



STATE OF KANSAS

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March 4, 1981

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ATTORNEY GENERAL OPINION NO. 81-62

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

Re: State Departments; Public Officers, Employees--  
State Historical Society--Sales of Extra Copies of  
State Publications

Synopsis: The State Historical Society may sell publications donated to the Society by the state pursuant to K.S.A. 75-2703. Any sale must comply with the competitive bid requirements of K.S.A. 1980 Supp. 75-3739. Proceeds from the sale of such publications must be deposited in the state treasury. Cited herein: K.S.A. 75-2701, 75-2702, 75-2703, 75-2704, 75-3036, K.S.A. 1980 Supp. 75-3739, K.S.A. 75-4215, Kan. Const., Art. 2, §24.

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Dear Mr. Snell:

You advise that the State Historical Society (hereinafter, "Society") has accumulated a burdensome quantity of excess state publications. These publications were donated by other state agencies and institutions to the Society pursuant to K.S.A. 75-2703. This section states:

"To enable the society to augment its collections, by effecting exchanges with other societies and institutions, thirty (30) bound copies each of the several publications of the state, and of its societies and institutions, except the reports of the supreme court and the statutes and session laws, shall be and the same are hereby donated to said society as they shall be issued the same to be delivered to the society by the

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secretary of state or other officer having custody of the same--to include also for deposit in its collections one (1) set of all the publications of the state heretofore issued, including the supreme court reports, and six (6) sets of the general statutes and session laws." (Emphasis added.)

The Society has been unable to exchange these remaining donated publications, and you ask if these publications can only be exchanged or if they may be sold. Although K.S.A. 75-2703 suggests the purpose of the donation is to permit exchanges to augment the Society's collections, this statute does not expressly authorize or forbid the sale of those publications. Indeed, this section does not call for any action at all to be undertaken by the Society, except to retain 1 copy of the supreme court reports and 6 copies of the statute books for its permanent collections; it merely requires the donation of these duplicate materials to the Society by the appropriate state officer. This section itself does not grant authority to the Society to exchange these or any other materials, nor does it require the exchange of these publications. In short, the initial phrase of this section is a general statement of the legislative purpose. Whether such general statement of intent should operate to restrict the Society's other statutory powers and duties, is to be determined by reference to other statutes which relate to the same subject matter. Clark v. Murray 141 Kan. 533, 537 (1935).

K.S.A. 75-2703 was originally part of the 1879 law designating the Historical Society, then a private corporation, a state agency and trustee for state historical property. See L. 1879, ch. 167 §§1-3. Although this section, as well as the other sections, has been amended in the century since its enactment, the above underscored language has remained unchanged. Likewise unchanged in substance is the pertinent language of Section 1 of the 1879 statute, now found at K.S.A. 75-2701, which provides in relevant part as follows:

"The state historical society, heretofore organized under the incorporation laws of the state, shall be the trustee of the state, and as such 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

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by the society of its publications, duplicate materials, or materials outside its fields of collection, that it may have or obtain."

Also, K.S.A. 75-2704, after providing that the Society's secretary is not to permit files and records to be removed, states that, "this shall not prevent the removal of materials for temporary purposes, or the sale or exchange of materials as authorized in K.S.A. 75-2701 and 75-2702." (Emphasis added.)

Hence, the 1879 Act, as amended, when viewed in all of its parts, authorizes the Society to sell, as well as exchange excess materials outside the fields of collection. Clearly, some copies of such donated state publications can neither be sold nor exchanged. However, beyond the few copies retained for the Society's collection, we are inclined to view the statement of purpose in 75-2703 as directory rather than mandatory. In Shriver v. Board of County Commissioners, 189 Kan. 548, 556 (1962), the Kansas Supreme Court enunciated the following principles regarding directory and mandatory statutes:

"Generally speaking, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

In Paul v. City of Manhattan, 212 Kan. 381, 385 (1973), it was noted that "[a] critical feature of mandatory legislation is often a provision for the consequences of non-compliance." Applying the above-stated rules of construction, it is our opinion that the reference to the exchange of donated publications set forth in K.S.A. 75-2703 is directory only, and the Society is free to sell or exchange duplicate publication pursuant to 75-2701.

