain Records Not Required to be Open; Personnel Records; Invasion of Personal Privacy

Synopsis: If a public record qualifies as a personnel record, it may be closed pursuant to K.S.A. 1990 Supp. 45-221(a)(4), with the exception of the information noted therein. However, not every public record concerning public employees automatically qualifies as a personnel record. Public records may be closed pursuant to K.S.A. 1990 Supp. 45-221(a)(30) when public disclosure would constitute a clearly unwarranted invasion of personal privacy. Closure under this subsection may not occur if the elements of invasion of privacy are not present, if the invasion of privacy can be eliminated by deleting the identifying personal information pursuant to K.S.A. 1990 Supp. 45-221(d), by providing statistical information pursuant to K.S.A. 1990 Supp. 45-221(e), or if the individual whose privacy interest is at risk consents to the disclosure. Closure under K.S.A. 1990 Supp. 45-221(a)(4) or (a)(30) is discretionary not mandatory. Cited herein: K.S.A. 45-215; 45-216; 45-217; K.S.A. 1990 Supp. 45-221.

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Dear Representative Hensley:

As state representative for the fifty-eighth district you request our opinion on whether the Kansas open records act (KORA) requires or allows a Kansas school district to release a list of teachers participating in that school district's insurance plan.

The KORA, set forth at K.S.A. 45-215 et seq., declares that it is "the public policy of this state that public records shall be open for inspection by any person unless otherwise provided by this act. . . ." K.S.A. 45-216(a). K.S.A. 45-217(f) defines public record to mean "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency." The KORA does not require a public agency to create a document nor must it prepare a document in a certain form. See Attorney General Opinion No. 86-43; see also Annot. 100 A.L.R.3d 699, 703 (1980). The definition of a public agency, records of which must be disclosed pursuant to the KORA, is set forth at K.S.A. 45-217(e) and this definition encompasses Kansas public school districts. Thus, public records of Kansas school districts must be open unless there is law which requires or allows closure of the specific record.

The records you inquire about concern which teachers have chosen to utilize or take advantage of insurance benefits offered by and through a school district. Although we have not received information from the school district in question, we believe that such a record may take one of two forms. If an individual chooses to receive an employer provided insurance benefit, such a choice ordinarily results in either a contribution by the employer, the reduction of the gross salary received by the employee, or both. Other amounts deducted from an employee's salary may include or reflect amounts deducted for taxes, unemployment insurance, social security, or deferred compensation plans. Salary information may reflect the amount of actual compensation received by an employee. Thus, payroll information concerning specific individuals may reflect the requested information. The requested information may also be contained in a record or list which merely reflects the identities and numbers of persons participating in a specific insurance program provided by or made available through the employer. It therefore becomes necessary to determine whether any law allows or requires closure of these two types of records.

Exceptions to mandatory disclosure under the KORA are set forth at K.S.A. 1990 Supp. 45-221. We have thus far not received factual information from the school district in question concerning whether the information in question exists or is contained in a specific type of record nor has the school district informed us as to the law relied upon in closing this record. However, because the information requested concerns individual teachers, we believe that the most applicable exception to the KORA may be set forth at K.S.A. 1990 Supp. 45-221(a)(4), which provides in pertinent part:

> "(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:
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> . . . .
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> (4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of services of officers and employees of public agencies once they are employed as such."

As evidenced by the provisions of K.S.A. 1990 Supp. 45-221(a)(4), while certain personnel records may be discretionarily closed, the names of public employees cannot be closed pursuant to reliance upon K.S.A. 1990 Supp. 45-221(a)(4). Moreover, the amount of each employee's salary must be disclosed upon request. However, although the names, positions, salaries and lengths of services of the teachers must be disclosed, we find no authority supporting a claim that amounts deducted from salary are the equivalent of salary. Salary deductions is information that may impact upon the net salary received, but it is not generally considered the actual salary provided to each employee. However, if an employer provided benefit can be described as "salary", K.S.A. 1990 Supp. 45-221(a)(4) requires disclosure of that amount upon request. If the information requested is only contained in a record that is in fact a personnel record, and it is information which is not required to be disclosed pursuant to K.S.A. 1990 Supp. 45-221(c)(4), it may be discretionarily closed.

Not all records concerning a public employee will automatically qualify as a personnel record. See Attorney General Opinions No. 90-136 and 89-106. See also Annot. 100 A.L.R.3d 699 (1980). Because we do not have sufficient information concerning the record in question, we cannot determine whether it qualifies as a personnel record. If a public record does not qualify as a personnel record (which may be determined by examining such things as the use of, purpose for, and general access to the specific record), it must be disclosed pursuant to K.S.A. 45-215 et seq. unless an exception other than K.S.A. 1990 Supp. 45-221(a)(4) permits or requires closure of that record.

