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ATTORNEY GENERAL OPINION NO. 91- 138

Barbara J. Hinton
Acting Legislative Post Auditor
Legislative Division of Post Audit
1200 Merchants Bank Tower
8th & Jackson
Topeka, Kansas 66612

Re: Public Records, Documents and Information --
Records Open to Public -- Public Policy That
Records be Open; Definitions; Custodian; Public
Records; Certain Records Not Required to be Open;
Records Obtained by Post Audit and Contained in
Work Papers

Legislature -- Legislative Post Audit --
Definitions; Duty of Confidentiality Imposed by
Law; Audit Work Papers

Synopsis: Records in the possession of the legislative
division of post audit fit the definition of public
records set forth at K.S.A. 45-217(f). Such
records are therefore subject to the Kansas open
records act (KORA) set forth at K.S.A. 45-215
et seq. However, such records may be closed
if the records are subject to a duty of
confidentiality imposed by law or if discretionary
closure is permitted pursuant to K.S.A. 1990
Supp. 45-221, as amended by L. 1991, ch. 149, §
12. It is our opinion that K.S.A. 1990 Supp.
45-221(a)(20), as amended, permits discretionary
closure of audit working papers prior to release of

the audit report, as such papers represent research data in the process of analysis. However, upon the release of the audit the data is no longer being analyzed. Thus, post audit must at that point provide requested access to records which are not otherwise permissibly or mandatorily closed by law. Cited herein: K.S.A. 45-215; 45-217; 45-218; 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; 46-1114.

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Dear Ms. Hinton:

As acting legislative post auditor you request our opinion on whether the division of post audit may refer requests for access to public records to an agency under audit when post audit has obtained the requested records from the public agency in question. You state that you are satisfied that specific records are in fact open public records, which are therefore subject to disclosure under the Kansas open records act (KORA). However, based upon the definition set forth at K.S.A. 45-217(c) and (d), and portions of K.S.A. 45-218, you maintain that the legislative division of post audit is not the official custodian of records obtained in the course of an audit. You therefore ask whether post audit may direct individuals requesting access to otherwise open public records to the public agency being audited. You also indicate that specific legislative post audit committee (LPAC) rules prohibit the release of audit working papers until the audit report is released. See LPAC Rule 2-1 and 2-2.

The nature of records which may become post audit working papers varies, but may include "work sheets, summaries, letters, memoranda, documents, and other materials prepared or collected by the team and used as a basis for information, findings, conclusions, or recommendations in the report." See Post Audit Operations Manual. You note that post audit does not maintain a complete set of an agency's records, but rather, may only obtain a selected page from a specific record, as is relevant to the audit topic. Additionally, you point out that the record you obtain from a public agency may not be a current version and that any request for a copy of a public record places a burden upon post audit to determine whether that record may be discretionarily closed by the agency being audited.

K.S.A. 45-215 et seq. establish the Kansas open records act (KORA) which generally requires that all public records be open unless closure is required or permitted by law. K.S.A. 45-217(f) sets forth the definition of a public record subject to the KORA:

"(f)(1) '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 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).

Possession is defined as "the detention and control, or the manual or ideal custody, of anything which may be the subject of property. . . ." Blacks Law Dictionary 1047 (5th ed. 1979). Post audit work papers are in the possession of post audit.

We must next examine whether post audit is a public agency as defined at K.S.A. 45-217(e):

"'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."

K.S.A. 46-1101 et seq. create the legislative division of post audit and this entity is supported by public funds. Thus, post audit meets the definition of a public agency set forth at K.S.A. 45-217(e). Recorded information in that agency's possession is subject to the KORA.

The definitions of custodian and official custodian set forth at K.S.A. 45-217(c) and (d) apply to post audit with regard to records in the possession of that agency. Merely transferring a record from one location to another does not negate a public agency's possession of a record, as recognized by K.S.A. 45-217(d) and K.S.A. 45-218(c). However, more than one public agency may actually have the same public record in their possession. The definition of a public record under the KORA does not limit responsibility for a record to the agency creating or "owning" the record in question. Rather, the definition extends to recorded information ". . . maintained or kept by or . . . in the possession of any public agency." It is our opinion that a public record in the possession of post audit is subject to the KORA even if another agency possesses the same record. We find no statute in the legislative post audit act or elsewhere which exempts post audit from the definitions set forth in the KORA. Therefore, in order to decline a request for a record in the possession of post audit, that agency must rely upon some law permitting closure of the specific record or records in question.

K.S.A. 1990 Supp. 45-221, as amended by L. 1991, ch. 149, § 12, sets forth a lengthy list describing the types of public records which may be closed. Subsection (a)(1) of that statute recognizes that specific records may be subject to prohibitions or restrictions limiting disclosure pursuant to federal law, state statute or rule of the Kansas Supreme Court. K.S.A. 1990 Supp. 46-1106(f) and 46-1114(b) recognize that post audit is "subject to the same duty of confidentiality imposed by law on any person or state agency with regard to any such books, accounts, records, files, documents and correspondence. . . ." Thus, if a specific record in the possession of post audit is subject to a duty of confidentiality imposed by law, post audit must respect that confidentiality and close such records. However, absent such a duty, records in the possession of post audit must be disclosed unless some other law permits closure of the record in question.

K.S.A. 1990 Supp. 45-221(a)(20), as amended, permits discretionary closure of public records that may be characterized as "notes, preliminary drafts, research data in the process of analysis . . . except that this exemption 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). Records contained in post audit working papers are obtained and compiled for the purpose of

conducting research on the audit topic. We believe that, prior to the release of the completed audit report, such records may be characterized as research data in the process of analysis. Such records may therefore be closed until or unless these papers are no longer in the process of analysis or have been publicly cited or identified in an open meeting or in an agenda to an open meeting. It appears that LPAC rules express the intent of that committee to exercise the discretionary authority set forth at K.S.A. 1990 Supp. 45-221(a)(20). Thus, while these working papers meet the definition of a public record subject to the KORA, they may be closed by post audit in accordance with the terms of K.S.A. 1990 Supp. 45-221(a)(20) and LPAC rules.


Prior to release of an audit report it is not inappropriate for post audit to refer requests for these working papers to the public agency being audited. The public agency must disclose public records unless a specific law permits or requires closure. However, once an audit report is final and becomes a public record, the working papers of post audit can no longer be characterized as research data in the process of being analyzed. Post audit may then continue to suggest contacting the audited agency for full or complete access to or copies of records and may contact the agency to ascertain whether that agency believes the law permits closure of a specific record [thus implicating the duty of confidentiality referenced in K.S.A. 46-1106(g)]. However, post audit must provide access to or copies of records in its possession unless the record in question is otherwise mandatorily or discretionarily closed by law.

In summary, records in the possession of the legislative division of post audit fit the definition of public record set forth at K.S.A. 45-217(f). Such records are therefore subject to the Kansas open records act (KORA) set forth at K.S.A. 45-215 et seq. However, such records may be closed if the records are subject to a duty of confidentiality imposed by law or if discretionary closure is permitted pursuant to K.S.A. 1990 Sup. 45-221, as amended by L. 1991, ch. 149, § 12. It is our opinion that K.S.A. 1990 Supp. 45-221(a)(20), as amended, permits discretionary closure of audit working papers prior to release of the audit report, as such papers represent research data in the process of analysis. However, upon the release of the audit report, the data is no longer

being analyzed. Thus, post audit must then provide access to records which are not otherwise permissibly or mandatorily closed by law.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
Assistant Attorney General

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