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ATTORNEY GENERAL OPINION NO. 92- 101

Barbara Hinton
Legislative Post Auditor
Legislative Division of Post Audit
1200 Merchants Bank Tower
8th & Jackson
Topeka, Kansas 66612

Re: Public Records, Documents and Information --
Records Open to Public -- Certain Records Not
Required to be Open; Peer Assistance Program Records

Legislature -- Legislative Post Audit -- Additional
Financial Compliance or Performance Audits
Authorized at Direction of Post Audit Committees;
Persons Subject to Audit; Access to Records;
Limitations; Peer Assistance Program Records

Synopsis: Persons and corporations conducting a state funded
peer assistance program on behalf of a state agency
are subject to the audit authority of the state
insofar as such audits relate to the state funded
program. The confidentiality and privilege
provisions of 42 U.S.C., § 290ee-3, K.S.A. 1991
Supp. 65-4921 et seq. or K.S.A. 1991 Supp.
47-846 et seq. may be read in harmony with the
access authority given the legislative division of
post audit pursuant to K.S.A. 46-1101 et seq.
The record closure laws cited herein do not
prohibit or prevent access to such records by the
division of legislative post audit. Pursuant to
the dictates and exceptions of the acts cited
herein, such records are and should remain

confidential, privileged and otherwise unaccessible whether possessed by the program, the state agency or the division of post audit. Cited herein:

K.S.A. 1991 Supp. 40-3401, as amended by L. 1992, ch. 156, § 2; K.S.A. 45-215; 45-217, as amended by L. 1992, ch. 321, § 22; K.S.A. 1991 Supp. 45-221; K.S.A. 46-1101; K.S.A. 1991 Supp. 46-1106; 46-1108; K.S.A. 46-1112; K.S.A. 1991 Supp. 46-1114; K.S.A. 46-1115; 46-1116; K.S.A. 1991 Supp. 47-846; 47-849; 65-4921; 65-4923; 65-4924; 65-4925; 42 U.S.C. § 290ee-3; 42 C.F.R. 2.1; 42 C.F.R. 2.53.

* * *

Dear Ms. Hinton:

You request our opinion regarding access by post audit to records pertaining to individuals licensed by the state who are or have been participants in one of the many state funded impaired licensee programs. You advise that the legislative post audit committee (LPAC) approved an audit reviewing the effectiveness of fee-funded regulatory agencies' programs for impaired licensees. The agencies involved in this audit include the Kansas state board of nursing, the board of healing arts, the board of veterinary examiners, the dental board, and the board of pharmacy.

Peer assistance programs are authorized pursuant to K.S.A. 1991 Supp. 65-4921 et seq. or K.S.A. 1991 Supp. 47-846 et seq. The programs are conducted by different entities. However, the basic purpose served by each program remains the same; the state is attempting to help state licensees recover from some problem, usually related to drug or alcohol use or addiction, while nevertheless protecting the public from any unsafe practice by these licensees. The program records are sought by post audit in an attempt to ascertain whether state funds are being utilized efficiently and effectively.

The records in question concern and name individual licensees. You inform us that "for us to be able to determine whether the programs are effective at helping licensees and protecting the public, we would need to know which licensees have been in the programs and look at their files to determine whether those licensees fulfilled their agreements to obtain treatment, and if not, what action the regulatory boards took against them. We would also need to know the identities of these individuals so that we could check for complaints

subsequent to their participation in the program that might indicate that the treatment had not been successful."

Access to public records is generally set forth in the Kansas open records act (KORA) at K.S.A. 45-215 et seq. The KORA provides that public records, as defined by K.S.A. 45-217, are open to the public unless a specific public record is otherwise required or permitted to be closed by law. K.S.A. 1991 Supp. 45-221(a)(1) recognizes that a public record may be closed if "disclosure [is] specifically prohibited or restricted by federal law, state statute or rule of the Kansas Supreme Court or disclosure is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas Supreme Court to restrict or prohibit disclosure." Some specific closure laws apply to certain patient or peer assistance records. See K.S.A. 1991 Supp. 65-2925, 47-879 and 42 U.S.C. § 290ee-3.

Despite the possible closure of a record pursuant to K.S.A. 1991 Supp. 45-221(a)(1) or other authority, the division of legislative post audit may nevertheless access confidential records. See K.S.A. 1991 Supp. 46-1106, 46-1108 and 46-1114. The issues therefore become (1) whether post audit access authority applies to the entity which possesses the records in question and (2) if post audit access authority is superseded or eliminated with regard to these specific records.

We will first address applicability of post audit access authority to the individuals or entities possessing the records in question.

K.S.A. 1991 Supp. 46-1106, 46-1108 and 46-1114 permit the post auditor access to records of a state agency or person subject to the legislative post audit act. "Person" is defined by K.S.A. 46-1112 as "(a) . . . an individual, proprietorship, partnership, limited partnership, association, trust, estate, business trust, group, or corporation, whether or not operated for profit, or a governmental agency, unit or subdivision."

K.S.A. 46-1101 et seq. create and delineate the authority of the LPAC and the division of post audit. K.S.A. 1991 Supp. 46-1108(b) permits audits to be conducted in order to determine "whether the programs and activities of a state agency, or a particular program or activity, is being efficiently and effectively operated." K.S.A. 1991 Supp. 46-1106, which is referenced in and adopted by K.S.A. 1991 Supp. 46-1108, states in subsection (g):

"In the discharge of the duties imposed under the legislative post audit act, the post auditor or firm conducting a financial-compliance audit or conducting other financial-compliance audit work shall have access to all books, accounts, records, files, documents and correspondence, confidential or otherwise, of any person or state agency subject to the legislative post audit act or in the custody of any such person or state agency. Except as otherwise provided in this subsection, the post auditor or firm conducting a financial-compliance audit or other financial-compliance audit work and all employees and former employees of the division of post audit or firm performing a financial-compliance audit or other financial-compliance audit work shall be subject to the same duty of confidentiality imposed by law on any such person or state agency with regard to any such books, accounts, records, files, documents and correspondence, and any information contained therein, and shall be subject to any civil or criminal penalties imposed by law for violations of such duty of confidentiality. . . ."
(Emphasis added).

K.S.A. 1991 Supp. 46-1114(b)(2) authorizes audits upon any person who receives any grant or gift from or through the state. K.S.A. 1991 Supp. 46-1114(d)(3) provides:

"Access to all books, accounts, records, files, documents and correspondence, confidential or otherwise, as authorized under subsection (b) of this section of any nongovernmental person audited under authority of subsection (c)(4) of this section shall be limited to those books, accounts, records, files, documents, and correspondence, confidential or otherwise, of such person to which the state governmental agency which regulates or licenses such person or the state institution on whose behalf such person

operates or functions is authorized under law to have access."

We have reviewed some of the contracts between the state agencies and the program providers. With the exception of the board of pharmacy, each agency has retained some authority to occasionally access records of individuals otherwise complying with the peer assistance program. Thus, K.S.A. 1991 Supp. 46-1114 permits access to some of the records in question.

In addition to audit authority under K.S.A. 1991 Supp. 46-1114, K.S.A. 1991 Supp. 46-1108 permits performance audits to determine if a program or activity of a state agency is being efficiently and effectively implemented. All of the licensing boards previously mentioned in this opinion are state agencies, and therefore subject to the legislative post audit act and the KORA. All of the agencies in question could conduct the peer assistance programs, however, each has chosen to contract with some other entity for the actual performance of peer assistance programs. In some instances the entity contracting with the state licensing agency performs the services. However, at least six programs subsequently contract with a third party who actually creates or possesses the records in question. Nevertheless, the records in question relate to a program of a state agency. It is important to note that a state agency (or its agents) may not, by contract, close records which are not otherwise permissibly or mandatorily closed pursuant to law. See Attorney General Opinion No. 91-116.

