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ATTORNEY GENERAL OPINION NO. 79- 219

Ms. Barbara J. Sabol
Secretary, Kansas Department on Aging
610 West 10th Street
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--
Public Officers and Employees--Open Meetings
Act--Agencies Subject Thereto

Synopsis: While there is no federal law requiring open meetings by area agencies on aging, such agencies are administrative units of the state and are therefore subject to the Kansas Open Meetings Act (K.S.A. 75-4317 et seq.).

* * *

Dear Ms. Sabol:

You have requested the opinion of this office on the question of whether the eleven Kansas area agencies on aging are subject to the Kansas open meetings law, K.S.A. 75-4317 et seq. You also inquire if there is any federal law or policy which requires open meetings of such agencies.

You advise that the area agencies on aging are all either non-profit corporations or governmental units such as cities or counties which have been selected by the State Department on Aging to provide services on a local basis. Under the grant system which is used, the state department acts as a conduit to disburse federal moneys received under the Older Americans Act, with no state funds being added in the process. Each year the areas submit plans to the state department which include the programs they propose to undertake, either by themselves

Ms. Barbara J. Sabol
Page Two
October 4, 1979

or through another "provider," who will be selected by means of a state-approved application process. Once a grant is approved, each area agency receives a portion of its funds each month during the year. For its part the state department continues to monitor the programs, as well as providing assistance and reviewing local procedures to insure compliance with state and federal regulations.

You also advise that the state department does not have the power to make staff changes or specifically direct area agency activities other than through "State policy." However, if substantial noncompliance with federal and state regulations occurs, you do have the power to suspend or terminate grants. Finally, you state that you do not consider the area agencies to be subdivisions of your department.

The Kansas Open Meetings Act was passed into law in 1972, with amendments to various sections thereof occurring in 1975, 1977 and 1978, and appears in the Kansas Statutes Annotated at 75-4317 et seq. The legislative declaration of policy underlying that law is set out in the first section thereof:

"In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental business and the transaction of governmental business be open to the public."

Thus, the Act applies to governmental bodies, as contrasted with nongovernmental groups. The more precise reach of the Act is prescribed by K.S.A. 1978 Supp. 75-4318(a) thus:

"Except as otherwise provided by state or federal law . . . , all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot . . . ,"
(Emphasis added.)

Ms. Barbara J. Sabol
Page Three
October 4, 1979

It is clear from the above that in order to be subject to the Act, the area agencies must be found to be legislative or administrative bodies, and they must receive or expend and be supported in whole or in part by public funds. There can be no doubt that the second prong of this test is met, for the area agencies do expend public funds. While it is true that the ultimate source of these funds is the federal government, they are transmitted to the state department first, and pursuant to K.S.A. 75-3036 must therefore be considered as state funds.

The question remaining then is whether the area agencies are legislative or administrative bodies of the state or of its political and taxing subdivisions. At this point it is necessary to note that of the eleven area agencies, three have been created by local units of government, while the other eight are private, nonprofit corporations which have been set up solely for the purpose of administering programs for senior citizens which are paid for by the Older Americans Act. We have been advised by your office that the three agencies which have been created by local governments are in Kansas City, Johnson County and Wichita. They are therefore "agencies" of "political and taxing subdivisions" of the state, and would accordingly be covered by the Kansas Open Meetings Act.

As for the remaining eight area agencies, it should be noted that they are nonprofit, voluntary associations which are incorporated under the general corporation laws of this state. Employees of these area agencies are not employees of the state and the agencies' procedures are governed by their own articles of incorporation and bylaws, subject of course to necessary federal and state guidelines in the handling of the grant moneys. All of these factors would weigh on the side of a determination that the eight are not under the Act.

However, there are a number of other factors which would seem to indicate a different result. As Kansas case law is of little help in defining what is an "agency" under the Open Meetings Act, cases from other jurisdictions must be considered. Some relevant factors which have been discussed include:

- 1) If the agency has the authority to make governmental decisions and act for the state, it is covered by an open meetings law. If it only collects information, makes recommendations or renders advice, it is not. McLarty v. Bd. of Regents, 231 Ga. 22, 200 S.E.2d 117, 119 (1973).

Ms. Barbara J. Sabol
Page Four
October 4, 1979

2) Does the agency have independent authority in the exercise of its functions? Soucie v. David, 440 F.2d 1067 (D.C. Cir. 1971).

3) Is the agency subject to government audits or otherwise have its business procedures supervised? Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

4) Finally, one court has defined "governmental agency" to include corporate instrumentalities that accomplish public ends, both governmental and proprietary. Ratan Public Service Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966).

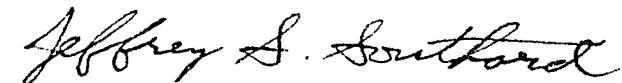
From the above, we would conclude that the eight area agencies not affiliated with local governments are also covered by the Open Meetings Act. While the state department has the ultimate say in which programs receive funding (through its approval of the annual plans), the local area agencies have considerable influence over which programs are selected and how they are funded after being approved. In essence, the area agencies do a great deal of the state department's work, at least on a local level. This would seem to constitute "governmental affairs" of the kind that the Act intended to be open to public scrutiny as the question of which programs are funded is of keen interest to many citizens, especially the elderly. Additionally, it would be an artificial distinction to require those area agencies which are run by local governments to comply, while excusing the others who perform the same functions. We would conclude that the area agencies on aging are administrative agencies subject to the Open Meetings Law.

As for your second inquiry, there appears to be no federal requirement concerning open meetings which would affect the area agencies on aging, as the government in the Sunshine Act of 1976 is limited to federal agencies. In any event, in view of the conclusions reached above, the question is moot.

Very truly yours,



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