



STATE OF KANSAS

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August 9, 1982

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ATTORNEY GENERAL OPINION NO. 82- 172

The Honorable Neal D. Whitaker  
State Representative, Ninety-First District  
359 South Hydraulic  
Wichita, Kansas 67211

Re:           Laws, Journals and Public Information --  
              Records Open to Public -- Application of  
              Public Records Laws to Wichita State  
              University Endowment Association

State Institutions -- State Educational  
Institutions; Management Operation -- Books  
and Records of Wichita State University  
Endowment Association

Synopsis:     The Wichita State University Endowment  
              Association is a private nonprofit corp-  
              oration which is not an "agency" of the  
              State of Kansas for purposes of the Kansas  
              Public Records Act, nor is it substantially  
              controlled by Wichita State University  
              within the meaning of K.S.A. 76-721.  
              However, otherwise public records in the  
              custody of the Association retain their  
              character as public records and must be  
              made available in accordance with K.S.A.  
              45-201 et seq. Cited herein: K.S.A.  
              17-6804, 17-6805, 17-7504, 45-201, 76-3a07,  
              76-3a09, 76-3a16, 76-721, 26 U.S.C.A. §170.

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Dear Representative Whitaker:

You inquire of this office regarding the application of the Kansas Public Records Act, K.S.A. 45-201 et seq., to the Wichita State University Endowment Association (WSUEA).

We note that you do not ask about application of the Act to specific records. Nor does your question involve issues of freedom of the press or prior restraint. As a matter of law, the press has no greater right to access to government information than the public generally. Pell v. Procunier, 417 U.S. 817, 834-35, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); McLaughlin v. Philadelphia, 348 A.2d 376, 379 (Pa. 1975). And, if the public is to have access to government records, such is a matter of statutory or common law rather than constitutional law. See Houchins v. KQED, Inc., 438 U.S. 1, 15, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978); Stephens v. Van Arsdale, 227 Kan. 676, 687, 608 P.2d 972 (1980); State v. Stauffer Communications, Inc., 225 Kan. 540, 592 P.2d 891 (1979). Hence, whether the records of endowment associations organized as nonprofit corporations should be public is a matter for legislative determination, and whether that determination has been made, and is adequately expressed in K.S.A. 45-201 et seq., as currently enacted, is the entire thrust of your query. Accordingly, our response represents our view of how the Kansas courts would construe the cited statutes.

However, in addition to the above cited Act, we feel it necessary, in light of prior opinions of this office, to consider K.S.A. 76-721, an act requiring public access to books and records of corporations "substantially controlled" by and contracting with institutions under the Kansas Board of Regents. See Kan. Att'y Gen. Op. Nos. 80-239 and 80-118. We note in passing that these prior opinions related to the Kansas University Endowment Association and the Kansas University Athletic Corporation, respectively. In the former, we opined that K.S.A. 76-721 was inapplicable to the endowment association, but in the latter, the same statute was applied to the athletic corporation. We emphasize that in neither case did we find the Kansas Public Records Act to be applicable to such non-profit corporations.

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The Kansas Public Records Act, K.S.A. 45-201 et seq., by its terms, applies only to "official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained." K.S.A. 45-201, emphasis added. Based on the legal status of WSUEA, the case law and prior opinions of this office, we have little hesitancy concluding that WSUEA is not an agency of the State of Kansas or a municipality within the meaning of K.S.A. 45-201 et seq.; hence, its records are not available for public inspection under that statute. Moreover, we believe the Kansas courts would not find K.S.A. 76-721 applicable to the Association, as it is not substantially controlled in its corporate decision-making by the University or the Kansas Board of Regents. In our judgment WSUEA is not so dissimilar in its corporate structure, mission or functional relationship from the Kansas University Endowment Association [considered in Att'y Gen. Op. No. 80-239] as to require a different conclusion.

The Wichita State University Endowment Association is a private, nonprofit corporation organized under the corporation laws of the state of Kansas. The Association is recognized under federal law as a §501(c)(3) tax exempt organization substantially supported by private donations and operating for the benefit of a publicly owned and operated university. I.R.C. §170(b)(1)(A)(iv). This distinguishes the Association for purposes of the Internal Revenue Code from the University itself [§170(b)(1)(A)(ii)] or other governmental units [§170(b)(1)(A)(2)]. The Association receives no public funds, nor does it share in state appropriations as part of WSU's budget. All Association expenses are paid with income derived from gifts and bequests. No fiscal or other reports are required by the state (other than annual corporate reports required of all private nonprofit corporations and filed with the Secretary of State pursuant to K.S.A. 17-7504), and the transactions involving the endowment funds have not been audited by the Legislative Post Audit Division. Civil service purchasing and budget laws which apply to the State, its agencies and institutions, have not been applied to the Association.

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The Association was organized in 1965, and its membership is currently composed of persons who have contributed to the endowment of WSU. See WSUEA By-laws, Article V. Selected from among the membership of the Association is a body known as the Board of Governors, which also includes certain ex-officio members. The Board exercises control and management responsibilities for the corporation. As a not-for-profit corporation, the Association was created by private citizens, rather than by the act of a governmental body, and may be dissolved as other nonprofit corporations in accordance with K.S.A. 17-6804 and 17-6805. Unlike the Kansas University Endowment Association where the ex-officio members of the corporate governing body lacked the right to vote, all members of the Board of Governors of WSUEA may vote.

Article II of the Association's Articles of Incorporation calls for the board of Governors to be composed of not less than ten nor more than seventy-five members. Presently seventy-three persons serve on the Board, including the following ex-officio members: the Governor of Kansas, an official representative of the Board of Regents, the President of WSU, the chairperson of the Board of Trustees of WSU, President of the WSU Alumni Association and the Executive Secretary of WSUEA. However, even with a quorum requirement of only ten members, the Board members who also serve as state officers or employees amount to no more than half the quorum requirement. With regard to the Executive Committee of WSUEA created by Article III, Section 1 of WSUEA By-laws only the University president sits on the fourteen member panel as a state employee. Under such circumstances, we find the voting privilege of a few state officials and employees to be insufficient in itself to bring the corporation under the state public records laws.

There are at least two additional factors pertinent to your inquiry which distinguish WSUEA from the Kansas University Endowment Association. First, WSU has a Board of Trustees which exercises certain statutorily assigned endowment powers. On July 1, 1964, the University, which had been a municipal institution, was transferred to the state's higher education system under the management of the Kansas Board of Regents. Title to all real estate, buildings, furnishings, fixtures and equipment comprising the educational facilities

of the university was transferred pursuant to statute to the Kansas Board of Regents. K.S.A. 76-3a09. Thereafter, the Board of Regents assumed full control over the management and operation of the university.

The governing body of the university, also known as the board of regents when the school was municipally owned, became the Board of Trustees of the University of Wichita. Board members are appointed by the governor pursuant to K.S.A. 76-3a16 and charged with management of certain endowment properties and the proceeds of a municipal tax levy authorized by K.S.A. 76-3a07. The trustees, however, may not disburse funds under their control without the prior approval of the Kansas Board of Regents. K.S.A. 76-3a16.

Because of the unique history of Wichita State University and its transfer into the state system of public higher education, the institution is twice endowed. Of the two endowments, one was created by and is operating under statute. Members of its governing body are appointed by the governor and its expenditures are regulated by agencies of the state. The other is a private nonprofit corporation, yet both share the common purpose of providing financial support for the university. It is not then entirely surprising that in furtherance of their common purpose, the two entities have made arrangements to share personnel and office space. It is this fact which gives rise to a third characteristic distinguishing WSUEA from KUEA. Unlike KUEA, which owns its own building and whose personnel have no official connection with the university as officers or employees, WSUEA shares office space with the staff of the Board of Trustees. That space is on public property (Morrison Hall) and is not leased under contract by the endowment. That, however, is not to say that WSUEA does not contribute to the trustees for use of the space. In the fiscal year ending June 30, 1982, WSUEA contributed \$141,050 to the Board of Trustees, paid \$28,000 of the Board's expenses directly and expended \$74,400 for its own operating expenses. Moreover, the executive secretary of WSUEA is also the executive vice president of the Board of Trustees and approximately one-half his salary is paid by a grant from WSUEA, as he shares his time between the two positions.

This sharing of space and personnel creates an entanglement between the university trustees and WSUEA which makes the determination of the Association's status as an agency or substantially controlled corporation more difficult than the determination made in Attorney General Opinion No. 80-239. However, applying the same analysis and cases cited in the prior opinion, we can only conclude that the entanglements are not of such legal significance as to make WSUEA an "agency" of the state of Kansas or a corporation substantially controlled by the university.

In addition to the cases cited in Kansas Attorney General Opinion No. 80-239 at 8 and 9, which are herein adopted by reference, we call your attention to a recent federal court case interpreting the Freedom of Information Act. In Irwin Memorial Blood Bank of the San Francisco Medical Society v. American National Red Cross, 640 F.2d 1051 (9th Cir. 1981) disclosure of the records of the American National Red Cross was sought under the FOIA. The only issue involved was whether the Red Cross was an agency for purposes of the FOIA. The Federal Act defines "agency" to include a "government controlled corporation," and the courts examine the characteristics of the corporation to see if they reflect substantial government control, supervision or decision-making authority. As such, an analysis under the FOIA resembles a combined analysis of the two Kansas statutes under consideration. In considering the application of FOIA, the Court noted that the Red Cross was permitted to use buildings belonging to the United States, with the Red Cross being responsible for maintenance and upkeep. The Red Cross was also required to transmit to the Secretary of Defense a report of its receipts and expenditures, which was audited by the Department of Defense and then forwarded to Congress.

