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ATTORNEY GENERAL OPINION NO. 91- 106

Marvin G. Stottlemire
Acting Assistant Secretary and
General Counsel
Department of Health and Environment
Landon State Office Bldg.
Topeka, Kansas 66612

Re: Public Records, Documents and Information --
Records Open to Public -- Certain Records Not
Required to be Open; Records Compiled on Radon
Testing; Records Pertaining to Identifiable
Individuals

Synopsis: K.S.A. 1990 Supp. 45-221(a)(24), as amended,
permits discretionary closure of records that are
compiled for research purposes and which pertain to
identifiable individuals. Research records which
pertain to identifiable individuals may include
residential addresses and such addresses may
therefore be closed pursuant to K.S.A. 1990 Supp.
45-221(a)(24). However, K.S.A. 1990 Supp.
45-221(d) and (e) may nevertheless require
disclosure of some of the information obtained by
KDHE in the process of researching radon levels
in Kansas. Cited herein: K.S.A. 45-215; 45-217;
K.S.A. 1990 Supp. 45-221, as amended by L. 1991,
ch. 149, § 12.

* * *

Dear Mr. Stottlemire:

As general counsel and acting assistant secretary to the Kansas department of health and environment (KDHE) you request our opinion on whether that agency may close certain records. These records would be voluntarily provided to the KDHE by private companies involved in radon testing and would contain information concerning the date of the measurement, the location of the measurement (address), the type of measurement, measurement results and where the measurement was made (e.g. basement or ground floor). Obtaining such information would assist the KDHE in assessing the indoor radon hazard in Kansas by helping to identify areas where the potential for high radon levels is the greatest. You note that there is no legal requirement that private companies provide such data to the KDHE and you believe it unlikely that companies will cooperate without assurances that exact locations will be kept confidential. You cite K.S.A. 1990 Supp. 45-221(a)(24) as possible authority permitting closure of such records.

K.S.A. 45-215 et seq. declare that all public records of this state shall be open for inspection unless otherwise provided by that act. K.S.A. 45-217(f) defines public record to mean "any recorded information, regardless of form or characteristics, which is made, maintained or is kept by or is in the possession of any public agency." Under K.S.A. 45-217(e), the KDHE is clearly an entity subject to this act. Thus, records kept by or in the possession of the KDHE are public records which must be open unless otherwise permissibly or mandatorily closed by law.

We have thus far not located a federal or state law which requires closure of radon test result records. K.S.A. 1990 Supp. 45-221, as amended by L. 1991, ch. 149, § 12, describes certain types or categories of records which may discretionarily be closed. K.S.A. 1990 Supp. 45-221(a)(24) provides authority for closing certain research records:

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

. . . .

"(24) Records which are compiled for census or research purposes and which pertain to identifiable individuals."

Our research reveals no previous discussion of this specific subsection. However, this subsection clearly permits closure of records which are compiled for research purposes and which pertain to identifiable individuals. Whether a record has been compiled for such a purpose and pertains to an identifiable individuals is largely a question of fact. We presume research is the primary purpose for compiling the records in question. Therefore, the issue is whether they pertain to identifiable individuals.

You indicate that the information potentially provided by private companies doing radon testing will identify a location. It is reasonable to assume that, in some instances, individuals will reside at such locations. It is our opinion that records with home addresses pertain to an identifiable individual and that K.S.A. 1990 Supp. 45-221(a)(24) permits discretionary closure of research records that contain an identifiable individual's address. However, we note that radon testing may also occur on business or unoccupied properties. The address of such properties may not pertain to identifiable individuals.

K.S.A. 1990 Supp. 45-221(d) states:

"If a public record contains material which is not subject to disclosure pursuant to this act, the public agency shall separate or delete such material and make available to the requestor that material in the public record which is subject to disclosure pursuant to this act. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency shall delete the identifying portions of the record and make available to the requestor any remaining portions which are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable, the public agency shall not be required to disclose those portions of

the record which pertain to such individual or individuals."

Subsection (e) of that statute also provides "the provisions of this section shall not be construed to exempt from public disclosure statistical information not descriptive of any identifiable person." Thus, where the research data is not descriptive of any identifiable person it must be disclosed. In addition, records which have information that pertains to an identifiable individual must nevertheless be disclosed upon the deletion of such material. It may be advisable to solicit the information you are interested in without a specific address to avoid making case-by-case determinations of whether the address identifies an individual. Absent such cooperation or compromise, it may be advisable to consider legislative amendment concerning closure of such records.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas