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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ROBERT T. STEPHAN
ATTORNEY GENERAL

September 19, 1980

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ATTORNEY GENERAL OPINION NO. 80- 201

Peter A. Motley, L.S.C.S.W.
Chairman, Alcohol Fund Advisory Committee
c/o Area Mental Health Center
156 Gardendale
Garden City, Kansas 67846

Re: State Departments; Public Officers, Employees--Open
Public Meetings--Committees and Subordinate Groups
Subject to Open Meetings Act

Synopsis: The Garden City/Finney County Alcohol Fund Advisory
Committee is subject to the Kansas Open Meetings Act,
even though the Advisory Committee neither receives
nor expends public funds, and is not supported in
whole or in part by public funds, because the Advisory
Committee is a committee or subordinate group of the
governing bodies of Garden City and Finney County, both
of which are bodies which do meet the public funding
test.

The Alcohol Fund Advisory Committee may meet in executive
or closed sessions, but only to discuss those topics
and under the conditions specified in K.S.A. 75-4319.

Members of a body subject to the Open Meetings Act who
knowingly fail or refuse to comply with the requirements
of the act are made personally liable for their actions
by K.S.A. 75-4320. Cited herein: K.S.A. 75-4317, K.S.A.
1979 Supp. 75-4318(a), K.S.A. 75-4319, 75-4320.

* * *

Dear Mr. Motley:

You request our opinion whether the Garden City/Finney County
Alcohol Fund Advisory Committee is subject to the Kansas Open

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Meetings Act, K.S.A. 75-4317 et seq. Specifically, you ask us to respond to three questions:

1. "Are we subject to the Open Meetings Law?"
2. "Whether we are or not, is there a mechanism by which we can meet in executive session?"
3. "Are our members personally liable under the act for open meetings act violations?"

You advise that the advisory committee serves in a voluntary capacity and neither receives nor expends nor is supported in whole or in part by public funds.

The Kansas Open Meetings Act was passed into law in 1972, with various sections added or amended in 1975, 1977, 1978 and 1979, and appears in the Kansas Statutes Annotated at 75-4317 et seq. The legislative declaration of policy upon which the law is based is set forth 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 affairs and the transaction of governmental business be open to the public." K.S.A. 75-4317(a).

Simply stated, the act requires governmental bodies to conduct the affairs of government in open and public meetings, as prescribed by K.S.A. 1979 Supp. 75-4318(a):

"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 part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot" (Emphasis added.)

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It is clear from the above that in order to be subject to the Act, the Garden City/Finney County Alcohol Fund Advisory Committee must be one of the above specified entities.

The Committee was created pursuant to a joint resolution of the Garden City and Finney County Commissions. Its purpose is specified in Section 2(A) of that resolution:

"Sanction and purpose. The Alcohol Fund Advisory Committee. . . will operate under the sanction of and be responsible to the Commission in all matters. The purpose of the committee, in its official capacity, shall be to make recommendation to the Commission for the budgeting and expenditures of 467 monies. The Commission having an ultimate responsibility for the budgeting and expenditures of 467 monies, shall retain the authority to accept or reject all proposals of [sic] recommendations made to them by the committee, by majority vote." (Emphasis added.)

The Committee's duties are specified in Section 2(H) of the Resolution:

- "(H) Duties. The Fund Advisory Committee shall have the following duties and responsibilities:
- "(1) To collect needs assessment, and resource inventory information to determine needed services and service priorities.
 - "(2) To issue requests for proposals for services identified above to be purchased by the city and county,
 - "(3) To evaluate submitted service proposals and to make recommendations to the Commission for the purchase of such services,
 - "(4) To evaluate the service of persons or agencies contracted with for services, or to establish a method of such an evaluation,
 - "(5) To generally supervise and coordinate alcoholism and abuse services in the city and county and to act as liaison with other persons or agencies involved in alcohol programs on the local, state, or federal levels."

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The Garden City/Finney County Alcohol Fund Advisory Committee is clearly a "committee" or subordinate group, with administrative responsibility, of the Garden City and Finney County Commissions, both of which are subject to the Open Meetings Act, under K.S.A. 1979 Supp. 75-4318(a).

Importantly, you advise that the Committee neither receives or expends nor is supported in whole or in part by public funds. However, this fact is not necessarily dispositive of the question whether the Committee is or is not subject to the Open Meetings Act, because the language of K.S.A. 1979 Supp. 75-4318(a) is somewhat ambiguous; it is not clear whether committees or other subordinate group of entities subject to the act must also receive or expend and be supported in whole or in part by public funds. That subsection provides, in pertinent part:

"[A]ll 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." (Emphasis added.)

In her exhaustive and thoughtful article, "The Kansas Open Meeting Act: Sunshine on the Sunflower State?" 25 Kan. L. Rev. 169 (1977), Professor Deannell R. Tacha discusses at length the problem presented by the ambiguity in the above-quoted language:

"The statutory description of groups covered [by the Kansas Open Meetings Act] has been a . . . source of confusion in the interpretation and application of the Kansas Act. . . .