Each of the contractual relationships of which we are aware result in receipt of funds from or through the state. Each of the contracting parties is conducting a program for the state agency. These programs are state agency programs. A primary or secondary contract to implement a state peer assistance program does not, in our opinion, automatically insulate the process or entity from post audit authority. Rather, each of the peer assistance contracting parties is performing a program on behalf of a state agency and receives state funds to do so. Thus, it is our opinion that, pursuant to K.S.A. 1991 Supp. 46-1114 or 46-1108, persons or corporations receiving funds from or through a state funded peer assistance program for the purpose of conducting such a program on behalf of a state agency are subject to audits conducted pursuant to K.S.A. 46-1101 et seq. insofar as such audits relate to the state funded program.

The remaining and perhaps most problematic issue is whether the rather broad access authority vested in the division of post audit is in some way negated or overridden by laws concerning the records in question.

The following statutes and regulation provide possible closure authority for the records in question: K.S.A. 1991 Supp. 65-4921 et seq., K.S.A. 1991 Supp. 47-846 et seq., 42 U.S.C. § 290ee-3, and 42 C.F.R. §§ 2.1 et seq.

42 U.S.C. § 290ee-3 states in pertinent part:

"(a) Disclosure authorization

"Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

"(b) Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent

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"(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

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"(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such

personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner." (Emphasis added).

42 C.F.R. § 2.1(b)(2) and § 2.53 further authorize access to patient records in order to audit and evaluate the drug abuse program. Thus, although we do not have sufficient information to determine if the federal law applies to the records in question, the confidentiality imposed by federal law nevertheless permits access to patient records by "qualified personnel for the purpose of conducting . . . management audits, financial audits, or program evaluation."

In Kansas the division of post audit is the agency authorized, assigned and qualified to conduct financial audits and program evaluations on state agencies, or entities providing services to such entities, as set forth in K.S.A. 1991 Supp. 46-1106, 46-1108, and 46-1114. This is the purpose and directive of the division. The personnel in this state agency are qualified to conduct management audits, financial audits or program evaluations. Assuming that federal law applies to the records in question, the federal law nevertheless permits limited unconsented to access for audit and program evaluation purposes. Therefore, although post audit personnel and staff remain subject to the duty of confidentiality imposed by K.S.A. 1991 46-1101 et seq., and possibly the federal law, it is our opinion that, if it applies, federal law permits the division of post audit access to records falling within the purview of 42 U.S.C. § 290ee-3 and the regulations adopted pursuant to this federal act.

K.S.A. 1991 Supp. 65-4921 et seq. was enacted as part of a comprehensive state effort to reduce injuries by and lawsuits involving health care providers. This act applies to and requires reporting by specific health care providers and medical care facilities, as those terms are defined by K.S.A. 1991 Supp. 65-4921. See also K.S.A. 40-3401. K.S.A. 1991 Sup. 65-4923 and 65-4924 specifically address reports relating to impaired health care providers. K.S.A. 1991 Supp. 47-846 et seq. is the corollary act for impaired veterinarians. It is this authority that specifically authorizes certain state licensing agencies to contractually provide for treatment programs. The licensees included within the ambit of these two acts include licensees subject to the authority of the Kansas state board of nursing, the board of healing

arts, the dental board, the board of pharmacy and the board of veterinary examiners.

K.S.A. 1991 Supp. 65-4925 makes reports and records made pursuant to K.S.A. 1991 Supp. 65-4921 et seq. confidential and privileged:

"(a) The reports and records made pursuant to K.S.A. 1986 Supp. 65-4923 or 65-4924, and amendments thereto, shall be confidential and privileged, including:

"(1) Reports and records of executive or review committees of medical care facilities or of a professional society or organization;

"(2) reports and records of the chief of the medical staff, chief administrative officer or risk manager of a medical care facility;

"(3) reports and records of any state licensing agency or impaired provider committee of a professional society or organization; and

"(4) reports made pursuant to this act to or by a medical care facility risk manager, any committee, the board of directors, administrative officer or any consultant.

