



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91-150

Charles Zimmerman  
City Attorney  
Municipal Building  
7th & Jefferson  
P.O. Box 287  
Junction City, KS 66441

Re: State Departments; Public Officers and Employees --  
Public Officers and Employees; Open Public Meetings  
-- Applicability to Meetings of Private Corporation  
Whose Board Members Also Serve on a Public Board

Synopsis: It is our opinion that the private corporation  
known as "The Spirit of '76, Inc." is not in itself  
subject to the provisions of the Kansas open  
meetings act (KOMA) set forth at K.S.A. 75-4317  
et seq. However, when members of this  
corporation's board are also members of a board for  
a public agency which is subject to the KOMA, the  
prearranged gatherings by a majority of a quorum of  
the public body are subject to the KOMA if the  
topic of discussion is the business or affairs of  
the public body. Cited herein: K.S.A. 75-4317;  
75-4317a; 75-4318.

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Dear Mr. Zimmerman:

As city attorney for the city of Junction City, Kansas, you  
request our opinion on the applicability of the Kansas open  
meetings act (KOMA), set forth at K.S.A. 75-4317 et  
seq., to a specific entity known as The Spirit of '76,  
Inc. (corporation). You inform us that this entity was  
originally created in 1973, pursuant to the Kansas corporation

laws. The original incorporator was also the executive director of a public body which had been previously created by joint action of the city and county. This public body continues to exist and is known as the economic development commission (EDC). You enclose articles of incorporation, bylaws, contracts, minutes of meetings, promissory notes, and a memo from a private attorney (Mr. Rombold). You do not include the joint resolution creating the EDC.

In your opinion request letter you state that the bylaws of the corporation establish the corporation's purpose: "to aid the economic development commission of the city of Junction City, Kansas. . . ." You also state that, while elected separately, the board of directors for the corporation have always been the same people that serve on the EDC board, with the paid EDC director always serving as the corporation's secretary. You note that, on several occasions, these boards have met at the same time and place, however, you indicate that the meetings of the two entities are conducted separately. Your letter and attachments reference the corporation's participation in and assistance with various economic development projects involving the EDC and the city and county.

You maintain that, as indicated by the documented transactions, the corporation acts as a landowner and landlord, and is independent of the city and county except as may be contractually agreed. You also believe that it is clear that the corporation is not supported in whole or in part by public funds, other than being allowed to conduct meetings in the same room rented by the EDC and the EDC payment of salary to the EDC director who also served as the corporation's secretary. You note that, while there has been a practice of having the same persons serve as EDC and corporation board members, this is not a requirement and any transactions between these two entities have been at arms length. Moreover, you inform us that the corporation has never been subject to a governmental audit or supervision by governmental entities.

As legal counsel for a publication company, Mr. Rombold concludes in his October 21, 1991 memo that the corporation is subject to the KOMA. He reaches this conclusion by examining the organizational documents of the corporation, the practices and transactions involving the corporation and the public entities. He concludes that the corporation is the "alter ego" of the EDC, and thus, subject to the KOMA.

The Junction City city commission and the Geary county board of county commissioners are bodies that are clearly subject to

the KOMA. While we have not been given a great deal of information concerning the creation or purposes of the EDC, it appears to be a board created and supported in whole by the city and county. Moreover, from the the information you provide, it appears that the EDC is empowered to represent the city and county, weigh options on their behalf, discuss alternatives and present recommendations to the city and county. Thus, it appears that the EDC board is a public body subject to the provisions of the KOMA. See Attorney General Opinions No. 84-10, 84-81, 86-84, 91-31, 88-25, 86-92, 80-201 and 86-38.

K.S.A. 75-4317a defines a meeting subject to the KOMA as "any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency." Thus, when a majority of a quorum of the EDC board participates in a prearranged gathering for the purpose of discussing or transacting the affairs of that body, a meeting subject to the KOMA occurs. Both you and Mr. Rombold inform us that individuals serving on the EDC board have always been the same persons that sit on the corporation's board. Individuals serving on both boards do not lose their identity as EDC board members merely by stating "now we are talking about corporation business". Because of the overlapping and even identical agenda items that are probably discussed by these two bodies, it is difficult to imagine a discussion on corporation business that does not include EDC business.

It is possible for a majority of a quorum of members of a public body to have prearranged gatherings that are not subject to the KOMA if the discussion is unrelated to the business of the public body. However, any prearranged gathering of a majority of a quorum of the EDC board wherein EDC business or matters are discussed is a meeting subject to the KOMA even if the stated or primary purpose of the meeting or discussion relates to the private corporation. To hold otherwise would be to permit county commissioners, or similar public bodies, to form groups known as "The County Commission, Inc." in order to privately discuss matters that clearly concern county business. This office cannot encourage such subversion of the intent of the KOMA.

Because some discussions by the directors of the private corporation may not be related to or concern EDC matters and because some future board for the corporation may not be comprised of the same persons making up the EDC board, we must also address whether the corporation is in its own right subject to the KOMA. K.S.A. 75-4318 sets forth two basic

tests for determining applicability of the KOMA to a specific body: (1) is the body a legislative or administrative body, state agency, or political and taxing subdivision or subordinate group of such a body? and (2) does the body, or its parent or controlling body, receive or expend and is it supported in whole or in part by public funds?