"The grammatical structure of the description has raised questions about the inclusion of subordinate groups. It is clear that the Act applies to all legislative and administrative bodies of the state and political and taxing subdivisions thereof receiving, expending, or supported in whole or in part by public funds. One important question is whether the 'receiving or expending and supported in whole or in part by public funds' test applies only to the parent legislative and administrative bodies and agencies or whether the test applies to all of their subordinate groups individually. The

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correct grammatical reading is that the 'receiving . . . public funds' phrase is a restrictive, participial phrase modifying 'bodies and agencies.' It does not modify the descriptive phrase 'including . . . subordinate groups thereof.' If the section were interpreted as it grammatically should be, so long as the parent state or local body meets the public funding test, all subordinate groups would automatically be covered by the Act regardless of the degree or existence of public funding." (Notes omitted.) Id. at 186.

We are advised that, contrary to Professor Tacha's assertion, the correct reading of the sentence in question is that the "receiving" phrase modifies both the "bodies and agencies" phrase and the "including" phrase.¹ Whatever the correct grammatical interpretation of the language in question is, we submit that the apparent disagreement and attendant confusion as to its meaning and application reinforces the assertion that the language in question is ambiguous, reasonably susceptible to either of the following interpretations:

1. The phrase "including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof" is merely parenthetical, explanatory language making subject to the act's coverage subordinate groups of "legislative and administrative agencies of the state and political and taxing subdivisions thereof," only the latter of which must satisfy the public funding test; or,
2. The language "including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof" specifies entities which are independently subject to the public funding test.

1. That view was the unanimous opinion of five members of the Emporia State University English Department faculty, Ms. Faye Vowell, Dr. Jeremy Wild, Dr. George Thompson, Dr. William Cogswell, and Mr. William Elkins, whose assistance we gratefully acknowledge.

The first interpretation would make your Committee subject to the Open Meetings Act because it is a committee or subordinate group of an entity which meets the public funding test, even though it neither receives nor expends any public funds itself, and is not supported in whole or in part by public funds. Under the latter interpretation, your Committee would not be subject to the act because, although it is a committee or subordinate group of an entity which is covered by the act, your Committee does not independently receive or expend and is not supported in whole or in part by public funds, and would therefore be exempt from the act's coverage.

In Natural Gas Pipeline Co. v. Commission of Revenue and Taxation, 163 Kan. 458 (1947), the Kansas Supreme Court declared:

"When it appears the meaning of language used in a statute is indefinite, uncertain or ambiguous, the cardinal rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature in enacting it governs when that purpose and intent is ascertainable from the language to be found therein. (Hunziker v. School District, 153 Kan. 102, 109 P.2d 115). Another principle, of almost equal importance, is that when a statute is susceptible of more than one construction it must be given that construction which, when considered in its entirety, gives expression to its intent and purpose (Shumaker v. Kansas Labor Dept., 154 Kan. 418, 118 P.2d 550)." Id. at 466. (Emphasis added.)

Moreover, as the Kansas Supreme Court announced in Johnson v. Killion, 178 Kan. 154 (1955), "[i]t is fundamental that where a statute is designed to protect the public, the language must be construed in the light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out." 178 Kan. at 158-159. The Supreme Courts of Arkansas and Florida have both applied this rule of liberal construction in cases involving interpretations of those states' open meeting laws, holding that statutes enacted for the public benefit are to be interpreted most favorably to the public. See, e.g., Laman v. McCord, 432 S.W.2d 753 (1968) and Board of Public Instruction of Broward Co. v. Doran, 224 So.2d 693 (1969).

The Kansas Legislature's intent and purpose in the enactment of the Open Meetings Act is clear: all meetings of public agencies and bodies conducted for the discussion or transaction of governmental business or affairs shall be open and public to insure the people's right of access and right to know what their government is doing. Guided by the foregoing rules of statutory construction, we must construe the ambiguous language of K.S.A. 1979 Supp. 75-4318(a) in that way which best gives expression to the legislative purpose.

To construe the statute in question so as to exempt from the act's coverage those subordinate groups or committees of public bodies or agencies which are subject to the act because such groups or committees do not themselves satisfy the public funding test, i.e., because they do not receive or expend public funds and are not supported in whole or in part by public funds, does not, in our opinion, serve to effectuate or give expression to the purpose of the Open Meetings Act. It is appropriate, therefore, to conclude that the correct interpretation of K.S.A. 1979 Supp. 75-4318(a) is that the language "including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof," is merely parenthetical, explanatory language making subject to the act the committees and other subordinate groups of "legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof" of which only the latter entities must satisfy the public funding test.²

To conclude otherwise would permit the governing bodies of cities, counties and other public entities to establish "advisory committees" or other such subordinate groups for the conduct of their business or affairs out of public view. If those committees or groups do not satisfy the public funding test, and are exempt from the coverage of the act under the narrower interpretation of the statute, all meaningful discussion and debate of government business, to which the people would otherwise have access, could be carried on in the shadows of secrecy. Obviously, such a construction could be used to defeat or subvert the purpose of the act.

