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June 5, 1980

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ATTORNEY GENERAL OPINION NO. 80- 118

Mr. Michael J. Davis
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Re: State Institutions--State Educational Institutions;
Management, Operations--Public Access to Corporate
Books and Records

Synopsis: The vouchers, invoices, expense claims, purchase orders and other supporting documents for checks written by the KUAC are "public records" within the meaning of K.S.A. 76-721. Such records, if available, should be made available for public inspection upon request. Cited herein: K.S.A. 10-804, 10-1101 et seq., 10-1117, K.S.A. 1979 Supp. 45-201 et seq., K.S.A. 76-721.

* * *

Dear Mr. Davis:

You request an opinion of this office regarding the application of K.S.A. 76-721 to the University of Kansas Athletic Corporation (hereinafter KUAC). The ultimate query is whether this statute would compel the production of certain documents of the corporation requested by a reporter for the Kansas City Times, to wit: "the vouchers, invoices, expense claims, purchase orders and other supporting documents for checks written by the Athletic Corporation during the last three fiscal years." [Document request letter of April 11, 1980.] The KUAC is reluctant to release such documents because of interpretive questions regarding the language

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of the above-cited statute, which states:

"The board of regents, or any state educational institutional [sic] with the approval of the board of regents, may enter into contracts with any party or parties including any agency of the United States or any state or any subdivision of any state or with any person, partnership or corporation if the purpose of such contract is related to the operation or function of such board or institution. If such contract is with a corporation whose operations are substantially controlled by the board or any state educational institution, such contract shall provide that the books and records of such corporation shall be public records and shall require an annual audit by an independent certified public accountant to be furnished to the board of regents and filed with the state agency in charge of post auditing state expenditures." K.S.A. 76-721.

More specifically, the University questions whether the statute applies to the KUAC, as a corporation "substantially controlled by" the University of Kansas; whether the phrase "books and records" includes the documents requested by the newspaper; and finally, whether the statute is to be construed together with K.S.A. 1979 Supp. 45-201 et seq., the public records law of Kansas. We will endeavor to respond to each of these questions in advising whether the records sought by the Kansas City Times should be made available.

K.S.A. 76-721 was enacted in 1970 (L. 1970, ch. 371, §11), and was subsequently amended (L. 1977, ch. 237, §36) to substitute the phrase "state educational institution" for the original language, "college or university." Otherwise it has not been amended in the decade since its initial enactment.

The Kansas Board of Regents has included provisions identical to this statute in its statement of policies and procedures utilized by state educational institutions. Likewise, the University of Kansas has made the language of the statute a part of its contract with the KUAC. Agreement, Paragraph 5 (January 24, 1977). The existence of such a provision suggests that the drafters and signers of the University/KUAC Agreement

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believed the requirements of 76-721 to be applicable.

From the terms of the Agreement there can be no question that the University and the KUAC maintain a complementary and contractual relationship, although whether this relationship rises to the level of an agency is not at issue herein. [See Brown v. Wichita State University, 217 Kan. 279, 217 Kan. 661 (1975). Affirmed: 219 Kan. 2 (1976), where the Kansas Supreme Court held that an agency relationship between W.S.U. and the athletic corporation did exist for purposes of determining tort liability.] The inquiry for purposes of K.S.A. 76-721 is whether the corporate "operations are substantially controlled" by the University. Yet, many of the key factors in determining the existence of an agency relationship are based on the element of control, and an examination of the Brown case is useful in comparing the degree of control which existed between W.S.U. and its athletic corporation and the magnitude of control exercised by the University of Kansas over the KUAC.

In holding the Physical Education Corporation (PEC) to be an agent of Wichita State University, the Kansas Supreme Court stated:

"The function of PEC, as stated by the appellee, is to conduct the business affairs and other related transactions associated with the intercollegiate athletic programs of Wichita State. The chairman of the Board of Directors of PEC is appointed by the president of Wichita State and is a member of the University's faculty. Several other board members are either on the faculty of, or associated with, Wichita State. Those board members are also appointed by the University's president. A faculty member of the University accompanied teams of Wichita State when it participated in athletic events at other universities. Mr. Katzenmeyer was the athletic director of the University, as well as an executive for PEC, and was appointed by the president. His salary was paid by the University. Wichita State admits Mr. Katzenmeyer was authorized to execute contracts on behalf of PEC. Moreover, the record clearly shows the president

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directed Katzenmeyer to award contracts for transporting its athletic teams by means of competitive bids. It is apparent from the facts the University could, and did, on several occasions, direct and control the activities of PEC. The natural, reasonable implication that arises when these and other facts are considered is that the parties intended to create an agency relationship." 217 Kan. at 288.

The University of Kansas Athletic Corporation, was originally chartered in 1925 as the University of Kansas Physical Education Corporation. KUAC's Restated Articles of Incorporation provide:

"This Corporation is organized NOT for profit, and the purposes for which it is formed are to develop intercollegiate athletic teams composed of students at the University of Kansas and to schedule and manage intercollegiate athletic contests, all in harmony with and in subjection to the general educational policy of the University of Kansas; to collect and own the receipts from such contests and such other moneys and goods as may be given or granted to the Corporation; to expend and disburse such receipts, gifts, and grants in the interests of the intercollegiate athletic program at the University of Kansas; to borrow money for the aforesaid purposes; to own and lease, either or both, such real and personal property, either or both, as is necessary, proper, or advisable for the aforesaid purposes; and, in general, to do any and all things incidental to or necessary, proper, or advisable for the carrying out of its purposes aforesaid."

Similarly, the Bylaws of KUAC delineate the relationship of the University to the corporation. Article I provides that the authority of the Athletic Board [the body which governs the no capital stock corporation] shall at all times "be exercised in a manner consistent with the principle of and to remain subject to the requirements of University control of varsity athletics, and, more particularly, at all times to remain subject to and be exercised in accordance with the control of the Chancellor and the Board of Regents."

The membership of the Board also highlights the University involvement in the corporate structure. The Board consists of twenty-one voting members, including two (2) faculty representatives appointed by the Chancellor, the Vice Chancellor for Student Affairs, the University Comptroller, the Executive Secretary of the University, six (6) faculty members appointed by the Faculty Senate, six (6) alumni appointed by the K.U. Alumni Association, the President of the Student Body, a chairperson of a Student Senate committee and two (2) students designated by the student body president. Two additional students, one male and one female, are selected by the Athletic Director to serve on the Board as non-voting members. In sum, all the members are associated with the University of Kansas and at least eleven (11) Board members, a majority, are full-time paid employees of a state-supported university.

According to the Bylaws, "the Board shall act as the policy-making body for the Corporation; shall determine, in general, the method of conducting the Corporation's business; and shall make recommendations to the Chancellor with regard to the Corporation's annual budget." KUAC Bylaws, Article I, Section 2. The day-to-day management of KUAC business is entrusted to an Athletic Director who is appointed by the Chancellor of the University, with the "approval of the Athletic Committee of the Kansas Board of Regents," and paid by the State of Kansas as an employee. Likewise, the other officers of the corporation are University employees; specifically, the Executive Secretary of the University, who is the Secretary of the Corporation, and the University Comptroller, who is the corporate Treasurer. However, it is the role of the Director in the management of the Corporation which is possibly most illustrative of the control exercised by the University over corporate operations. The Director's duties are established in Article III, Section 3 of the Bylaws as follows:

"The Director of Athletics shall be the chief executive officer of the Corporation and shall have the general powers and duties of management generally vested in the office of president of a corporation. The Director shall represent the Chancellor at all meetings of the Board and shall be an ex officio, non-voting member of the Executive Committee and of all other standing and ad hoc committees of the Board. He shall be responsible for the submission of each annual budget to the Board for its consideration and recommendations and for transmitting to the Chancellor those recommendations."

In view of the reasoning of the Court in Brown, supra, and the corporate structure of the KUAC, prescribed by its Articles of Incorporation, Bylaws and the Agreement between KUAC and the

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University, we have little difficulty concluding that the corporation is, indeed, "substantially controlled" by the University of Kansas within both the letter and the spirit of K.S.A. 76-721.

A far more difficult question arises from the phrase "books and records of such corporations" as used in K.S.A. 76-721. The KUAC has agreed to disclose to the newspaper the KUAC budget, financial summaries, monthly expenditure reports and the certified audit required by statute. The supporting documents, which may or may not be kept by the Corporation, have not been released.

The words "books and records" are nowhere defined in this or other statutes or in Kansas case law interpreting this section. Fortunately, however, the phrase "books and records" (or phrases of like import) as used in reference to corporate entities, has been the subject of considerable litigation arising from the common law and statutory right of corporate stockholders to inspect the books and records of their corporations. In the absence of other interpretive guidelines, reference to commonly understood meaning of such words in corporation law seems appropriate. It is, after all, a corporation which is the subject of this statute. Its financial records are kept in the ordinary course of business just as other corporations and in contrast to the bookkeeping practices of state and local government bodies, subject to other public record laws, which maintain financial data pursuant to the mandates of specific state statutes such as the Cash Basis Law, K.S.A. 10-1101 et seq., and the municipal warrants statute, K.S.A. 10-804.

