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ATTORNEY GENERAL OPINION NO. 91- 116

Barbara Hinton
Acting Legislative Post Auditor
1200 Merchants Bank Tower
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Topeka, Kansas 66612-2212

Re: Public Records, Documents and Information -- Records Open to Public -- Certain Records not Required to be Open; Ability of Agent for State to Contractually Close Record not Otherwise Closed by Law

Legislature -- Legislative Post Audit -- Additional Financial-Compliance or Performance Audits Authorized at Direction of Post Audit Committee; Persons Subject to Audit; Access to Records, Limitations

Synopsis: K.S.A. 1990 Supp. 46-1101 gives the legislative post auditor access to otherwise confidential or private records; K.S.A. 1990 Supp. 46-1106 requires the post auditor to comply with any "duty of confidentiality imposed by law." The Kansas open records act (KORA), K.S.A. 45-215 et seq., requires public records to be disclosed upon request unless a law permits or requires closure of a specific public record. The record in question is a contract which was in part made by a public agency. It therefore meets the definition of a public record, and is subject to the KORA. The only provision we have located that permits or requires closure of the questioned portions of the public record is in the contract itself. Public

records may not be closed by contract unless a law permits or requires closure of the specific record. As no such law has been located, with regard to the specific portions of the record in question, it is our opinion that a contractual term attempting to close this information is void as against stated public policy. Such a term must therefore be severed from the otherwise legal portions of the agreement, and disclosure of the questioned portions of the record may occur. Disclosure of other records or matters must be examined on a case by case basis to determine if there is a legal duty to disclose such records or matters. Absent a mandatory disclosure requirement, an agreement not to disclose creates a duty which post audit must respect, pursuant to K.S.A. 1990 Supp. 46-1106(g). Cited herein: K.S.A. 45-215; 45-216; 45-217; K.S.A. 1990 Supp. 45-221, as amended by L. 1991, ch. 149, § 12; K.S.A. 46-1101; K.S.A. 1990 Supp. 46-1106; 46-1108; 46-1114.

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Dear Ms. Hinton:

As acting legislative post auditor you request our opinion concerning the permissible content of a post audit report and the confidentiality restrictions of a specific contract. The audit report in question concerns a specific investment made on behalf of the Kansas public employees retirement system (KPERS). This audit was authorized by the legislative post audit committee (LPAC) on April 26, 1991, and was partially completed in June, 1991. The second part of the audit is currently being readied for a draft report and will address the reasons for a specific investment.

In connection with this audit and the proposed draft report, you have been given access to a contract entitled "Stock Purchase and Settlement Agreement," which has among its provisions a confidentiality clause. You attach a copy of this agreement and ask whether the agreement places any restrictions on the types of information you can legally include in an audit report or audit working papers. You also ask whether the contract places restrictions on KPERS when it responds either to the draft audit report or to subsequent questions about the investment. You inform us you would like the audit report to contain the following information: (1)

the fact of existence of the contract; (2) the parties to the contract; (3) the amounts paid for stock and to an individual associated with management of the company; and (4) the fact that the agreement includes a confidentiality provision and a release of all legal claims.

K.S.A. 46-1101 et seq. create the LPAC and establish the office of post auditor. K.S.A. 1990 Supp. 46-1106, 46-1108 and 46-1114 set forth the types of audits which may be performed, the procedures utilized to authorize and approve commencement of such audits, and the scope and subject matter of these audits. The audit in question is a performance audit report, apparently authorized pursuant to K.S.A. 1990 Supp. 46-1114. Subsection (b) of that statute permits the post auditor access to "all books, accounts, records, files, documents and correspondence, confidential or otherwise, to the same extent permitted under subsection (g) of K.S.A. 46-1106 and amendments thereto . . . ." (Emphasis added). Thus, post audit has obtained access to the agreement in question, but only to the same extent permitted by K.S.A. 1990 Supp. 46-1106(g).

K.S.A. 1990 Supp. 46-1106(g) provides:

> "Except as otherwise provided in this subsection, the post auditor or firm conducting a financial-compliance audit or other financial-compliance audit work and all employees and former employees of the division of post audit or firm performing a financial-compliance audit or other financial-compliance audit work shall be subject to the same duty of confidentiality imposed by law on any such person or state agency with regard to any such books, accounts, records, files, documents and correspondence, and any information contained therein, and shall be subject to any civil or criminal penalties imposed by law for violations of such duty of confidentiality . . . subject to the provisions of subsection (d). . . ." (Emphasis added).

This provision recognizes that, while the post auditor may have access to certain documents or information, he or she is "subject to the same duty of confidentiality imposed by law on any such person or state agency. . . ." We must therefore

determine if a "duty of confidentiality imposed by law" limits disclosure, and if so, to what degree.

The confidentiality given this agreement was created pursuant to the agreement itself. The language in question provides in part:

> "7. Confidentiality. (a) The parties hereto deem it to be in their respective best interests to maintain all of the terms and conditions of this Agreement in strictest confidence. Accordingly, the parties to this Agreement agree that they shall not disclose or attempt to disclose any of the terms or contents of this Agreement to any person who is not a party to this Agreement, and who is not employed by a party to this Agreement. Further, each party to this Agreement agrees to restrict knowledge of the terms and contents of this Agreement only to those officers, directors, employees, agents, and representatives of such party as it shall deem reasonably necessary for the conduct of its business to possess such knowledge. Finally, each party to this Agreement shall use every reasonable and lawful means at its disposal to prevent any person over whom it has any control or influence from disclosing information that is not permitted to be disclosed under this Agreement."