As Professor Tacha has correctly noted, this office has previously rejected the construction of the statute we have adopted today, taking the position that "each subordinate group, as well as the parent

2. We acknowledge that this interpretation may result in some overlap of coverage, by the inclusion of some committees or other subordinate groups, which themselves satisfy the public funding test, under either interpretation. Those committees or groups may appropriately be characterized simply as "bodies or agencies" subject to the act, although they may also be subordinate to another body or agency. Our liberal construction best effectuates the public policy enunciated in K.S.A. 75-4317 by extending the broadest possible coverage of the act to insure public access to the decision-making process.

state or local legislative or administrative body, must meet the public funds test." 25 Kan. L. Rev. at 186. She wrote:

"Attorney General Vern Miller made this interpretation clear in response to an inquiry regarding application of the open meetings law to state university faculty senate and parking and traffic board meetings:

"To the extent that there are committed, pursuant to this authority, to a faculty senate the conduct of university affairs and the action of its business, that senate may be deemed to be an "administrative body" of the state. It is further necessary, in order to fall within the scope of the act that the senate receive, or determine upon expenditures of, public funds." (Notes omitted.) Id., citing a letter opinion addressed to Max Bickford, July 18, 1972, p. 2.

We note, however, that General Miller expressed the contrary view, adopting the interpretation we announce here, in a 1973 opinion, Attorney General Opinion No. 73-235, published in Volume VIII, Opinions of the Attorney General, concluding that meetings of standing committees of the Marysville City Council should be open to the public as required by the open meetings law. The General noted that

"these committees, each composed of three members, investigate various proposals referred to them by the mayor and council, meeting usually informally in the home of a committee member or at the site of a project under consideration. The function of the committees is purely advisory, and they have no power to bind the city, to receive or expend public funds or the like.

....

"K.S.A. 75-4318 specifically enumerates 'committees, subcommittees and other subordinate groups' as subject to the act. The study committees about which you inquire fall squarely, in our view, within this statutory language. Such committees meet solely for the conduct of the affairs of the city, in that their assignment is to study and discuss public questions assigned to it by the council, and to formulate such recommendations for council consideration as they may choose. The recommendations and views of such committees may often be accorded great weight in the

consideration of the matters which are brought before the entire council. To exclude the public from such meetings, at which assigned public questions are discussed by duly constituted subordinate committees of members of the governing body would violate, in our view, both the letter and the spirit of the open meeting law." (Emphasis added.) Opinions of the Attorney General, Vol. VIII, pp. 1033-1034.

In contrast, former Attorney General Curt Schneider concluded that "[a]n advisory body established by the mayor of a city, which is vested with no administrative powers of the city and which neither receives nor expends any public funds, and which is not supported in whole or in part by public funds, is not subject to the Kansas open meeting law." Attorney General Opinion No. 76-140, p.1.

To the extent the earlier opinion of General Miller, and the opinions of General Schneider conflict with the conclusion herein expressed, we respectfully record our disagreement and disaffirm these opinions, for the reasons discussed at length above.

Accordingly, we conclude that all meetings conducted by the Alcohol Fund Advisory Committee must be open unless, pursuant to K.S.A. 75-4319, the Committee desires to conduct an executive or closed session. That statute describes certain procedures which must be followed scrupulously before any private session may be held. Subsection (b) of that statute specifies an exclusive list of subjects which may be discussed at closed sessions, as follows:

- "(1) Personnel matters of nonelected personnel;
- "(2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship;
- "(3) consultations with the representative of the body or agency in employer-employee negotiations;
- "(4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;

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"(5) matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a public hearing if he or she so requests; and

"(6) preliminary discussions relating to the acquisition of real property."

In addition, subsection (c) of the statute warns:

"No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act."

Therefore, in answer to your second question, there is a mechanism by which you may meet in executive or closed session. However, you may not hold a closed session unless all requirements of K.S.A. 1979 Supp. 75-4319 are fulfilled.

Your final question concerns whether members of your committee are personally liable for violations under the open meetings law. K.S.A. 75-4320 specifies, in pertinent part:

"(a) Any member of a body or agency subject to this act who knowingly violates any of the provisions of this act or who intentionally fails to furnish information as required by subsection (b) of K.S.A. 75-4318 shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed five hundred dollars (\$500) for each violation." (Emphasis added.)

Pursuant to this section, members of your committee are potentially personally liable should they knowingly violate or participate in violations of the act.

In conclusion, it is our opinion that the Garden City/Finney County Alcohol Fund Advisory Committee is subject to the Kansas Open Meetings Act. This is true even though the Advisory Committee does not receive or expend public funds and is not supported in whole or in part by

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public funds, because the Committee is a committee or subordinate group of the governing bodies of Garden City and Finney County, both of which are bodies which do meet the public funding test. As a body subject to the act, the Alcohol Fund Advisory Committee may meet in executive or closed sessions, but only to discuss those topics and under the conditions specified in K.S.A. 75-4319. Finally, members of a body subject to the act who knowingly fail or refuse to comply with the requirements of the act are made personally liable for their actions by K.S.A. 75-4320.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas

Steven Carr
Assistant Attorney General

RTS:BJs:SC:pf