



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90-14

The Honorable Barbara Lawrence
State Representative, 84th District
State Capitol, Room 174-W
Topeka, Kansas 66612

Re: Public Records, Documents and Information --
Records Open to Public -- Access to Memoranda from
School Superintendent to School Board

Synopsis: Memoranda written by school board staff and wherein
opinions are expressed or policies and actions are
proposed are not public records which must
mandatorily be disclosed unless such memoranda are
publicly cited or identified in an open meeting or
in an agenda to an open meeting. Such citation or
identification subjects the memoranda to mandatory
disclosure, unless otherwise specifically
prohibited by law. However, even if such citation
or identification does not occur, unless
information contained in the memoranda is
specifically prohibited or restricted from
disclosure by federal law, state statute or rule of
the Kansas supreme court, it may nevertheless be
discretionarily disclosed by the public agency.
Cited herein: 20 U.S.C. § 1232g; K.S.A. 45-215;
K.S.A. 1989 Supp. 45-221; K.S.A. 72-9005.

* * *

Dear Representative Lawrence:

As Representative for the Eighty-Fourth District, you request our opinion on four written memoranda sent by the administration of U.S.D. 259 to school board members. You state that these memoranda were cited and identified by a board member at a January 29, 1990 school board meeting. You enclose copies of the memoranda and related news articles and you ask our opinion on whether the Kansas open records act (KORA), K.S.A. 45-215 et seq., requires or allows public access to these memoranda.

The KORA generally provides that, unless otherwise specifically provided by law, public records maintained by public agencies of this state are open to the public. A Kansas school board is a "public agency" as defined by K.S.A. 45-217(e)(1), and thus, unless an exception from disclosure exists, records held by that agency must be disclosed.

K.S.A. 45-217(f)(1) defines public record to include "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency." (Emphasis added). Thus, documents in the possession of a public agency must be disclosed unless otherwise provided by law. We note that the KORA does not address records held by or in the possession of individuals. Thus, disclosure of information held by a private individual or other person acting in a private capacity will not implicate the provisions of KORA, but rather, may be subject to those restrictions generally applicable to all private individuals. The memoranda in question are in the possession of a public agency, and thus fit within the definition of a "public record". They must therefore be disclosed unless an exemption or exception mandates or allows the document to remain confidential.

Certain documents held or produced by a school board may be subject to the types of restrictions acknowledged by K.S.A. 1989 Supp. 45-221(a)(1), and thus, prohibited from disclosure. For example, K.S.A. 72-9005 states that "the evaluation documents and responses thereto shall be made available only to the evaluated employee, the board, the appropriate administrative staff members designated by the board, the school board, the school board attorney upon request of the board, the state board of education as provided in K.S.A. 72-7515, the board and the administrative staff of any school to which such employee applies for employment, or other persons specified by the employee in writing to his or her board." Additionally, 20 U.S.C. § 1232g restricts the release of certain student information or educational

records. The memoranda in question do not contain student record or employee evaluation information. Moreover, we are unaware of and have been unable to locate any federal law, state statute, or rule of the Kansas supreme court that would generally prohibit disclosure of memoranda written by a school board superintendent or school employee to a school board. Specific memoranda may contain information that cannot be disclosed. However, a public record which contains material not subject to disclosure may nevertheless be released with the protected information deleted. See Tew v. Topeka Police & Fire Serv. Comm'n, 237 Kan. 96 (1985); K.S.A. 1989 Supp. 45-221(d).

If specific legal prohibitions do not restrict or prevent disclosure of a public record, some public records held by a public agency may nevertheless be discretionarily closed. K.S.A. 1989 Supp. 45-221(a)(2)-(37) set forth the basic types of records that the KORA allows to be discretionarily closed. K.S.A. 1989 Supp. 45-221(a)(20) most closely describes the memoranda presented to this office for review: "except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose . . . notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except this exception shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting." (Emphasis added). K.S.A. 1989 Supp. 45-221(a)(20) does not prohibit disclosure, rather, this provision allows a public agency to discretionarily determine whether or not to release such records. Thus, unless such a record is publicly cited or identified in an open meeting or an agenda to an open meeting, memoranda held by a public agency in which opinions are expressed or policies or actions are proposed, are not necessarily subject to mandatory disclosure and the decision to release or close such a record becomes a discretionary matter properly resolved by the record holder.

As expressly stated in K.S.A. 1989 Supp. 45-221(a)(20), memoranda that might otherwise be discretionarily closed become subject to disclosure if cited or identified in an open meeting or an agenda to an open meeting. The information included with your letter indicates that one school board member at the very least attempted to cite or identify the memoranda during an open meeting. Citation or identification at an open meeting changes the discretionary confidentiality that a memorandum described under K.S.A. 1989 Supp. 45-221(a)(20) might otherwise enjoy. However, we do not have sufficient information to nor is it necessary that we determine whether the citation or identification at the

specific open meeting was sufficient to require disclosure if the board, or one of its members, discretionarily chooses to disclose a record that may be legally disclosed. While the board or its legal counsel might adopt a policy or advise to the contrary, unless a law prohibits disclosure of a public record, it may be released. In making the decision to discretionarily release information that is not subject to mandatory disclosure, the decision maker should of course consider all possible ramifications. The exceptions to mandatory disclosure set forth pursuant to K.S.A. 1989 Supp. 45-221(a)(20)-(23) protect an agency's internal predecisional deliberations. There is a benefit to frank dialogue from and between staff members which might not occur if memoranda are unprotected from premature public scrutiny.

In summary, the memoranda sent to the school board appear to be subject to the KORA, but unless cited or identified in an open meeting or in an agenda for an open meeting, the school board is not required to disclose the records. If the memoranda have been cited or identified in an open meeting or an agenda to an open meeting, they must be released unless federal law, state statute, or rule of the Kansas Supreme Court restricts or prohibits disclosure.

We cannot provide a general statement concerning your question regarding the release of staff communications. The discussion contained herein is intended to provide guidance concerning such communications, but each record maintained, kept or in the possession of a public agency must be examined on its own merits in order to determine whether the KORA applies or requires disclosure.

Very truly yours,



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