



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87-86

Jack D. Walker, M.D.
Secretary
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Laws, Journals and Public Information -- Records
Open to Public -- Inspection of Records

Synopsis: In lieu of a comparable Environmental Protection Agency (EPA) program, the Kansas Department of Health and Environment (KDHE) is authorized by the EPA to conduct a hazardous waste program as prescribed by the federal Resource Conservation and Recovery Act (RCRA). KDHE must meet various federal open records requirements to maintain authorization. KDHE meets all federal requirements for timely response to informational inquiries. Additionally, the Secretary has the authority pursuant to K.S.A. 65-3431 to adopt rules and regulations as shall be necessary to carry out the purposes of the Hazardous Waste Act (K.S.A. 65-3430 et seq.) Cited herein: K.S.A. 45-218; K.S.A. 45-221; K.S.A. 45-222; 65-3401 et seq.; 65-3430 et seq.; 65-3431; 5 U.S.C. § 552; 40 C.R.F. 2.112 (1986); § 2.118 (1986).

* * *

Dear Dr. Walker:

As Secretary for the Kansas Department of Health and Environment (KDHE), you request our opinion regarding open records. Specifically, you inquire as to the amount of time

your agency has to respond to a request for information regarding the Solid and Hazardous Waste program (K.S.A. 65-3401 et seq.), pursuant to the open records law requirement of K.S.A. 45-218(d). In addition, you request our opinion as to whether K.S.A. 45-221, which lists disclosure exemptions, is broader than the exemptions promulgated by the Environmental Protection Agency (EPA), pursuant to Section 3006(f) of the Hazardous and Solid Waste Amendments of 1984 (HSWA).

As to your initial inquiry, K.S.A. 45-218(d) states:

"Each request for access to a public record shall be acted upon as soon as possible, but not later than the end of the third business day following the date that the request is received. If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection. If the request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requestor not later than the end of the third business day following the date that the request for the statement is received." (Emphasis added).

In our opinion, the phrase "shall be acted upon" in the first sentence of this section indicates that some final agency action must occur within a three day time frame. When possible, access will be granted immediately. If immediate access is not possible, that agency action will take the form of either a grant or a denial of the request within a three day period. After the agency has taken some action, a dissatisfied requestor can seek relief through the remedies provided in K.S.A. 45-222.

As to your next inquiry, 40 C.F.R. § 2.118(a) (1986) lists nine categories of information which are exempt from the mandatory disclosure requirements of 5 U.S.C. § 552(a). It states:

"5 U.S.C. § 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. § 552(a). No request under 5 U.S.C. § 552 for an existing, located record in EPA's possession shall be denied by any EPA office or employee unless the record contains (or its disclosure would reveal) matters that are -

"(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

"(2) Related solely to the internal personnel rules and practices of an agency;

"(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. § 552(b): Provided, That such statute:

"(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

"(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential (see Subpart B);

"(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) Personnel and medical files and similar files and disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would; (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source; (e) disclose investigative techniques and procedures; or (f) endanger the life or physical safety of law enforcement personnel;

"(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) Geological and geophysical information and data, including maps, concerning wells."

K.S.A. 45-221(a) states in relevant part:

"Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:"
(Emphasis added).

This language makes the disclosure of all records mandatory on the agency. The statute merely lists 35 exceptions in which disclosure is not mandatory.

Because of the discretionary nature of this statute, the Kansas Department of Health and Environment (KDHE) may, as a matter of policy in the execution of their Hazardous Waste Program, by regulation require disclosure of that information required to be disclosed under federal law.

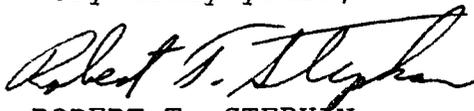
K.S.A. 65-3431 states in relevant part:

"The secretary is authorized and directed to: (a) Adopt such rules and regulations . . . relative to hazardous waste management as shall be necessary to . . . enable the secretary to carry out the purposes and provisions of this act."

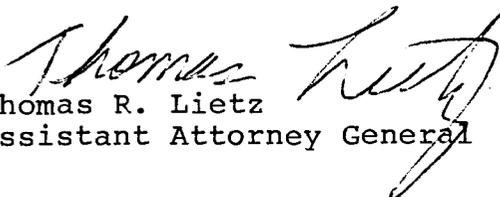
Because the very existence of the state program depends upon the state disclosure requirements being as broad as the federal requirements (5 U.S.C. § 552(a)), KDHE has the statutory authority to adopt a regulation of this nature.

In conclusion, K.S.A. 45-218(d) requires that the Kansas Department of Health and Environment must take some form of final agency action within three days of a request for information regarding the Solid and Hazardous Waste Program. This action is well within the applicable federal guidelines. Additionally, the secretary has the authority pursuant to K.S.A. 65-3431 to adopt rules and regulations as shall be necessary to carry out the purposes of the Hazardous Waste Act (K.S.A. 65-3430 et seq.)

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Thomas R. Lietz
Assistant Attorney General

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