"Such reports and records shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and shall not be admissible in any civil or administrative action other than a disciplinary proceeding by the appropriate state licensing agency." (Emphasis added).

The provision of state funded peer assistance programs to impaired veterinarians is set forth at K.S.A. 1991 Supp. 47-846 et seq. K.S.A.. 1991 Supp. 47-849 provides in pertinent part:

"(a) The reports and records made pursuant to K.S.A. 1989 Supp. 47-847 or 47-848, and amendments thereto, shall be confidential and privileged, including:

"(1) Reports and records of executive or review committees of a professional society or organization;

"(2) reports and records of the board or impaired veterinarian committee of a professional society or organization; and

"(3) reports made pursuant to this act to or by any committee or any consultant.

"Such reports and records shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and shall not be admissible in any civil or administrative action other than a disciplinary proceeding by the board."
(Emphasis added).

It is possible that not all reports or records concerning an impaired licensee necessarily occur pursuant to K.S.A. 1991 Supp. 65-4921 et seq. or K.S.A. 1991 Supp. 47-846 et seq. The reports and records in question appear to primarily be in the possession of organizations conducting programs pursuant to this authority and on behalf of a state agency. For the purposes of this opinion we must therefore assume that the records in question are reports made pursuant to the acts cited herein.

These acts make the reports and records in question "confidential and privileged" and limit the ability of persons or entities to discover, subpoena or otherwise compel their release. The dispositive issue therefore becomes whether such "confidential and privileged" status overcomes the post audit division access authority set forth at K.S.A. 46-1101 et seq.

We are faced with access statutes which declare that the division of post audit "shall have access to all . . . records . . . confidential or otherwise. . . ." And, closure statutes which provide that certain reports and records ". . . shall be

confidential and privileged . . . and not subject to subpoena."

"Confidential" has been defined as "entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret. . . ." Blacks Law Dictionary 269 (5th ed. 1979). See also Burke Energy Corp. v. Dept. of Energy for U.S., 583 F.Supp. 507, 510 (D.C. Kan. 1984); Cochran v. Amrine, 155 Kan. 777, 782 (1942); and State v. George, 223 Kan. 507 (1978).

"Privileged" means "possessing or enjoying a privilege; exempt from burdens. . . ." Blacks Law Dictionary 1078 (5th ed. 1979), while "privilege" is "a particular and peculiar benefit enjoyed by a person, company, or class, beyond the common advantages. . . . An exceptional or extraordinary power or exemption. . . ." Id. at 1077. Baldrige v. Shapiro, 455 U.S. 345, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982), held that the confidentiality provisions of the Census Act constituted a privilege within the meaning of discovery provisions of Federal Rules of Civil Procedure.

"Privilege" within the meaning of statutes governing discovery is the privilege as it exists in the law of evidence. Wesley Medical Center v. Clark, 234 Kan. 13 (1983).

From the herein cited authority, we must conclude that the terms "confidential and privileged" contained in K.S.A. 65-2925 and K.S.A. 1991 Supp. 47-879 are meant to ensure that the reports subject to those statutes remain secret and cannot be used against program participants except in the circumstances described in those statutes. The access authority granted post audit does not negate this confidentiality or privileged status. However, we do not believe the use of the term "privileged" countermands the access authority of post audit. Rather, it is meant to restrict the circumstances under which such reports may be used or made public.

