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May 9, 1985

ATTORNEY GENERAL OPINION NO. 85- 49

Colt Knutson
Riley County Attorney
6th and Humboldt, Suite 1
Manhattan, Kansas 66502

Re: State Departments; Public Officers, Employees --
Public Officers and Employees -- Open Public Meetings;
Bodies Subject Thereto; Not-for-Profit Corporations

Synopsis: A not-for-profit corporation is subject to the Kansas Open Meetings Act if it: (1) receives public support in its operations such as public funds or the use of public facilities; and (2) acts as a governmental agency in providing services to the public that would otherwise be provided by state or local government. Additional factors include the degree of control which a government body has over the activities of the corporation, the degree to which the corporation's directors are selected by a government body, and whether, in the absence of the legal relationship it has with a government body, the corporation could independently exist. Upon applying these factors to the Memorial Hospital Association, Inc., it is our opinion that the association is subject to the provisions of the act, and must hold meetings for the conduct of its affairs in public, subject to the provisions of the act. Cited herein: K.S.A. 75-4318; 75-4319.

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Dear Mr. Knutson:

As County Attorney for Riley County, Kansas, you request our opinion concerning the application of the Kansas Open Meetings Act to the Board of Directors of the Memorial Hospital Association, Inc. (hereinafter "the association"). Questions have been raised whether, following a reorganization of the joint body which oversaw the operations of the hospital, the Open Meetings Act applies to both of the new bodies which were created. While the association has taken the position that the act does not apply to its meetings, the second entity created by the reorganization, the Board of Trustees of Memorial Hospital, Inc. (hereinafter "trustees"), observes the act in its proceedings. Acting on behalf of several interested parties, you accordingly seek our opinion.

Included with your request were a number of documents which provide a factual background to your inquiry, including a memorandum and stipulation of facts from the association's attorney and statements of position from a local radio station and the local newspaper. From these documents, we believe the following facts can be taken as undisputed:

1. The association is a not-for-profit corporation organized and operated under the laws of the state. Under by-laws which have been in effect since November, 1984, it is governed by a board of directors who are selected by other board members. However, several, if not all, of the present board members were originally appointed by the County Commissioners of Riley County prior to the time the joint board (see paragraph 3 below) split into the board of directors of the association and the trustees.
2. The board of trustees are presently appointed by the county commission and are responsible for allocating the proceeds of a mill levy which the county imposes for the upkeep of the physical facilities of Memorial Hospital, which is owned by Riley County. Mill levy money represents about 5% of the operating budget for the hospital.
3. Prior to November, 1984, only one board was in charge of the operations of the hospital. This joint board was composed of persons who served as both trustees and as directors of the association. All were appointed by the county commission, and met publicly. The split was achieved by the joint board itself, with several members elected to

the board of directors of the association and the rest remaining as trustees.

4. The joint board managed all of the affairs of the hospital from March, 1982 until November, 1984, when the split occurred. In December, 1984, the directors and the trustees entered into a lease agreement for the hospital, under the terms of which the association pays an annual rent of one dollar. The trustees, and through them, the county commission, retains ultimate control over the hospital through provisions in the lease which provide for remedies if the lessee (i.e. the association) is deemed to be in default through the occurrence of various events. According to newspaper accounts, the lease had been in the process of being drafted since at least March, 1984. Manhattan Mercury, March 22, 1984. This same article quotes one of the county commissioners as saying that the split of the two boards, which was formally approved at a meeting that day, would allow the association to hold private, rather than in open, meetings.

Given the above facts, it remains to determine whether the association as now structured continues to fall under the provisions of the Kansas Open Meetings Act. K.S.A. 75-4318 defines the scope of the act as follows:

" . . . 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 in part by public funds shall be open to the public"

The above language sets forth a two-part test which must be met before a body can be found to be included within the act's provisions, namely that: (1) the body be a legislative or administrative agency of the state or one of its political or taxing subdivision, or be subordinate to such a body; and (2) the body receives, expends or is supported in whole or in part by public funds, or, in the case of subordinate groups, has a parent or controlling body which is so supported. See also State ex rel. Murray v. Palmgren, 231 Kan. 524, 535 (1982).

