



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 149

David Markham
Labette County Counselor
P.O. Box 611
Parsons, Kansas 67357

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Chamber of Commerce

Synopsis: The Parsons Chamber of Commerce, Inc. is not subject to the provisions of the Kansas Open Meetings Act in administering the county motel bed tax funds. While the Chamber expends public funds, it is not a legislative or administrative agency of the state or its political and taxing subdivisions. Cited herein: K.S.A. 75-4317; K.S.A. 1988 Supp. 75-4318.

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Dear Mr. Markham:

As county counselor for Labette county, you request our opinion concerning the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq. Specifically, you inquire whether the KOMA is applicable to an advisory subcommittee of the Parsons Chamber of Commerce, Inc., the executive board of the Parsons Chamber of Commerce, Inc., and the board of directors of the Parsons Chamber of Commerce, Inc.

We are informed that in 1987 the Labette County Commission passed a motel bed tax to raise money to promote conventions

and tourism. Approximately \$17,000 has been collected, but no monies have been spent. All of the motels in the county affected by the tax are located in Parsons. You state that the Parsons Chamber of Commerce, Inc. (Chamber), a nonprofit corporation, "proposed itself to the County Commission as an entity to spend the money to promote conventions and tourism in the county."

Apparently the county commission agreed to the Chamber's proposal. You inform us that the Chamber submitted a proposed budget to the county commission. In an open meeting the commission reviewed and approved the budget, authorizing the Chamber's board of directors to spend \$8,800 over the next year to promote conventions and tourism. At the end of the year the Chamber is to submit an annual report to the commission to account for the expenditures made.

We understand that, since the budget was approved, the Chamber has appointed an advisory sub-committee to make recommendations as to how the funds should be spent. These recommendations are made to the executive board of the Chamber and are non-binding. The executive board reviews the proposals and then makes recommendations to the board of directors. The Chamber's board of directors is the only body authorized by the commission to expend the motel bed tax funds. The expenditures are to be approved by a majority of the board of directors in accordance with the budget approved by the commission. Therefore, you ask whether meetings of the Chamber's subcommittee, executive board, or board of directors are subject to the provisions of the KOMA.

By its terms the KOMA applies to

"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. . . ." K.S.A. 1988 Supp. 75-4318(a).

The above language sets forth a two-part test which must be met for a body to be included within the act's provisions:

(1) the body is a legislative or administrative agency of the state or one of its political or taxing subdivisions, or is 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, the parent or controlling body is so supported. It is clear that the second prong of this text is met as the Chamber receives and expends public funds. The question is whether the first part of the test is met; whether the Chamber, by receiving public funds which must be spent as approved by the commission, is a legislative or administrative body or subordinate to a legislative or administrative body.

A similar question was before the Kansas Supreme Court in Memorial Hospital Ass'n, Inc. v. Knutson, 239 Kan. 663 (1986). In that case the court stated:

"Whenever a body or group has in any way derived the authority for its existence from a legislative or administrative agency, that body or group so created is also subject to the open meetings act. Where courts have found that the agencies or bodies were not subject to the various act, they have looked at form and not considered how the entity came into existence or, in some instances, its purpose.

"Courts have found two types of entities, whatever form they may take, which are not subject to the open meetings laws: (1) those which are merely advisory and have no decision-making authority, and (2) those which are basically independent entities which have some connection, by contract or other tie to a government entity, but are not actually created by some form of government action.

"Where it can be shown that a public body has intentionally, and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine for the elected board what course should be pursued, or where the actions of the private citizens are in any way binding upon the elected officials,

the meetings of such groups should be open to public scrutiny. Public bodies cannot be allowed to do indirectly what the legislature has forbidden." 239 Kan. at 670-71.

In holding that the KOMA was not applicable to Memorial Hospital Association, the court ruled that, when a county hospital board leases the hospital property to another, the lessee (association) is not subject to the KOMA if the lessee

"(1) has no governmental decision-making authority to expend public funds, and (2) is an independent entity which by contract agrees to provide hospital services under a lease of hospital property from a board of trustees." Id. at 672.

The court also noted that the lessee/association was not created as an "alter ego" to the governmental bodies involved and was not created to evade the open meetings law. Id.

In Attorney General Opinion No. 81-253 we opined that Planned Parenthood, Inc., a private, nonprofit corporation, was not subject to the KOMA. Though it received public funds, we concluded that the first part of the test was not met because the entity was not "of" the state or a political or taxing subdivision thereof.

"The mere fact that this corporation [Planned Parenthood] contracts with the county to provide services which the county would otherwise provide, does not extend the requirements of the Kansas Open Meetings Act to an essentially private entity." (Page 6).

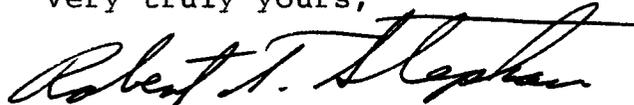
The opinion relied in part on the following authority's construction of the KOMA:

"A private corporation, by contracting to perform services for the State of Kansas or a political or taxing subdivision, does not subject its board of directors to public scrutiny under the Act." Smoot and Clothier, Open Meetings Profile: The Prosecutor's View, 20 Washburn L.J. 241, 252 (1981).

See Attorney General Opinion No. 80-239 ("cooperation between an essentially private organization and a public agency does not subject the former to the [KOMA].")

In the situation before us, neither the Chamber nor any of the Chamber's boards or committees was created by the county commission. We have no evidence to suggest that the commission agreed to have the Chamber administer the motel bed tax money to avoid the open meetings law. The Chamber is a private entity which has agreed to provide services for the county. As the court in Memorial Hospital noted, the courts have found that basically independent agencies not created by governmental action which are connected to a governmental entity by contract are not subject to open meetings laws. The Chamber is a basically independent entity whose connection with the county commission is the agreement and approved budget to promote conventions and tourism. Therefore, we conclude that the Chamber, including the board of directors, executive board, and advisory sub-committee, is not subject to the KOMA in this instance.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rita L. Noll
Assistant Attorney General

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