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July 25, 1983

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ATTORNEY GENERAL OPINION NO. 83- 112

Eugene C. Hegarty
State Bank Commissioner
700 Jackson
Topeka, Kansas 66603

Re: Banks and Banking -- Banking Code; Supervision --
Confidential Nature of Examination Records

Synopsis: K.S.A. 9-1712 provides that all information gathered or recorded by the bank commissioner in the investigation or examination of any bank shall be confidential, and not disclosed except under certain limited circumstances. Under K.S.A. 9-1714, the commissioner may appoint a special deputy to take charge of a bank which is being conducted in an unsound manner, and any records, memoranda or correspondence by or to such a deputy are part of an on-going investigation, and so come under the terms of K.S.A. 9-1712. The Kansas Open Records Act, K.S.A. 45-201 et seq., accordingly does not apply, since such material is specifically closed by law and so excluded from the Act [K.S.A. 1982 Supp. 45-201(b)(5)]. Cited herein: K.S.A. 9-1701, 9-1712, 9-1714, 9-1903, K.S.A. 1982 Supp. 45-201, 1983 House Bill No. 2327.

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Dear Commissioner Hegarty:

On behalf of the Kansas State Bank Department, you request our opinion on a question concerning the scope of K.S.A. 9-1712, which pertains to the confidentiality of certain information collected by your office. Specifically, you inquire whether materials generated through the efforts of a special deputy appointed under K.S.A. 9-1714 would be included under the statute's coverage, and, if so, what effect the Kansas Open Records Act, K.S.A. 45-201 et seq., has in such a situation.

Contained in the original act which established the present state banking code (L. 1947, ch. 102), K.S.A. 9-1712 states as follows:

"All information which the commissioner shall gather or record in making an investigation and examination of any bank or trust company shall be deemed to be confidential information, and shall not be disclosed by the commissioner or any assistant, or examiner, or employee thereof, except to the attorney general when in the opinion of the commissioner the same should be disclosed, and except as otherwise provided in this act."

The term "commissioner" used in the statute refers to the state bank commissioner, who is the chief executive officer of the state bank department which administers those statutes regulating the affairs of Kansas banks. Among such statutes is K.S.A. 9-1701, which provides for the examination of Kansas banks at least once every year for the purpose of determining the institutions' soundness. Whenever the commissioner determines that any bank is being operated in an unlawful or unsound manner, he may appoint a special deputy bank commissioner to take charge of the management of the bank and correct, if possible, the undesirable conditions. K.S.A. 9-1714. While such a step may lead to an insolvency proceeding, under the statutes it is separate and distinct, and is not tantamount to such a result. See K.S.A. 9-1903 and State v. Wilson, 108 Kan. 641 (1921).

Examinations made under K.S.A. 9-1701 are in writing, and contain a "full, true and careful statement of the condition" of the bank. Given the wording of K.S.A. 9-1712, there can be little question but that such examination reports are confidential information. As such, they are not within the scope of the Kansas Open Records Act, K.S.A. 45-201 et seq., for that act exempts from inspection by the public any "records specifically closed by law." K.S.A. 1982 Supp. 45-201(b)(5). While the act was totally overhauled by the 1983 Legislature in an act which does not take effect until January 1, 1984 (1983 House Bill No. 2327), even the new enactment retains the exemption for records closed by operation of statute. Section 7(a)(1). Therefore, our conclusion will likely remain unchanged after the effective date of the new act.

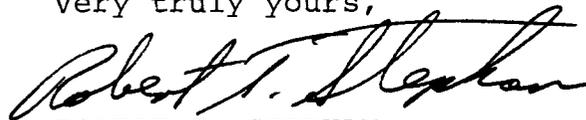
It remains to determine whether information obtained by a special deputy appointed under K.S.A. 9-1714 also comes under the provisions of the confidentiality statute. Initially, there can be little doubt that the operation of a bank under such conditions would require letters, reports, memoranda and other documents showing the current financial

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picture. Further, since the deputy serves under the direction of the commissioner, any efforts to resolve the situation which necessitated his appointment would also require correspondence and orders from the state banking department. Taken together, all of this material would be produced either by the commissioner or his employees or agents in the course of a continuing examination and investigation of the bank's affairs, based on information obtained previously which indicated unlawful or unsound conditions. The same considerations which require ordinary examinations to be closed, such as prevention of commercial advantage to competitors and retention of confidence by the public, would apply even more in this situation, where a full-fledged investigation is in progress. The situation is analogous to that in the case of Atchison, T. & S.F. Ry. Co. v. Kansas Commission on Civil Rights, 215 Kan. 911 (1974), where investigative records were held to be outside the scope of the Open Records Act, although the court's holding there hinged on the phrase "required to be kept and maintained," rather than on a confidentiality statute.

In conclusion, K.S.A. 9-1712 provides that all information gathered or recorded by the bank commissioner in the investigation or examination of any bank shall be confidential, and not disclosed except under certain limited circumstances. Under K.S.A. 9-1714, the commissioner may appoint a special deputy to take charge of a bank which is being conducted in an unsound manner, and any records, memoranda or correspondence by or to such a deputy are part of an on-going investigation, and so come under the terms of K.S.A. 9-1712. The Kansas Open Records Act, K.S.A. 45-201 et seq., accordingly does not apply, since such material is specifically closed by law and so excluded from the Act [K.S.A. 1982 Supp. 45-201(b)(5)].

Very truly yours,



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RTS:BJs:JSS:hle