



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

September 8, 1976

ATTORNEY GENERAL OPINION NO. 76-278

Mr. Robert Corbett
Department of Health & Environment
Building 740, Forbes AFB
Topeka, Kansas 66620

RE: Public Information--Records--Public Inspection

Synopsis: The Division of Health of the State Department of Health and Environment may refuse to allow public inspection of certain "Food Establishment Inspection Forms" which are used as investigative devices by the Department.

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Dear Mr. Corbett:

You have asked whether certain "Food Establishment Inspection Forms" used by departmental inspectors are public records and thereby available for public inspection pursuant to K.S.A. 45-201.

K.S.A. 45-201 provides that all official public records will be available for personal inspection by any citizen whenever such "records by law are required to be kept and maintained".

The Food, Drug and Cosmetics Act is found in K.S.A. 65-619, et seq., and the section which provides for inspections of food establishments is K.S.A. 65-674, 1975 Supp. The language contained in K.S.A. 65-674 does allow for inspections and for the securing of samples and specimens to determine if provisions of the Act have been violated. However, there is no provision under this section which mandates that any records pertaining to these inspections be kept or maintained by the Department of Health and Environment;

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nor is there any provision which requires that the results of said inspections be disseminated to the general public. In view of the fact that the legislature clearly omitted any reference to the maintenance of such records and/or the need to have such information available for public inspection, it is clear that the inspection forms do not fall within the scope of K.S.A. 45-201.

There is a second rationale for denying public access to these departmental firms. In essence, these inspection forms are an investigative tool which is used by Health and Environment. The Kansas Supreme Court held in Atchison, T. & S.F. Rly. Co. v. Commission on Civil Rights, 215 Kan. 911, 529 P.2d 666 (1974) that K.S.A. 45-201 did not apply to the investigative files of the Kansas Commission on Civil Rights. The Court based its decision on the fact that there was no legislative intent "to require the Commission to open its files to public scrutiny at the investigation or conciliation stage". Ibid. at 919. It may, therefore, be argued that this precedent should be extended to investigative activities of the Department of Health and Environment.

It is argued by some that K.S.A. 65-102a, 1975 Supp. would allow public inspection of these forms. That statute provides in pertinent part:

"All correspondence, written materials or other documents relating to environmental concerns, for which public release of such information is not prohibited, shall be available for public inspection in the offices of the secretary of health and environment during regular office hours."

Those who promote this statute as allowing inspection of the Food Establishment Inspection Forms argue that food and drug establishments are part of the "environment", and therefore, the inspection of same is an "environmental concern".

Such is not the case, for that theory is based upon a misreading of K.S.A. 65-102a and Executive Reorganization Order No. 3 (1974 Session Laws) which authorized the formation of the Department of Health and Environment. That reorganization act mandated the creation of several divisions within Health and Environment. For example, Section 3 created the Division of Health which was vested with all powers, duties and functions of the existing division of food and drug, and numerous other functions set forth in Sec. 4(a). A separate and distinct Division of Environment was created in Sec. 5, and that division was vested with certain powers and duties in Sec. 6.

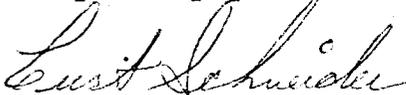
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Pursuant to Executive Order No. 3, these various divisions were in fact created; furthermore, the Bureau of Food and Drug was created within the Division of Health to administer the provisions of K.S.A. 65-619, et seq., and all pertinent administrative regulations.

As there is a distinct delineation of authority among the various divisions within the Department of Health and Environment, it is apparent that K.S.A. 65-102a pertains only to correspondence, written materials and other documents relating to environmental concerns. There is no authority in K.S.A. 65-101, et seq. which calls for similar access to records of health concerns. This obvious omission by the legislature indicates that it did not intend public access to departmental records beyond the scope of K.S.A. 65-102a.

Therefore, in view of all the above mentioned factors, it is apparent that you need not make these inspection forms available for inspection by any member of the public.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS/CAB/cgm