



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

April 11, 1975

Opinion No. 75- 158

The Honorable Jim Lawing
State Representative
211 South Chautauqua
Wichita, Kansas 67211

Dear Representative Lawing:

You have requested an opinion from this office concerning whether newspaper reporters may validly be denied access to highway department in-house files concerning the acquisition of right-of-way property.

The operative statutory authority relative to this inquiry, K.S.A. 45-201, provides in pertinent part:

"All official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained, except those of the juvenile court which shall be open unless specifically closed by the judge or by law, adoption records, records of the birth of illegitimate children, and records specifically closed by law or by directive authorized by law, shall at all times be open for a personal inspection by any citizen, . . ." [Emphasis added.]

Clearly, the outcome-determinative issue in this inquiry is what constitutes ". . . public records . . . which records by law are required to be kept and maintained."

One approach to the resolution of this question places reliance upon K.S.A. 75-3501 which provides the only definition of "records" to be found in the Kansas statutes.

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That section provides in part:

"For the purposes of this act: 'Records' mean all documents, correspondence, original papers, maps, drawings, charts, indexes, plans, memoranda, sound recordings, microfilm, motion-picture or other photographic records, or other materials bearing upon the activities and functions of the department or agency or its officers or employees."

Under K.S.A. 68-423a, it is the declared public policy of this state and the duty of the State Highway Commission:

". . . to provide for the acquisition of real property necessary for the construction, improvement, reconstruction maintenance or drainage of the state highway system, in advance of actual construction, for the purpose of eliminating costly details in construction, reducing hardship to owners of such property, and eliminating economic waste occasioned by the improvement of such property immediately prior to its acquisition for highway uses. The legislature therefore finds and declares that purchase and condemnation of real property necessary for the construction, reconstruction, improvement, maintenance or drainage of the state highway system, reasonably in advance of programmed construction, if for a public use and purpose and for a public highway purpose."

In light of this declared policy, the accomplishment of the objectives outlined therein would obviously necessitate the establishment and maintenance of files, documents and other memoranda relative to right-of-way acquisitions. One such "record" would be the in-house appraiser's report kept on the purchases of the various right-of-ways. A literal application of the K.S.A. 75-3501 definition of "records" would seemingly make these records available to public inspections under the provisions of K.S.A. 45-201.

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The fallacies in this reasoning process are quite evident. First and foremost, this rationale renders nugatory the phrase "which records by law are required to be kept." By applying such an all inclusive concept to the word "records," the underlined portion of the statute above would be inconsistent with such a definition. In other words, if it had been the legislature's intent to provide citizens with access to all records, documents and memoranda which are necessitated by the performance of any duty or obligation imposed by statute or otherwise, on the state or the various political and taxing subdivisions specified therein, a simple deletion of this underlined phrase could have accomplished the same result. Therefore, it must be presumed that the insertion of this phrase was done for the twofold purpose of providing definitional insight into the word "records" and to place reasonable limitations on the right of citizen access.

The basic argument in support of unlimited citizen to public record access is further deficient in several other particulars. The unlimited access argument is premised upon the definition of records as contained in K.S.A. 75-3501. However, nothing in the legislative history suggests this conclusion. The language of K.S.A. 75-3501 is essentially the same today as it was when the law was reenacted in 1957. The open records law, K.S.A. 45-201, was enacted during the same session. Therefore, it must be presumed that when the legislature used the phrase "for purposes of this act" to preface the definition of "records" in K.S.A. 75-3501, it was their intent that the word "records" be construed in pari materia with its use in K.S.A. 45-201. Although each was enacted in separate pieces of legislation, both deal with various aspects of the same topic--the management and public access to public records. Applying the rule that these statutes on the same subject are to be construed in reference to each other, the negative implication to be derived is that the legislature did not intend that the word "records", as used in K.S.A. 45-201, be as all encompassing as it is when used in K.S.A. 75-3501. Hence, when the words "public records" in K.S.A. 45-201 are modified by the phrase "which records by law are required to be kept and maintained", it manifests the intent of the legislature as supportive of the conclusion to only allow public inspection of those records which are statutorily mandated to be kept and maintained and not to all those merely within the broad spectrums of materials and paraphenalia specified in K.S.A. 75-3501 or those reasonably related to the performance of any duty imposed upon the particular agency. Accordingly, it is the opinion of this office that only those files and records which are specifically required to be kept by a statute are subject to public scrutiny under the provisions of K.S.A. 45-201 et seq.

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Your correspondence further suggests that since these right-of-way acquisitions are purchased in part through the use of federal funds, the Freedom of Information Act, 5 U.S.C.A. 552, may possibly allow public inspection.

The Freedom of Information Act (FOIA) was passed as an amendment to the Federal Administrative Procedure Act (APA), 5 U.S.C.A. 551. FOIA specifies the rules applicable to the public dissemination and inspection of agency records. The scope of its application is to "each agency" as the term is defined in the APA at 5 U.S.C.A. 551(1). The word "agency" is defined there to mean:

"each authority of the Government of the United States whether or not it is within or subject to review by another agency, but does not include--

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title--
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix."

As can be seen, the terms are not broad enough to encompass the mere grant of funds to a state agency. Accordingly, FOIA is not applicable to the situation you have described.

Yours very truly,



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Attorney General

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