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August 2, 1990

ATTORNEY GENERAL OPINION NO. 90- 92

Meredith Williams, Post Auditor
Legislative Division of Post Audit
109 W. 9th
Suite 301, Mills Bldg.
Topeka, Kansas 66612-1285

Re: Public Records, Documents and Information -- Records
Open to Public -- Certain Records Not Required to be
Open; Post Audit Reports

Legislature -- Legislative Post Audit -- Post Audit
Reports; Status Under the Kansas Open Records Act

Synopsis: Rules of the legislative post audit committee (LPAC) adopted March 12, 1990, prohibit distribution of a legislative division of post audit final audit report to LPAC members and to the public prior to four days before the report is scheduled to be presented to the committee. While such a report is a public record subject to the Kansas open records act (KORA), K.S.A. 45-215 et seq., LPAC rules are not inconsistent with the KORA because discretionary closure of the record is permitted by K.S.A. 45-221(a)(22). Under this exemption to the KORA, disclosure would be required only if the report is publicly cited or identified in an open meeting or an agenda of an open meeting or if the report was distributed to a majority of a quorum of the committee. Mere announcement of the record's name in an open meeting without any discussion of its content does not require disclosure of a record otherwise permissibly closed under K.S.A. 1989 Supp. 45-221(a)(22). The facts presented thus do not mandate disclosure under these provisions. Therefore, pursuant to LPAC rules, the post auditor must

decline this record request. Cited herein: K.S.A. 45-215 et seq.; 45-217; K.S.A. 1989 Supp. 45-221(a)(22); K.S.A. 46-1101; 46-1102; 46-1103; 46-1108; 46-1114; 75-4713.

* * *

Dear Mr. Williams:

The vice chairperson of the legislative post audit committee has requested a copy of a completed performance audit report prior to its distribution to other members of the committee. You request our advice concerning the disclosure of this report under the Kansas open records act (KORA), K.S.A. 45-215 et seq.

K.S.A. 46-1101 et seq. create the legislative post audit committee (LPAC). K.S.A. 46-1102 discusses appointment by the LPAC of the post auditor to serve under the direction of the committee. K.S.A. 46-1103 provides: "there is hereby established the division of post audit within the legislative branch of the government and this division is under the direct supervision of the post auditor in accordance with policies adopted by the legislative post audit committee." Post audit committee rules, adopted March 12, 1990, discuss the procedures for release and distribution of performance audit reports:

"(a) Performance audit reports, sunset audit reports, special audit reports and all other written reports conducted pursuant to K.S.A. 46-1108 or 46-1114 and amendments thereto shall be distributed by the Legislative Post Auditor, after completion and upon distribution, to the members of the Legislative Post Audit Committee, the Governor, Director of Accounts and Reports, Director of the Budget, and audited agencies, the appropriate federal agencies, if any, other staff of the Legislative Post Audit Committee and any member of the legislature who requests a copy of the audit report or other report. Performance audit reports, sunset audit reports, special audit reports and all other written reports conducted pursuant to K.S.A. 46-1108 or 46-1114 and amendments thereto shall be distributed no more than four days, excluding Sundays and legal holidays, before such audit report is scheduled to be

presented by the staff of the legislative division of Post Audit to the Legislative Post Audit Committee or to another committee of the legislature.

"(b) Performance audit reports, sunset audit reports, special audit reports and all other written reports shall be made available to the public and the media after completion and upon presentation to the Legislative Post Audit Committee or to another committee of the legislature.

"(c) Except as provided in LPAC Rule 2-4 or 2-5, no member of the Legislative Division of Post Audit and other staff of the Legislative Post Audit Committee shall publicly comment on or release the contents of any performance audit report, sunset audit report, special audit report or any other written report until the report has been made available to the public and the media." Rule 2-2. (Emphasis added).

Prior LPAC rules permitted post audit committee members access to final post audit reports, and under such prior rules, the requester of the record in question could be given a copy of the report. However, current rules restrict committee member access to no more than four days prior to scheduled presentation of the report by staff to the committee. Thus, pursuant to the current rules, the committee member has been denied access to the report. The primary issue, therefore, becomes whether the current LPAC rules concerning distribution and availability of final reports comport with the provisions of the KORA. If the rules and their application to these facts do not violate the provisions of the KORA or other laws, the post auditor and his staff are required by K.S.A. 46-1103 to follow the policies adopted by the LPAC.

The KORA applies to public records which are defined at K.S.A. 45-217(f):

"'Public record' means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency.

"(2) 'Public record' shall not include records which are owned by a private person or entity and are not related to the functions, activities, programs or operations funded by public funds or records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state." (Emphasis added).

K.S.A. 45-217(e) defines public agency:

"(e) (1) 'Public agency' means the state or any political or taxing subdivision of the state, or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.