You inform us that the school district in question has refused disclosure of the record and "contends that privacy interests prevent it from disseminating the names of teachers." As evidenced by K.S.A. 1990 Supp. 45-221(a)(4), mere release of the names and salaries of public employees is not only permitted by the KORA, it is required. However, K.S.A. 1990 Supp. 45-221(a)(30) permits discretionary closure of "public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

As discussed in Attorney General Opinion No. 89-106, K.S.A. 1990 Supp. 45-221(a)(30) provides a narrow exception which is intended to protect information in government records that relates to the intimate details of a person's private life. See Annot. 26 A.L.R.4th 666 (1983). Mere release of the names of public employees ordinarily does not rise to the level of a "clearly unwarranted invasion of personal privacy." However, it appears that the requested information would link named individuals with participation in an employer provided insurance program. Thus, we must determine whether release of records reflecting that information would result in a "clearly unwarranted invasion of personal privacy."

Kansas recognizes the tort of invasion of privacy, but expressly precludes liability for public disclosure of facts that have entered the public domain. Rawlins v. Hutchinson Publishing Company, 218 Kan. 295, 305 (1975). The KORA personal privacy exception is similar to the personal privacy provision in the federal freedom of information act 'FOIA). In examining the FOIA, courts have held that embarrassment alone does not suffice to justify nondisclosure, Simms v. CIA, 642 F.2d 562 (D.C. 1980), and recognized that if the invasion of privacy is insubstantial, a superior public interest in disclosure

prevails, Campbell v. U.S. Civil Service Commission, 539 F.2d 58 (D.C. 1976).

The most probable form of privacy invasion claim available appears to be the tort of public disclosure of private facts which requires (1) a public disclosure, (2) disclosure of private facts rather than public ones, and (3) a matter made public which would be offensive and objectionable to a reasonable person of ordinary sensibilities. 62A Am.Jur.2d Privacy § 91 (1990). Thus, the school district may not rely upon K.S.A. 1990 Supp. 45-221(a)(30) in closing records unless these three elements are present.

The right of privacy is generally not applicable to publication of matters of public record. Id. at § 103. Courts have recognized that there is no invasion of privacy where an agency made employees names and addresses available to labor organizations seeking recognition through the elective process, or where an employer published and distributed to its employees, without the employees' permission, a credit sheet showing the wages and deductions of employees as an election tactic during an organizational campaign by a labor union. Id. at § 114. In general, disclosure of governmental records reflecting job related information has been declared by the courts not to be an invasion of privacy. See Tobin v. Michigan Civil Service Commission, 331 N.W.2d 184 (Mich. 1982); Annot. 26 A.L.R. Fourth 666, 675 (1983).

Records containing materials exempt from disclosure may be released with deletion of any closed information. K.S.A. 1990 Supp. 45-221(d); see also Kryston v. Board of Education, 430 N.Y.S.2d 688 (N.Y. 1980), International Business Machines Corp. v. State Dept. of Treasury, Revenue Division, 248 N.W.2d 605 (Mich. 1976). In addition, information that might otherwise be permissibly closed based upon the potential for invasion of privacy, may be released if the individual whose privacy interest is being protected consents to the release of that information. See Messina v. Lufthansa German Airlines, 441 N.Y.S.2d 557 (N.Y. 1981).

Without sufficient fact information we cannot determine whether K.S.A. 1990 Supp. 45-221(a)(30) permits closure of a specific record. However, this exception may be utilized only where there is a risk of clearly unwarranted invasion of personal privacy. We believe it doubtful that such a privacy action would prevail if the school district merely released

information concerning which employees participate in an insurance program, especially if either the individual's consent was obtained prior to release of the record or individually identifiable information was deleted.

In conclusion, if a public record qualifies as a personnel record, it may be discretionarily closed pursuant to K.S.A. 1990 Supp. 45-221(a)(4) with the exception of the information noted therein. However, not all public records concerning public employees automatically qualify as personnel records. Closure of public records pursuant to K.S.A. 1990 Supp. 45-221(a)(30) may discretionarily occur when public disclosure would constitute a clearly unwarranted invasion of personal privacy. Closure under this subsection may not occur if the elements of invasion of personal privacy are not present, if the invasion of personal privacy can be eliminated by deleting the identifying personal information pursuant to K.S.A. 1990 Supp. 45-221(d), by making statistical information available pursuant to K.S.A. 1991 Supp. 45-221(e), or if the individual whose privacy interest is at risk consents to the disclosure. Closure under K.S.A. 1990 Supp. 45-221(a)(4) or (a)(30) is discretionary not mandatory.

Very truly yours,

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