This conclusion is buttressed by the overriding purpose expressed in 75-2703, namely, the providing of, and exchange of state publications to, the Society is "[t]o enable the society to augment its collections." Where the Society has attempted to exchange these state publications with other institutions or societies and has been unsuccessful, the continued storage of these materials does little if anything to help the Society augment its collections. The Society was never intended as a repository for duplicate agency publications, rather

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the donations were provided to assist the society in enhancing its collections, a goal which is hardly furthered by the waste of shelf and floor space when the sale or exchange of excess publications (with private persons, not societies or institutions) might increase revenues of the State of Kansas and the Society, possibly for use in purchasing additions to the Society's collections. Thus, we would conclude that the sale of excess state publications delivered to the Society pursuant to K.S.A. 75-2703 is lawful, where exchange of such publications is not possible.

Your second question concerns how the Society can sell these publications; specifically, whether a "flea market" technique could be used. Although, no statute specifically relating to property of the Historical Society requires it to be sold in a designated fashion, other statutes relating to the purchase or sale of property by state agencies are applicable. Specifically, K.S.A. 1980 Supp. 75-3739 requires the use of competitive bids for sale, as well as purchase, of goods and services. Without repeating the entire section, the competitive bid statute generally requires competitive bids for the sale of all state property, except where authorization for sale by other means has been obtained from the Director of Purchasing. Depending on the value of the property to be sold, and the nature of the goods and market conditions, an open market sale may be permissible. However, competitive bids are the general rule and exceptions require approval by the Division of Purchasing.

Your final question was whether the Society may retain the proceeds of these sales to be used to purchase new materials or whether they must be deposited in the state general fund. It is our opinion that these proceeds must be deposited in the state treasury to the credit of the state general fund.

K.S.A. 75-4215(a) states the general rule that:

"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."

The significance of this section when applied to the Society is complicated by the Society's unique status as both corporation and state agency.

This office has on two prior occasions rendered opinions that dealt with this question in the context of Society activities. In Attorney General Opinion No. 78-225, former Attorney General Curt Schneider concluded that the Society could not retain proceeds from an admission fee to a craft fair conducted on state property. That opinion was modified by Attorney General Opinion No. 79-202 in which we concluded that the Society could keep proceeds from a native art and music festival

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conducted on state property by the Society in its private corporate status. Although the festival was held on state property, there was practically no other state involvement. The festival was financed, planned, coordinated and insured by private sources. Involvement by state employees was marginal and restricted to contribution of efforts on "their own time." We concluded that this was an example of the Society acting in its corporate capacity and not its state agency capacity. The proceeds were not public funds and therefore not to be deposited in the state treasury.

Thus, the applicability of K.S.A. 75-4215 has been based on whether the Society was acting in its corporate or agency capacity. In turn, this distinction has been based on the character and origin of the resources used in the activity.

The proposed sale of state donated publications contrasts sharply with the native art and music festival discussed above. The income producing activity here, unlike the largely private native art and music festival, is essentially public. These publications were created and provided at public expense and donated to the Society by agencies of the State. On these facts, we would conclude that the resources to be sold continue to be public, hence the donations to the Society are held in the Society's capacity of a state agency. It follows then, under the reasoning of Attorney General Opinion No. 79-202, that the proceeds of these publications must be deposited in the state treasury, and since these moneys have not been earmarked for deposit in any special fund, they must be credited to the state general fund, as required by K.S.A. 75-3036.

Finally, the legislature expressed an interest that the Society not be permitted to use funds obtained in its state agency capacity as it can use funds obtained in its corporate capacity. K.S.A. 75-2702 states in pertinent part:

"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."

This section restricts the Society in its use of public funds in a way it is not restricted as to its corporate funds. See Kansas Constitution, Article 2, Section 24; Attorney General Opinion No. 79-202, pp. 5-6. The purpose for K.S.A. 75-2703 is to permit the Society to augment its collections. However, to permit the Society to convert state donated publications to cash and use the proceeds as

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the Society's executive committee might choose is to treat donations made under K.S.A. 75-2703 as roundabout cash appropriations. In our judgment, K.S.A. 75-2702 and Article 2, Section 24 of the Kansas Constitution forbid this result.

To conclude, the society may sell excess publications donated to it by the state under K.S.A. 75-2703. Any sale must comply with the competitive bid requirements of K.S.A. 1980 Supp. 75-3739 and the proceeds of the sale must be deposited in the state treasury.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Bradley J. Smoot  
Deputy Attorney General

RTS:BJS:hle