



STATE OF KANSAS

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September 13, 1979

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ATTORNEY GENERAL OPINION NO. 79- 202

Mr. Joseph W. Snell, Executive Director
Kansas State Historical Society
120 West Tenth
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--
State Historical Society--Powers as Private, Non-
profit Corporation

Synopsis: The Kansas State Historical Society, as a nonprofit corporation, may conduct a native music and art festival on state property and use proceeds from the sale of tickets and products as the executive committee of the Society may determine.

* * *

Dear Mr. Snell:

You inquire concerning Attorney General Opinion No. 78-225, which concluded that the Kansas State Historical Society may conduct music and craft fairs and charge fees for certain activities where such activities are determined to be in the "public interest." In addition, said opinion declared that all moneys received from such fairs must be deposited into the state general fund.

You advise that the Society plans a music and arts festival for the public at which food products and crafts will be sold. An entrance fee will be charged for all who attend. Further, you advise that it was not the Society's intent to conduct the festival as a state agency, but rather in its capacity as a nonprofit corporation. You question whether moneys received by the Society in its corporate capacity must be deposited in the general fund in accordance with Attorney General Opinion No. 78-225. For the reasons stated below, we must modify Attorney General Schneider's opinion insofar as the moneys collected are received by the Society in its corporate capacity.

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As a general proposition, the law as stated in the above-cited opinion is indeed correct. However, the Kansas State Historical Society is a unique creature of Kansas law and Kansas history. The Society is more than a state agency; it is a nonprofit corporation.

The Kansas State Historical Society was formed December 14, 1875, and filed its corporate charter with the Secretary of State on December 15, 1875. The Society received its first state appropriation in 1877 when the legislature authorized \$3,000 for the secretary's salary and the purchase of the Thomas H. Webb collection. In 1879 the legislature recognized the Society as the "trustee of the state" and provided that as such it should "faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state." (L. 1879, ch. 167, §1.)

From the very beginning the Society solicited not only the donation of documentary and material objects pertinent to the history of Kansas, but also the gift of funds whereby the corporation could purchase needed materials for which there was little or no legislative appropriation. In assembling the centennial history of the Society, Edgar Langsdorf recorded that in 1888 the Society's board of directors, at its annual meeting

"discussed at some length the functions of the Society and particularly its duties and responsibilities under the 1879 act of the legislature which designated it as the trustee of the state and ipso facto the state's official agency in the field of history. The Society's members and officers are private citizens, the board declared, who devise and carry out through the staff the work of the organization. 'But what they do is for the people of the State.' The collections are the property of the state, and expenses are paid largely by the state." Langsdorf, The First Hundred Years, XLI Kansas Historical Quarterly 265, 301 (1975).

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During the 1888 meeting the Board then adopted the following resolution as a matter of policy:

"Resolved, That this Society hereby formally declares it to be the intention of the Society, that its library and collections hitherto gathered, and all that shall hereafter be gathered, are, and are to become the exclusive property of the State of Kansas, for the use of the people of the state"
4 Kansas Historical Collections, Sixth Biennial Report 111(1886-1890).

The Society continues to operate under this resolution and all items acquired by donation or purchased with corporate or appropriated funds automatically become state property. Traditionally, however, the accumulation of cash moneys by the corporation has been excluded from this practice as have receipts from materials created or purchased by the corporation for resale in an effort to build up the corporate fund balance.

The Bylaws of the Society recognize the distinction between state funds and corporate funds. Paragraph 7 states:

"The secretary, treasurer, and personnel authorized to handle funds of the Society, as distinguished from state-appropriated funds, shall be bonded in an amount and with surety as approved by the executive committee and the Society shall pay the premiums on such bond." (Emphasis added.)

Paragraph 12 states:

"Donations, bequests, membership dues, and receipts from any source not subject to State control shall be deposited to the account of the Society in financial institutions protected by federal insurance, or in government bonds or other securities as determined by the secretary and treasurer with the advice and consent of the executive committee. Such accounts shall be submitted for audit by the State. Such audits, and an annual financial report prepared by the treasurer, shall be examined by the executive committee which on the day of each annual meeting shall make written report of the results of such examinations to the board of directors." (Emphasis added.)

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Clearly the corporate bylaws of the Society contemplate the receipt and maintenance of separate corporate funds. The audit of such accounts by the state is done primarily for the purpose of determining the annual state appropriation to the Society and the state exercises no control over the expenditure of corporate accounts. This has been the practice for more than 100 years and has been approved by the state budgeting and auditing agencies.