We note in passing that Kansas law, K.S.A. 17-6510, provides for stockholder inspection of "the corporation's bylaws, stock register, a list of its stockholders, books of account, records of the proceedings of the stockholders and directors and the corporation's other books and records." K.S.A. 17-6511 extends this right of inspection to holders of bonds, debentures and other corporate obligations.

Courts of other states have construed the phrase "books and records" to mean all books and records. In Bank of Heflin v. Miles, 318 So.2d 697 (1975) stockholders sought access to all books and records of a bank. There, the Alabama Supreme Court said: "The applicable statute is not limited to 'relevant' books and records; it is to be liberally construed." Id. at 701. In Weigel v. O'Conner, 373 N.E.2d 421 (1978) the Appellate Court of Illinois held that a lower court erred by selectively

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refusing to allow stockholder access to requested documents, including

"television logs; contracts with advertisers; invoices issued to advertisers; cash receipt journals; cash disbursement journals; all records evidencing due bills or trade-outs received by or issued to the company; documents reflecting fees paid in connection with sales of broadcast time; documents reflecting loans by the company to individuals; minutes of director and shareholder meetings; all reports filed by the corporation with the Federal Communication Commission; records of all work ordered from and performed by the corporation for C.E.T., Inc. and records of payment for such work; records of all gifts or gratuities given by the corporation; and a current list of all shareholders." Id. at 424.

Finally, the Supreme Court of Oregon held that the Oregon stockholder access statute permitting inspection of corporate "books and records of account" was "not to be limited to 'books and records of account' in any 'ordinary,' literal or otherwise limited sense, but to be the subject of a broad and liberal construction so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply." Meyer v. Ford Industries, Inc., 538 P.2d 353, 358 (1975).

In short, in other states where the phrase "books and records" has been used in conjunction with statutes permitting shareholder access to corporate documents, the phrase has not been narrowly construed allowing the corporations to decide what records are to be exposed. In Kansas, we find nothing in the statute to suggest that the Legislature intended the disclosure of only some of the financial records of the corporations subject to K.S.A. 76-721. The phrase "books and records" is a legally accepted term of art, selected by the Legislature for use in the above-cited statute. We find no reason to believe the Legislature intended to vary the common understandings of that phrase when enacting 76-721. Therefore, we believe the records sought by the Kansas City Times are within the class of books and records of the corporations subject to K.S.A. 76-721.

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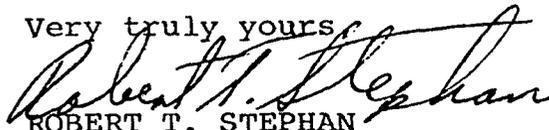
Finally, you suggest that by making the "books and records" of the corporations "public records", the legislature intended to bring the corporate records under the standards for disclosure contained in the Kansas Public Records Act, K.S.A. 1979 Supp. 45-201 et seq.

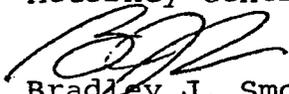
K.S.A. 76-721 makes no specific reference to the open records law, nor does it mention the "kept and maintained" standard of 45-201 applicable to documents of government agencies. In view of these facts, we see no reason to append 45-201 onto 76-721 for purposes of interpreting the meaning of public records as used in the latter statute. As you suggest, 76-721 may well create a different standard for "public records" in the hands of corporations from that standard in 45-201 regarding government agencies. Yet, it is not uncommon for the Legislature to express its desire for public access to records in more than one fashion. For example, K.S.A. 10-1117, a section of the Kansas Cash Basis Law, requires financial records of Kansas municipalities to be kept and made available for public inspection. K.S.A. 1979 Supp. 45-201 et seq., applies to the State of Kansas and most Kansas municipalities and K.S.A. 10-1117 also applies to municipalities, although the latter only covers financial records of the municipality.

We do not believe that the Legislature, by declaring certain corporate financial records to be "public records," intended the public to search for some other statute requiring these corporate records to be "kept and maintained" before public access would be permitted. Numerous statutes require documents of government bodies to be kept (see for example: K.S.A. 10-804 and 10-1117, noted above), yet the business affairs of corporations are not established by statute, hence, the records of corporations are kept by the dictates of ordinary business practice, rather than by virtue of legal mandate. In the case of 76-721 the Legislature has simply declared what corporate records are to be public and has by-passed the definitional phrasing of 45-201 as to what constitutes public records under that act.

Thus, it is our opinion that the vouchers, invoices, expense claims, purchase orders and other supporting documents for checks written by the KUAC are "public records" within the meaning of K.S.A. 76-721. Such records, if available, should be made available for public inspection upon request.

Very truly yours,


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