Initially, it may be concluded with little difficulty that the trustees are subject to the act, for they are a subordinate board to the county commission, which in turn is a legislative body which heads a political and taxing subdivision of the state. The same situation was found in the Palmgren case, in which both the Thomas County Commission and four of the six members of the board of trustees of the Thomas County Hospital were found to have violated the act. The Riley County trustees are appointed by the county commission, take their direction from the county commission, and receive public moneys which are raised as a result of a tax levy imposed by the county commission. Hence, the board of trustees is a subordinate group of the county and is subject to the act.

In examining the board of directors of the association, it is readily apparent that the same level of control is not present, a result which was apparently consciously sought by the joint board during the time that the split was being discussed and carried out. During the past several years, our office has on numerous occasions examined this type of factual situation (i.e. where a non-profit where a corporation exists that receives public funds and is in some way related to a governmental unit) in order to determine whether the act applies. In Attorney General Opinion No. 79-221, we concluded that a private nursing home was not subject to the act, as it did not exercise any powers of either state or local government, and had no directors appointed by a government agency. While state money was clearly paid to the home (in addition to federal funds, insurance reimbursements and private moneys), such money was for services which the home rendered which were supplemental to, rather than in lieu of, actions taken by the state. The home existed apart from receiving public funds, and would continue to do so even in the absence of any agreements with the state.

A similar conclusion was reached in Attorney General Opinion No. 80-239, which concerned the activities of the Kansas University Endowment Association. In addition to the absence of any state control over the activities of the association, the opinion noted that:

"The Kansas Open Meetings Act has not been interpreted to apply to truly private entities whose association with the state or its political and taxing subdivisions is based on 'arms-length' contractual obligations. For example, the fact that a building contractor performs the service of constructing a new

hospital or office building for the State for which he receives a considerable sum of tax dollars does not subject his corporate board of directors to public scrutiny under K.S.A. 75-4317 et seq." Id. at 7.

The same conclusion was reached in Attorney General Opinions No. 81-253 and 82-256, involving the application of the act to Planned Parenthood of South-Central Kansas, Inc., and the Kansas Cosmosphere and Discovery Center, Inc., respectively. In each case, it was found to be conclusive that: (1) the corporation, which was private and not-for-profit, did not administer a government program for which state or local government would otherwise be responsible; (2) the corporate directors were not appointed by a governmental body; and (3) the county exercised no control over the activities of the corporation, although the corporation did comply with necessary federal and state regulations in order to qualify for public funds.

However, in Opinions No. 79-284 and 84-10, we found that non-profit corporations were subject to the act where they (1) received public funds in their operations and (2) acted as a governmental agency in providing services to the public. The former opinion concerned McPherson County Diversified Services, Inc. (MCDS), which was supported by tax revenues and provided services to the developmentally disabled citizens of McPherson County. It was pertinent to our conclusion that the McPherson County Commissioners confirmed all appointments to the board of directors of MCDS and that MCDS was required to report back to the county concerning the handling of its funds and types of services it provided. The opinion concluded that these activities constituted "governmental affairs of the kind which the Act intended to be open to public scrutiny." Id. at 3. Additionally, the opinion noted that MCDS was providing services that the county would be providing but for the existence of MCDS, and thus MCDS was essentially acting in a governmental capacity. The latter opinion, concerning the Economic Opportunity Foundation, Inc. (EOF) of Kansas City, Kansas, reached the same conclusion for similar reasons.