See State ex rel., Murray v. Palmgren, 231 Kan. 524

(1982). This office has examined several non-profit corporations to determine if the specific body is subject to the KOMA. See Attorney General Opinions No. 89-149, 88-27, 87-188, 87-143, 85-175, 85-49, 84-10, 82-256, 81-253, 80-239, 79-284, 79-221 and 79-219.

In Attorney General Opinion No. 84-10 we concluded that the KOMA applied to the Economic Opportunity Foundation, Inc. (EOF) created by a joint resolution of the city commission of the Kansas City, Kansas, and the board of county commissioners of Wyandotte county. In examining legal authority defining "public agency" we considered whether (1) the agency had authority to make governmental decisions and act for the city or county, (2) the agency had independent authority to exercise its functions, (3) the agency was subject to governmental audits or otherwise supervised by a governmental body, and (4) the agency was a corporate instrumentality that accomplished public ends, both governmental and proprietary.

In Attorney General Opinion No. 89-149 we concluded that the Parsons Chamber of Commerce, Inc., was not subject to the KOMA. While the chamber expended public funds, it was not a legislative or administrative agency of the state or a political or taxing subdivision of the state. In reviewing the nature of the chamber, this office considered the statements of the Kansas Supreme Court in Memorial Hospital Association, Inc. v. Knudson, 239 Kan. 663, 671 (1986):

"Courts have found two types of entities, whatever form they may take, which are not subject to the open meetings laws:

(1) those which are merely advisory and have no decision-making authority, and (2) those which are basically independent entities which have some connection, by contract or other tie to a government entity, but are not actually created by some form of government action."

In the situation at hand, there are several pertinent facts about the corporation that we must consider: the Spirit of '76, Inc. was not created by action of the city or county, rather, an individual was its original incorporator [however, this individual also happened to be (at this time) the executive director of the EDC]; the corporation may continue to exist even if the city or county no longer interacts with

the corporation; it has not been subjected to governmental audits; neither the city or county may control the actions of the corporation outside of any contractual agreement entered into by the corporation; and the corporation may not make independent decisions on behalf of the city or county unless the EDC, city or county has delegated such decision-making authority.

However, although the corporation in question is not actually created or directly controlled by government action, we must also consider the following statement from Knudson:

"Where it can be shown that a public body has intentionally, and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine for the elected board what course should be pursued, or where the actions of the private citizens are in any way binding upon the elected officials, the meetings of such groups should be open to public scrutiny. Public bodies cannot be allowed to do indirectly what the legislature has forbidden." 239 Kan. at 670-71.

The purpose of the corporation is solely to assist public entities in performing public duties. The membership of this corporation's board is entirely and traditionally made up of persons who also sit on a public body. Mr. Rombold points out in his October 21, 1991 memo that:

"Just as the corporation borrows its board of directors from the EDC, so too does it borrow its only paid staff member from the EDC. The secretary of the corporation is the director of the EDC. A search for the minutes of the corporation reveals that the minutes of the corporation are often contained in the minutes of the EDC. Furthermore, an audit of payments made to the corporation reveals that rental payments made to the corporation are often drawn to the order of the EDC, but nonetheless deposited to the credit of the corporation."

However, we have no evidence that independent actions by the corporation are binding on the EDC, city or county or that an impermissible purpose or intent exists. Facts provided to

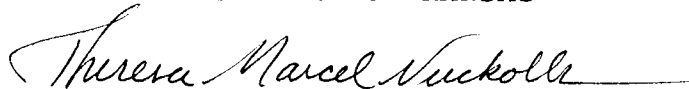
us point to a highly incestuous relationship between the corporation and EDC and it is not unreasonable for Mr. Rombold to infer that the corporation is merely the alter ego of the EDC. Nevertheless, there does not appear to be a legal requirement that the corporation use EDC board members as its directors nor do the bylaws of the corporation or the authority contractually delegated by EDC to the corporation give either any independent control over the actions or decisions of the other. Moreover, the city or county does not appear to be legally required to make use of the corporation. Thus, despite the intertwinement, past practices and appearances, it is our opinion that the corporation remains an independent entity not created or supervised by a governmental entity. The corporation has no independent authority to make governmental decisions and may legally accomplish its purpose without any supervision or interaction with or by a governmental entity. Thus, it is our opinion that The Spirit of '76, Inc. is not itself an entity subject to the KOMA.

In summary, it is our opinion that the private corporation known as "The Spirit of '76, Inc." is not in itself subject to the provisions of the Kansas open meetings act. However, when members of this corporation's board are also members of a board for a public agency which is subject to the KOMA, the prearranged gatherings by a majority of a quorum of the public body are subject to the KOMA if the topic of discussion is the business or affairs of the public body. Because of the identical purposes served by both the private and public bodies, it is our opinion that many, if not all, of the discussions of the private body's board will directly concern the business or affairs of the public body. Therefore, prearranged gatherings by a majority of a quorum of the body for the purpose of discussing such matters must be conducted pursuant to the KOMA.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls  
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