In addition, the President of the United States appointed eight of the fifty members of the Board of Governors of the Red Cross, with one of the presidential appointees serving as the principal officer of the corporation. The other seven appointees were officials of departments and agencies of the federal government. Despite these indices of federal involvement, the Court held that the Red Cross was not an agency of the Federal Government. The Court noted that "[t]he characteristics that indicate federal control must

be viewed in connection with the factors that indicate the contrary." 640 F.2d at 1057. The factors which indicated the contrary included the purposes of the organization, its organizational position within the International Red Cross, the availability of membership to any citizen and the voluntary nature of its workers.

Applying a similar analysis and one which we used in considering the Kansas University Endowment Association we reach the following conclusions:

(1) The WSU Endowment Association performs no government function. The Association makes investments to benefit the educational undertakings of the University, but the Association holds title to the contributions made to the Association. Such funds are derived from private donations and are not from tax dollars or other public moneys. As this office concluded in the KUEA opinion, investment of private donations by the endowment association is not a government function.

(2) The WSU Endowment Association is not dependent on the State of Kansas for operation financing. Although the Association's office is in a state-owned building, the Association donates a considerable sum of money to the Board of Trustees and pays more than its share of the office operating expenses.

(3) The WSU Endowment Association is not "substantially controlled" or regulated by the State of Kansas or by state employees. By contrast, in Attorney General Opinion No. 80-118 the Kansas University Athletic Corporation (KUAC) was considered to be "substantially controlled" by the University for purposes of K.S.A. 76-721. The corporate structure of the KUAC provides that a majority of the governing body consists of fulltime paid employees of the state-supported university. The corporate charter and by-laws also require the governing body to be "subject to and exercised in accordance with the control of the Chancellor and Board of Regents." State courts have found that a similar corporate structure indicates the corporation is "substantially controlled" by the state. See, Brown v. Wichita State University, 217 Kan. 279, 540 P.2d 66;

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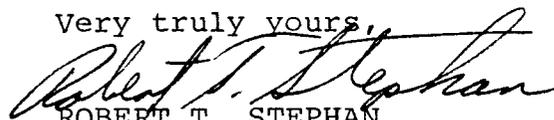
217 Kan. 661, 538 P.2d 713 (1975), rev'd and rem'd on rehearing: 219 Kan. 2, 547 P.2d 1015 (1976), Carl v. Board of Regents of University of Oklahoma, 577 P.2d 912 (Okla., 1978), Greene v. Athletic Council of Iowa State University, 251 N.W.2d 559 (Iowa, 1977), North Central Association of Colleges v. Troutt Brothers, Inc., 548 S.W.2d 825 (Ark., 1977).

In the KUEA opinion, this office concluded that the State of Kansas did not have "substantial control" of the KUEA. The WSU Endowment Association has a corporate structure much the same as the KUEA and unlike those organizations considered in the above cases. The actual control of the WSU Endowment Association is not held by those few members of the Board of Governors who are state officers or employees. As with the KUEA, the WSU Endowment Association is not subject to the control or supervision of the University or the Kansas Board of Regents.

(4) The WSU Endowment Association is not a creature of government. It was not created by statute and does not exercise governmental powers.

Based on the foregoing facts and judicial expressions, we can only conclude that WSUEA is not subject to either K.S.A. 45-201 et seq., or K.S.A. 76-721. The Association is not an agency of the state or a corporation substantially controlled by Wichita State University. Since you have not inquired about application of the public records act to records of the Board of Trustees of WSU, we express no official opinion regarding that subject. However, we feel obliged to reiterate the distinctions between the two endowments noted supra at 4 and 5. Further, we must caution that records which are the property of the university or the Board of Trustees which may be recognized as public records under the Act retain their status as public records, even if mingled with records of WSUEA. Such records must be made available in accordance with K.S.A. 45-201 et seq.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Bradley J. Smoot  
Deputy Attorney General

RTS:BJS:may



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August 9, 1982

The Honorable Neal D. Whitaker  
State Representative, Ninety-First District  
359 South Hydraulic  
Wichita, Kansas 67211

Dear Representative Whitaker:

Enclosed please find your requested opinion regarding the Wichita State University Endowment Association. We are mailing copies of the opinion to other interested persons including the Wichita Eagle-Beacon and counsel for the Association, as both submitted written arguments regarding the issues presented.

Allow me to take this opportunity to again urge the legislature to enact a clear and comprehensive public records law. I have always felt that the legislature, not this office or the courts, should determine the scope of public access to government books and records. So long as the present law remains on the books, we will have to enforce our opinions on a case by case basis in the courts, and it will be legal distinctions, rather than public policy considerations, which will determine the outcome. Confusion as to the scope of the act benefits no one.

Very truly yours,

A handwritten signature in cursive script that reads "Robert T. Stephan".

Robert T. Stephan  
Attorney General of Kansas

RTS:hle

cc: Davis Merritt  
Clark D. Ahlberg  
Robert L. Howard