While the above groups of opinions reach opposite results, they are reconcilable because of the differences in the relationships between the corporations and their respective governmental units. We note a recent law journal article which observed that "a concept fundamental to the application of the Act is the requirement that the legislative or administrative body be 'of' the state or political or taxing subdivisions." Smoot and

Clothier, Open Meetings Profile: The Prosecutor's View, 20 W.L.S. 241, 252 (1981). As noted in Attorney General Opinion No. 79-284, supra, MCDS was "of" the county government, because the organization was providing services that the county government would normally provide and was legally responsible to, and substantially controlled by the county government. Moreover, while we concluded that organizations such as MCDS and EOF would cease to exist but for the continued approval and support of a state or local unit of government, it was also our conclusion that entities such as Planned Parenthood would continue to exist and provide services even in the absence of a relationship with a governmental body. While the amount of public funds which an agency receives is clearly one factor to consider, also relevant are legal agreements between the corporation and a governmental body, or legal action taken by the body without which the corporation would be unable to exist. Thus, a corporation could be found to be dependent upon state or local government and yet receive only a portion of its funds in the form of public money.

When these considerations are applied to the Memorial Hospital Association, Inc., it is our opinion that the Riley County Board of Commissioners has retained control in several significant respects. First, although the present by-laws of the association do not permit the county to appoint directors, all of the present directors, as former members of the "joint board," were appointed by the county. Since it is these members who will choose subsequent members, the decisions made by the county commission will have an on-going effect.

Second, the commissioners maintain control over the association through the terms of the lease agreement which was entered into between the association and the trustees, acting on behalf of the county commission. As previously noted, the lease was not an "arms-length" agreement, in that negotiations between the commission and the joint board were underway, if not essentially concluded, prior to the time of the split. In addition, the association is dependent for its operational existence on the terms of the lease, for while the by-laws set forth a purpose of managing and operating a hospital in Riley County, the present facility is owned by the county, and the association remains there at the county's leave. Should default occur on the lease (Article 1, §§1.25, 1.25), the association will be stripped of its authority and will be without a hospital to manage.

Finally, the association is clearly providing services which, but for its existence, the county would otherwise have to provide, either directly or through another corporation. In keeping with

past opinions, this is sufficient to make the association involved in the "affairs of" the county. While the amount of mill levy money is not a major part of the association's budget, it must be remembered that the association is managing a facility that is not its own, as in the case of a nursing home. This is not therefore a situation, as in the Planned Parenthood opinion, where the corporation could carry on its functions in the absence of a legal relationship with a unit of government.

In closing, it should be acknowledged that the Kansas Open Meetings Act contains no hard and fast rules for determining the application of the act to corporations like the association which are not clearly public or private in nature, but which instead fall somewhere in between. In such situations, it is helpful to note the language used in State ex rel. Murray v. Palmgren, supra, when the Kansas Supreme Court found that the act is subject to broad construction in order to carry out the stated legislative intent:

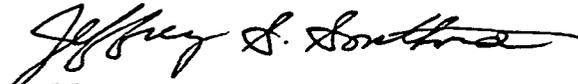
"This court has long adhered to the rule a penal statute should be strictly construed. See, e.g., State v. Kearns, 229 Kan. 207, 208, 623 P.2d 507 (1981); State v. Doyen, 224 Kan. 482, 488, 580 P.2d 1351 (1978). Thus, if the KOMA can be characterized as penal, it might arguably be strictly construed. This theory, however, flies in the face of the purpose of the KOMA, stated in K.S.A. 75-4317(a): '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 government affairs and the transaction of governmental business be open to the public.' Obviously, the intent behind the statute is to protect the public. In Johnson v. Killion, 178 Kan. 154, 158-59, 283 P.2d 433 (1955), this court stated: 'It 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.' See also Smith v. Marshall, 225 Kan. 70, 75, 587 P.2d 320 (1978)." 231 Kan. at 530.

In conclusion, it is our opinion that in so far as Memorial Hospital Association, Inc., is (1) controlled to a significant degree by the Riley County Commission, acting through the trustees of the hospital, and (2) receives public funds and the use of a public facility, it is subject to the provisions of the Kansas Open Meetings Act. Accordingly, while executive sessions may be held for those subjects set forth at K.S.A. 75-4319(b), the general conduct of the business of the association must be done in meetings open to the public.

Very truly yours,



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RTS:JSS:crw