Other contractual provisions speak to release of liability and enforcement of the contract.

Signators to this contract included a former investment manager for KPERS and two private entities, one of whom was a former employee and majority stockholder of the entity purchased. The employment contract through which the state hired the former investment manager provided the manager with authority to invest or enter certain contracts on behalf of KPERS. See Section 2.01 of the Special Investment Advisory Services Agreement. Thus, the former investment manager for KPERS signed the agreement on behalf of KPERS. In entering into a contract, an agent has the power to bind a disclosed principle to a contract term which may lawfully be performed by the principle. 2A C.J.S. Agency § 144 (1973). However,

an agent is not a party to the contract, but rather, acts on behalf of the principal. 3 C.J.S. Agency § 386 (1973); See also Colonial Securities, Inc. v. Merrill Lynch, 461 F.Supp. 1159 (N.Y. 1978). Thus, the state (through KPERS) and the two private entities are the parties to the contract, and the contract is binding upon the state unless it exceeds the authority of the contracting parties or violates public policy.

No action may be maintained, either at law or in equity, to enforce a contract or agreement made in contravention of the law. Hunter v. American Rentals, 189 Kan. 615 (1962). "If an agreement binds the parties, or either of them, to do something opposed to the public policy of the state, it is illegal and absolutely void. An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest in society, violates some public statute, or tends to interfere with the public welfare or safety." Id. at 618, (emphasis added). "[W]here there are constitutional or statutory provisions, they govern as to what is the public policy, and it is the duty of the judiciary to refuse to sustain or enforce that which is against the public policy of the state as manifested by the legislation or fundamental law or the state." 17A Am.Jur.2d Contracts § 262 (1991). Contracts that contain valid and invalid provisions in which the lawful provisions can be easily severed will be upheld as to the lawful provisions. Miller v. Foulston, Siefkin, Powers and Eberhardt, 246 Kan. 450, 462 (1990); Gage v. First Federal Savings and Loan of Hutchinson, 717 F.Supp. 745 (Ks. 1989); See also Bemmis v. Becker, 1 Kan. 226 (1862); St. Joseph and Denver City Rlrd. Co. v. Ryan, 11 Kan. 602 (1873). Thus, we must determine if a state agency, such as KPERS, may, through its agent, legally close the portions of the record in question.

K.S.A. 45-216 declares it "to be the public policy of this state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy." (Emphasis added). The KORA does not require that a record be created or discussed by a public agency, however it does require a public record to be open unless closed by law. Thus, disclosure of public records is mandated as the public policy of the state, unless otherwise provided by the KORA.

K.S.A. 45-217(f) defines public record to mean "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). KPERS is a public agency, as defined by K.S.A. 45-217(e). KPERS, through its agent, created and entered into the contract in question. Thus, that public agency made the record in question. The definitions of custodian and official custodian set forth at K.S.A. 45-217(c) and (d) permit a state agency such as KPERS to maintain its records without having actual custody or control of the records. Thus, the record in question is in the possession of a state agency. It is our opinion that this contract, entered into by a state agency, and pertaining to an investment of public monies, is a public record subject to the KORA. It is therefore presumed open unless otherwise provided by the act.

K.S.A. 1990 Supp. 45-221, as amended by L. 1991, ch. 149, § 12, sets forth a rather lengthy list of basic types of records which may be discretionarily closed. It also recognizes that closure may manditorily occur pursuant to ". . . federal law, state statute or rule of the Kansas Supreme Court . . . ." In determining whether a public record may or must be closed, it becomes necessary to examine and determine the exact nature and content of the specific public record.

While we recognize that certain contracts or specific contract terms could be a record for which specific closure authority exists, we find no statutory exception to the mandatory openness dictated by the KORA which permits the portions of the public record (contract) in question to be closed. It may be argued that contract law should be recognized as legal authority to close an otherwise open public record. However, contract law recognizes that neither an agent nor the principle can authorize or agree to violate public policy or exceed the scope of their authority. Thus, if a public agency does not independently have the authority to close a public record, neither it nor its agents have the authority to contractually agree to such a term or requirement. We find no statutory authority giving KPERS the power to contractually "override" the KORA. It is our opinion that, as a public record, the agreement itself is subject to the KORA and the portions in question not only may but must be disclosed by any entity subject to the KORA. Any contractual term to close an otherwise mandatorily open public record is void as against the public policy declared in K.S.A. 45-215 et seq. Such void terms must be severed from the lawful portion of the contract.

Please note that the principles discussed herein largely concern certain portions of a specific document. Other records or unrecorded information may be discretionarily closed if there is no positive duty to disclose them or if closure is permitted or required by law. If a state agency has the legal duty or discretionary authority to close a specific record or other matter, it may exercise such discretion or duty through its agent or a contract.

Very truly yours,

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