Statutory construction rules dictate that the intent of the legislature governs when that intent can be ascertained from the statute. See State ex rel. Stephan v. Kansas Racing Commission, 246 Kan. 708 (1990); Cedar Creek Properties, Inc. v. Board of County Commissioners, Johnson County, 246 Kan. 412 (1990). In determining the legislative intent, the court may look at the historical background of the statute, the purpose to be accomplished by its enactment, the necessity and effect of the statute, and the effect of the statute under

the various constructions suggested. Matter of Marriage of Ross, 245 Kan. 591 (1989); Stauffer Communications, Inc. v. Mitchell, 246 Kan. 492 (1990). There is a presumption that the legislature does not intend to enact useless or meaningless legislation. Matter of Adoption of Baby Boy L, 231 Kan. 199 (1982). It is the duty of a court to reconcile different statutory provisions so as to make them consistent, harmonious and sensible; general and special statutes should be read together and harmonized whenever possible, but to the extent a conflict exists, special statutes will prevail unless it appears that the legislature intended to make the general statute controlling. Kansas Racing Management, Inc. v. Kansas Racing Commission, 244 Kan. 343 (1989). When there is conflict between a statute dealing generally with this subject and another statute dealing specifically with a certain phase of that subject, the specific statute controls unless it appears that the legislature intended to make the general act controlling. State v. Wilcox, 245 Kan. 76 (1989); Garden City Educators Association v. Vance, 224 Kan. 732 (1978).

35 K.L.R., Comment, 763, 777 (1987) discusses the intent behind enactment of health care risk management laws:

"One of the new sections of the 1986 Act requires each medical care facility in Kansas to establish an Internal Risk Management Program. The program is designed to discover, as well as prevent, the occurrence of medical malpractice. The section sets forth several technical requirements, including the process of investigating claims and the determination of whether a negligent act was committed. Activities conducted under the auspices of the Internal Risk management Program are confidential, and any findings made are not discoverable or admissible at any subsequent legal proceeding. The Internal Risk Management Program is designed to force the medical profession to police itself, not to provide claimants with damaging evidence to present at trial."

All legislative history and subsequent comment located by this office evidences a strong desire to encourage impaired providers to come forward and utilize state funded recovery programs. Insuring confidentiality about a provider's

participation in such a program was seen as one way to encourage participation. It is our understanding that individuals entering impaired provider programs sometimes sign a contract which agrees that the program will not further reveal the identity of the impaired licensee if that individual fully complies with the requirements of the program. The agent for the state may make such a contractual promise only if the principle state agency itself possesses and has delegated the authority to promise such closure. See Attorney General Opinion No. 91-116. It has been argued that possession of the records by the legislative post audit division would risk discouraging participation by impaired licensees and possibly make the documents subject to discovery and legal process, in contravention of the provisions of K.S.A. 1991 Supp. 65-4925 and 47-849. In accordance with the statutory construction rules cited herein, these matters may be considered in determining legislative intent.

The express language of K.S.A. 1991 Supp. 65-4925(a) and K.S.A. 1991 Supp. 47-849(a) provide that any report or record made pursuant to those acts is privileged and confidential and is not subject to discovery, subpoena or other legal means of compulsion for their release. The express language in K.S.A. 46-1101 et seq. gives post audit access to confidential records. We acknowledge that the peer assistance statutes are the more specific and the post audit statutes are general. However, whenever possible, we must read statutes in harmony. Further, we must consider that failure to furnish information or records to post audit division may result in the withholding of otherwise available state funds, as provided by K.S.A. 46-1115, or imposition of class A misdemeanor penalties, pursuant to K.S.A. 46-1116. Post audit also possesses subpoena powers under K.S.A. 46-1001 et seq.

K.S.A. 1991 Supp. 47-849(d) provides that nothing in that section shall limit the authority of the board to require reports to the board on actions or recommendations and the state agency may require transfers of records of such committees. K.S.A. 1991 Supp. 65-4923(e) provides "if a state agency that licenses health care providers determines that a review or executive committee referred to in subsection (a) is not fulfilling its duties under this section, the agency, upon notice and an opportunity be heard, may require all reports pursuant to this section to be made directly to the agency." It may be difficult, or even impossible, to determine if a committee is in fact fulfilling its duties if the board (state) cannot ascertain the information sought by post audit.

K.S.A. 1991 Supp. 65-4924(c) requires impaired provider committees to develop procedures and consultation with the licensing agency for periodic reporting of statistical information, and requiring "periodic disclosure and joint review of such information as the licensing agency considers appropriate regarding reports received, contacts or investigations made and the disposition of each report." (Emphasis added). It appears that each of the licensing agencies themselves retain and possess some authority to contractually provide for access of reports concerning individuals. As noted previously, we have been provided with copies of some of the contracts between the state agencies and the program providers. Some access to the identity of impaired providers is contractually retained by most of the state agencies in question. Moreover, each impaired provider law cited herein permits access to these records by the agency funding the program.

We understand it has been the practice of some of state agencies to ordinarily refrain from asking for or obtaining any information on specific individuals if those individuals continue to comply with the terms of their treatment program. However, it does not appear that the closure law authority cited herein absolutely prohibits the licensing agencies or the post auditor from obtaining individually identifiable records or reports. To infer such a prohibition would effectively eliminate the ability of the state to conduct management or financial audits or program evaluations done to ensure compliance with the program contract. Such oversight is contemplated and permitted by state and federal law.

The purpose of the risk management program laws is served by ensuring the confidentiality and privileged nature of the reports and records in question. The special confidential and privileged status given these records restricts access to information and encourages participation in state funded treatment programs. Access to the post auditor under K.S.A. 46-1101 et seq. does not open the door to access by the LPAC or other entities. However, as recognized by the acts themselves (and the federal act), the licensing agencies have the authority to monitor and determine the effectiveness and efficiency of the programs they are funding. One monitoring mechanism available to the state and its agencies is accessing individual records, as permitted by 42 U.S.C. § 290ee-3, 42 C.F.R. 2.1, K.S.A. 1991 Supp. 65-4924(c) and K.S.A. 1991 Supp. 47-849(d). In addition, the legislative post audit act gives the post auditor access to confidential records. As representatives for the state, the licensing agencies and post

audit should cooperatively seek to insure that the purpose of the impaired provider act is served and that state funds and programs are being utilized in accordance with the applicable laws and contracts.

The confidentiality of the records is not automatically compromised or lost by providing access to the state agencies or to legislative post audit. Rather, the dictates of K.S.A. 1991 Supp. 65-4921 et seq., K.S.A. 1991 Supp. 47-846 et seq., and K.S.A. 46-1101 et seq. provide that these records are and shall remain confidential and cannot be used against the licensee/participant except in appropriate actions on the license. We note that in Bryan v. Hilst, Case No. 90-4101-S, a federal magistrate reviewed the provisions of K.S.A. 1990 Supp. 65-2898 and allowed civil litigants to obtain from a licensing board those records used by the licensing agency in an investigation of a licensee. This court opinion does not address records subject only to K.S.A. 1991 Supp. 65-4925 or K.S.A. 46-1101 et seq. authority. Thus, while we might prefer a more definitive legislative directive on this issue, we do not believe that the provisions of 42 U.S.C. § 290ee-3, 42 C.F.R. 2.1 et seq., K.S.A. 1991 Supp. 65-4921 et seq. or K.S.A. 1991 Supp. 47-846 et seq. conflict with or eliminate the access authority provided to the division of post audit pursuant to K.S.A. 46-1101 et seq.

It is our opinion that the confidentiality and privilege statutes concerning records created pursuant to 42 U.S.C. § 290ee-3, K.S.A. 1991 Supp. 65-4921 et seq. or K.S.A. 1991 Supp. 47-846 et seq. may be read in harmony with the access authority given the legislative division of post audit pursuant to K.S.A. 46-1101 et seq. These closure laws do not prevent access to such records by the division of legislative post audit. Such records are and should remain confidential and privileged whether possessed by the program, the state agency or the division of post audit.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



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