"(2) 'Public agency' shall not include:

"(A) Any entity solely by reason of payment from public funds for property, goods or services of such entity; (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court; or (C) any officer or employee of the state or a political or taxing subdivision of the state if the state or political or taxing subdivision does not provide the officer or employee with an office which is open to the public at least 35 hours a week."

The legislature meets the definition of a public agency, and thus, records made, maintained, kept by or in the possession of the legislature are public records and are therefore subject to the provisions of the KORA. Performance audit reports are made, maintained, kept by and in the possession of the public agency, and thus, are public records subject to the provisions of the KORA.

K.S.A. 45-215 et seq. require all public records to be open with certain exceptions. K.S.A. 1989 Supp. 45-221 sets forth the general exceptions to the KORA. The most probable

exception to the KORA which would permit closure of a final post audit report, and the exception you cite, can be found at K.S.A. 1989 Supp. 45-221(a)(22). This exception permits discretionary closure of records that fall within the following description:

"(22) Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:

"(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

"(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain."

This exception permits discretionary closure of records of a public agency having legislative powers when such records pertain to research prepared for one or more members of the agency. The post audit committee is made up of members of the legislature. K.S.A. 46-1103 places the division of post audit within the legislative branch of the government. The documents in question are records pertaining to research prepared by the division staff for members of the legislature. Further, the information and recommendations provided by the post audit process may prove to be the basis for future legislation. See K.S.A. 46-1108; LPAC Rule 3-3. Thus, it appears that the provisions of K.S.A. 1989 Supp. 45-221(a)(22) apply to the record in question. This final post audit report, therefore, qualifies as a public record which may be discretionarily closed by the record holder. The committee has exercised this permissive authority through its rules and has closed these types of records. However, K.S.A. 1989 Supp. 45-221(a)(22) contains two exceptions to discretionary closure.

This brings us to the issue of whether the exception in K.S.A. 1989 Supp. 45-221(a)(22)(A) applies to this specific record in such a way as to require the disclosure of a record which might otherwise be discretionarily closed. This exception would apply if, as provided in the KORA, the record has been "[p]ublicly cited or identified in an open meeting or an agenda of an open meeting." This requires us to examine the exception and the facts surrounding the record request.

Your letter succinctly sets forth the facts concerning past references to this specific report:

"The audit of the vehicle identification number inspection program was authorized by the Legislative Post Audit Committee at its April 3, 1990 meeting. Staff actually began the audit engagement on April 16, 1990. A preliminary draft of the audit report was delivered to the Kansas Highway Patrol on July 11, 1990, and the Patrol's written response to the preliminary draft was received on July 18, 1990. After reviewing the Patrol's written response, a final audit report was prepared and copies were made. No distribution of the final audit report has taken place; all copies of the final audit report remain in this office. Additionally, no member of this staff has discussed the contents of the final audit report with any non-staff person.

"The Legislative Post Audit Committee has met on three occasions since authorizing the audit of the vehicle identification number inspection program. Members' agendas and appropriate tabbed materials for all three meetings are enclosed. At the April 25, 1990 meeting, I directed members' attention to the enclosed Tab C graphic and quickly reviewed the current schedule status of each of the Division's performance audit engagements, including the vehicle identification number inspection program. I provided a similar schedule update at the Committee's June 14, 1990 meeting, again directing members' attention to the graphic, this time in members' Tab E, enclosed. The Committee next met on Thursday, July 19, 1990.

"The Committee's July 19, 1990 agenda, as issued by the Chairman, contained only one item, 'Consideration of Audit Requests.' Materials relating to this item, including the standard graphic depicting the status of the Division's performance audit engagements, were mailed to members in

advance of the meeting and were included as members' Tab A, also enclosed.

"The meeting was called to order by the Chairman with six members present in person, two members present by conference call hookup, and two members absent. In his opening remarks, the Chairman indicated that the meeting had been called so the Committee could approve additional audit assignments as one audit team was currently ready for a new assignment and two additional teams would be ready in early August. A motion was made, seconded, and eventually passed to authorize the conduct of a package of five audit requests. All Committee members participated in the discussion of the motion.

"Several portions of that discussion are relevant to this request. Vice-Chairman Miller stated that he objected to considering additional assignments before reviewing the completed audit of the vehicle identification number inspection program. He also questioned why the audit was not being presented at the meeting. Chairman Bogina indicated that the completion date of the audit was uncertain at the time the agenda was prepared and that he did not want to meet on only one audit when two additional audits were scheduled for completion by mid-August. Staff did not participate in the discussion on the completed audit of the vehicle identification number inspection program. The brief Committee discussion of the audit report focused exclusively on the report's status; the contents, findings, and recommendations were not discussed."

Thus, the report in question was referred to in open meetings of the post audit committee as a document in the process of being created, and once it was completed, as a document in existence. However, the content of the report has not as yet been made available to anyone outside the post audit division staff. This is in keeping with the rules adopted by the legislative post audit committee. We must determine whether such references in open meetings are sufficient to trigger the applicability of the

exception to K.S.A. 1989 Supp. 45-221(a)(22)(A), and require release of the report.

A fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. Matter of Adoption of Baby Girl G, 12 Kan.App.2d 223 (1987). In interpreting statutory provisions courts are not bound to examine language alone, but may properly inquire into causes which impel the statute's adoption, the objective sought to be obtained, the statute's historical background, and the effect the statute may have under various constructions suggested. State v. Calb, 218 Kan. 459, modified 219 Kan. 231 (1975). When a statute is susceptible to more than one construction, it must be construed to give expression to its intent and purpose, though such construction is not within the strict literal interpretation of the statute. Manzanarez v. Bell, 214 Kan. 589 (1974). When words are sufficient in and of themselves to convey legislative purpose and are appropriate to that end, a court must follow the plain meaning of such words. However, if statutory language is of doubtful meaning or adherence to the strict letter would lead to injustice or absurdity, or result in contradictory provisions, the general design and purpose of the statute should be kept in mind and its provision should be given a fair and reasonable construction with a view to affecting its purpose and object. Lincoln American Corporation v. Victory Life Insurance Co., 375 F.Supp. 112 (D.C. Kan. 1974).

Legislative history on the KORA does not reveal a specific discussion of the pertinent exception language "publicly cited or identified in an open meeting or an agenda of an open meeting." Two possible interpretations exist: (1) mere mention of a record at a public meeting or in an agenda to an open meeting requires that the record be open, or (2) citation or identification includes references to or reliance upon the content of the document in question. In drafting the KORA, the 1979 special committee on federal and state affairs reviewed the Colorado and Kentucky statutes concerning open records and used those acts as model legislation. Report on Kansas Legislative Interim Studies to the 1980 Legislature 267 (1979). Colorado and Kentucky statutes generally recognize that narrative reports and preliminary recommendations may be discretionarily withheld from public inspection. Ky. Rev. Stat. Ann. § 61.878(1)(h); Colo. Rev. Stat. § 6254(a). See also, Kentucky Attorney General Opinions No. 79-444, 87-10, 87-15, 87-24, and 87-25. However, neither the Colorado nor the Kentucky open records statutes include the "cited or identified in an open meeting" language.

Legislative history on the KORA and similar statutes from other states evidence a policy permitting discretionary closure of records that are tentative or preliminary to some action. Other states permit closure of documents throughout the legislative process and do not recognize a point at which they must be open. Kansas is unique in its open records law because it provides exceptions to discretionary closure when the record comes before the policy making body. These exceptions allow the public access to records relied upon or used by decision makers to formulate policy. Thus, Kansas does not permit public bodies to make decisions based upon records that the body is considering but which are not available to the public.

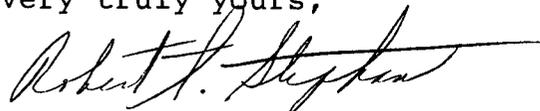
We do not believe the purpose of the open records law requires or is served by mandating disclosure of an otherwise permissibly closed record merely because an individual announces its name or title without any discussion of the content. We believe such an interpretation would be disruptive to the governmental process and could lead to injustice. Such a construction would not be reasonable or in keeping with the manifest purpose of the provisions of the KORA. It is our opinion that disclosure becomes mandatory if the record cited or identified in an open meeting or an agenda of an open meeting in such a way as to allow the public body access to the contents of the record. The legislature provided the exceptions to K.S.A. 1989 Supp. 45-221(a)(22) in order to require disclosure if the record is necessary for the public to understand a public body's discussion of the record in an open meeting. This interpretation of K.S.A. 1989 Supp. 45-221(a)(22) comports with this office's long-standing interpretation of the requirements and purposes of the Kansas open meetings act, K.S.A. 75-4713 et seq. Based upon the facts presented, we do not believe such discussions of the report in question have taken place, and thus, K.S.A. 1989 Supp. 45-221(a)(22)(A) does not require mandatory disclosure of the record in question.

K.S.A. 1989 Supp. 45-221(a)(22)(B) would require disclosure of the record in question if it were "distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain." Thus, upon distribution of the report in question to a majority of a quorum of the post audit committee the KORA would require disclosure of the report to the public. However, the committee's own rules, quoted above, prohibit distribution of the report even to committee members except within a four-day period prior to the report's scheduled presentation to the committee. Because of these rules, it would appear that not only are you permitted to deny public access to the record, but you are prohibited from disclosing the record,

even to the requester, who is a committee member, until four days prior to the scheduled meeting at which the report is to be presented.

In summary, we believe the KORA permits closure of the report in question. The committee has chosen to exercise the discretionary authority granted by the KORA and has adopted rules which prohibit disclosure of what otherwise could be an open record. Unless and until the committee changes its own rules, or the KORA is otherwise applicable, the post auditor must follow the policies and directives of the committee.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