The Kansas State Historical Society was a corporate entity prior to becoming a state agency. Such fact is recognized by the language of the enabling statute, K.S.A. 75-2701, which states, in part: "The state historical society, heretofore organized under the incorporation laws of the state, . . ." (Emphasis added.)

Similarly, the act recognizes the distinction between state money and corporate money, declaring that the Society

"shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections of property for the state, and shall not sell, mortgage, transfer or dispose of in any manner or remove from its building or buildings, except for temporary purposes, any article thereof, or part of the same, without authority of law: Provided, This shall not prevent the sale or exchange by the society of its publications, duplicate materials, or materials outside its fields of collection, that it may have or obtain." Id.

Under the law, the corporate executive committee retains the authority to control the acquisition of real and personal property:

"There shall continue to be a board of directors to consist of as many members as the society shall determine. The society may acquire property, real or personal, by gift, bequest or otherwise, in any amount, and upon such conditions as its executive committee may deem best for its interests." Id.

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Finally, K.S.A. 75-2702, which details the statutory duties of the Society, provides:

"No expenditure shall be made under this act or expense incurred except in pursuance of specific appropriations therefor, and no officer of said society shall pledge the credit of the state in excess of such appropriation."

Such language shows no evidence of a legislative intent to restrict the corporate powers of the Society. In fact, this language is repetitive in view of other constitutional and statutory requirements. See Kansas Constitution, Article 2, Section 24 and K.S.A. 75-3025.

Thus, for over 100 years the state has permitted the Society to conduct financial transactions both as a state agency and as a corporate enterprise. Funds in the form of gifts, grants and sales of publications collected by the Society as a corporation are not co-mingled with treasury funds. For example, in the tax year ending June 30, 1978, the Society showed a corporate balance of \$339,198.75. Annual Report, Not for Profit Corporation, Kansas State Historical Society (1978). Such moneys were not considered state funds, were not lapsed into the state treasury at the end of the fiscal year, and remain in the complete control of the executive committee of the Society which membership contains but one state employee. (The Director of the agency serves as Secretary to the Historical Society pursuant to the bylaws of the corporation, paragraph 4.)

If funds are collected by a state agency, they must be remitted to the state treasurer pursuant to K.S.A. 75-4215, which provides:

"All fees, tuition and charges of any and whatsoever nature hereafter collected by any state agency shall be remitted daily to the state treasurer unless otherwise provided under authority specified in this act."

Further, unless otherwise specified, "all public moneys and revenue coming into the state treasury" must be deposited in the general fund. See K.S.A. 75-3036.

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Thus, if the entry fees charged and sales receipts collected at the native music festival were collected by the Society as a state agency and became public moneys or revenue coming into the state treasury, the Society would not be able to pay for the expenses incurred for the festival from such proceeds absent a specific appropriation. Kansas Constitution, Article 2, Section 24 and K.S.A. 75-2702. However, under the facts as presented, we can only conclude that the role of the Society in the production of the 1979 festival was performed by the Society in its corporate capacity and not as a state agency.

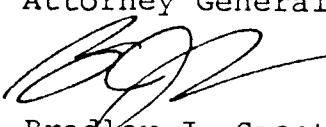
Although the festival is being held on state land (the title to all lands administered by the Society is held in the name of the State of Kansas), no state funds will be used to defer costs of the festival. Such costs will be paid by proceeds from fees and sales. Should costs exceed income, the state incurs no obligation; liability rests with the corporation. Likewise, profits in excess of costs are to be deposited in corporate bank accounts for use in next year's festival. The Society as a corporation has purchased comprehensive liability insurance for the four days prior to the festival and the two days of the program. And the planning and coordinating of the festival has been done by a volunteer committee composed primarily of private citizens. Involvement of state employees has been marginal and restricted to contributing their efforts on "their own time."

Under such circumstances, we believe moneys received by the Society for the native music festival are not collected by the state agency; are not public moneys; and do not come into the state treasury. Such income belongs to the Society as a corporation and is not subject to the appropriation process and attendant statutory limitations.

Therefore, we conclude that the Kansas State Historical Society, as a nonprofit corporation, may conduct a native music and art festival on state property and use proceeds from the sale of tickets and products as the executive committee of the Society may determine.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk