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ATTORNEY GENERAL OPINION NO. 91-157

Barbara J. Hinton  
Legislative Post Auditor  
1200 Merchants Bank Tower  
8th & Jackson  
Topeka, Kansas 66612-3792

Re: Legislature -- Legislative Post Audit --  
Legislative Post Audit Committee to Specify Who  
Performs Financial Compliance Audits; Firm or Firms  
Selected by Contract; Audit Working Papers

Public Records, Documents and Information --  
Records Open to Public -- Definitions; Public  
Records; Audit Working Papers Prepared by Private  
CPA Firm Under Contract with Legislative Post Audit

Accountants, Certified Public -- General Provisions  
-- Client Communications and Working Papers

Synopsis: It is our opinion that, pursuant to the definitions  
of public record and public agency set forth at  
K.S.A. 45-217, and in accordance with the  
declarations set forth in K.S.A. 1-401, working  
papers created, maintained and in the possession of  
a private CPA firm, whose only connection with a  
public entity is a service contract entered into  
pursuant to K.S.A. 1990 Supp. 46-1122, are  
records which are not subject to the provisions of  
the Kansas open records act (KORA). However,  
post audit may review such working papers in  
accordance with the oversight duties dictated by  
K.S.A. 1990 Supp. 46-1127(a), the access powers

of the division of legislative post audit and as recognized by general legal principles applicable to the accountant/client relationship. Access to or review of CPA working papers by post audit does not automatically alter the nature of the records for purposes of the open records act. If copies of records are provided to post audit, records in the possession of post audit must be closed by post audit if the records in question are subject to a duty of confidentiality. Cited herein: K.S.A. 1-401; 45-215; 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; 46-1122; K.S.A. 46-1127; K.A.R. 74-5-101; 74-5-105.

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Dear Ms. Hinton:

As legislative post auditor, you request our opinion on whether audit working papers created by a CPA firm are public records subject to the Kansas open records act (KORA) when those papers are created pursuant to a contract with the post audit and pertain to a financial compliance audit. In addition to your opinion request letter, we have also received and reviewed correspondence from an attorney (Mr. John Frieden) which sets forth the position of his client CPA firms.

K.S.A. 46-1101 et seq. set forth and create the legislative division of post audit (LDPA). K.S.A. 1990 Supp. 46-1106, 46-1108 and 46-1114 authorize financial compliance audits by the LDPA. The latter statutes codify certain procedures and generally grant post audit broad access powers. These powers authorize the LDPA to obtain certain records which are not ordinarily subject to the mandatory openness dictated by the KORA, K.S.A. 45-215 et seq.

When conducting a financial compliance audit, K.S.A. 1990 Supp. 46-1122 permits the LDPA to contract for services:

"The legislative post audit committee shall specify whether a financial-compliance audit of or financial-compliance audit work at a state agency is to be conducted: (a) By a firm or firms qualified to perform such audit or audit

work; or (b) by the post audit. If the legislative post audit committee specifies that a firm or firms is to perform such audit or audit work, such firm or firms shall be selected and shall perform such audit or audit work as provided in K.S.A. 46-1123 and amendments thereto and K.S.A. 46-1125 to 46-1127, inclusive, and amendments thereto. If the legislative post audit committee specifies that the post auditor is to perform such audit or audit work, the post auditor shall perform such audit or audit work as directed by the legislative post audit committee pursuant to K.S.A. 46-1106 and amendments thereto and, if the audit or audit work is performed to comply with federal government audit requirements, in accordance with specifications for the conduct of such audit or audit work established by the contract audit committee." (Emphasis added).

K.S.A. 46-1127 provides in pertinent part:

"(a) The contract audit committee shall monitor the performance of the firm or firms conducting a financial-compliance audit pursuant to a contract entered into under K.S.A. 46-1126 and amendments thereto to insure that such audit is performed in accordance with the specifications developed for the conduct of such audit. The firm or firms selected to perform such audit shall submit a written audit report at the conclusion of the audit to the post auditor who shall distribute the complete audit report to members of the legislative post audit committee, the governor, the director of accounts and reports, the director of the budget, the secretary of administration, the state agency which is audited and other persons or agencies as may be required by the specifications." (Emphasis added).

Mr. Freiden informs this office that the working papers in question, which are created pursuant to an agreement authorized and entered into pursuant to K.S.A. 1990 Supp. 46-1122, may include "statements, records, schedules and memoranda . . . [which] necessarily include the thoughts, ideas, and preliminary work of the auditor." The records in question apparently remain in the possession of the CPA firm. You inform us that, based upon legislative post audit committee (LPAC) rule 2-5, making post audit working papers public records upon release of the report, LDPA has taken the position that working papers created by CPA firms are also public records subject to the provisions of the KORA and LPAC rules. You state that this position has been orally communicated many times to those firms choosing to contract with post audit. However, we understand that this has thus far not been reduced to a contractual agreement. The current contract between LDPA and CPA firms provides for access and review authority by post audit, but does not require that post audit be given their own copies of the records. This is the basis for the opinion request.

As previously noted, K.S.A. 46-1101 et seq. grant post audit access to records which might not otherwise be available to any other entity. Access to records under this act generally occurs pursuant to an ongoing audit of an entity. In the situation at hand, CPA firms are not being audited, they are acting as the auditor. K.S.A. 1990 Supp. 46-1106(g), [which is also referenced in K.S.A. 1990 Supp. 46-1108 and 46-1114], make post audit, and its contractees, subject to any duty of confidentiality imposed by law. See also K.S.A. 46-1127. Access to records by post audit pursuant to K.S.A. 46-1101 et seq. does not in and of itself make a specific record a public record subject to the KORA. We must therefore determine whether the records in question constitute public records.

K.S.A. 45-217(f) defines public record:

"(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).

Thus, if a record is obtained by post audit pursuant to K.S.A. 46-1101 et seq. powers, but that record fits the exception set forth at K.S.A. 45-217(f)(2), the record is not a public record subject to the KORA despite its being in the possession of post audit.

The nature of the entity possessing, maintaining, making or keeping the record therefore becomes pertinent. For purposes of determining if a specific entity is subject to the provisions of the KORA, public agency is defined at K.S.A. 45-217(e):

"(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."  
(Emphasis added).

We note that the location of a record does not automatically dictate whether it is in fact a public or private record.

Custodial duties may be delegated and actual possession by a public agency may not be required for a record to qualify as a public record:

"(c) 'Custodian' means the official custodian or any person designated by the official custodian to carry out the duties of custodian under this act.

"(d) 'Official custodian' means any officer or employee of a public agency who is responsible for the maintenance of public records, regardless of whether such records are in the officer's or employee's actual personal custody and control."  
K.S.A. 45-217.

Thus, a public agency cannot cause a public record to become a private record by merely transferring possession of the record. The nature of the record, and not its location, must be considered when determining if the record is subject to the KORA. K.S.A. 1-401 addresses ownership of documents and information created in the course of an accountant-client relationship and provides in pertinent part:

"(a) Except as otherwise provided in this section, all statements, records, schedules and memoranda, commonly known as working papers, made by a certified public accountant, or by any employee of a certified public accountant, incident to, or in the course of professional service to clients by such certified public accountant, except records delivered to a client by such certified public accountant, shall be and remain the property of such certified public accountant in the absence of a written agreement between the certified public accountant and the client to the contrary." (Emphasis added).

You inform us, but we have not independently verified, that AICPA Professional Standards AU § 339.06 states that "the auditor's rights of ownership are subject to the ethical limitations relating to the confidential relationship with the client." This ethical limitation appears to be addressed by K.S.A. 1-401(c), which provides for access to working papers

in connection with peer reviews. See Attorney General Opinion No. 88-70; 1 C.J.S. Accountants §§ 12, 13 (1985).

Thus, it appears that, as the client and as post audit statutes specify, post audit has access to the records in question. However, this does not automatically result in post audit (or any other entity) having a right to obtain copies of the records under the KORA. For such rights to exist, the specific records must first fit the definition of a public record.

One part of the definitional section of K.S.A. 45-217(e)(1) recognizes that the records of agents of the state may be subject to the KORA. However, a contract between a private entity and a state agency does not automatically make the private entity an agent for the state nor subject records to the KORA. See K.S.A. 45-217(e)(2)(A). It has been argued that, in acting pursuant to K.S.A. 1990 Supp. 46-1122, CPA firms are not agents for the state. Mr. Frieden cites K.A.R. 74-5-101 and 74-5-105, which discuss the independence of certified public accountants and prohibitions concerning incompatible occupations. Mr. Frieden believes that "the requisite autonomy of a CPA firm is destroyed upon a finding that the CPA firm is controlled by the LDPA such that the firm becomes an 'instrumentality' of the LDPA." He concludes that:

"Since a CPA firm which provides auditing services to the LDPA under contract cannot be a public agency within the meaning of K.S.A. 45-217(e)(1) or because they are specifically excluded under K.S.A. 45-217(e)(2)(A), the working papers generated by such firms in the course of the audit are not public records within the meaning of the Act. K.S.A. 45-217(f)."

On the other hand, because the authority being utilized by the CPA firm is governmental in nature, it may be argued that creation of the working papers is performance of a governmental task or function, which indicates an agency relationship. If such a relationship exists, records created by the agent may in fact meet the definition of a public record set forth at K.S.A. 45-217. See Attorney General Opinion No. 91-116. Additionally, even if the working papers are presumed to be owned by a private entity, such records are

directly related to functions, activities, programs and operations funded by public funds.

Nevertheless, the clear statement of ownership set forth in K.S.A. 1-401, the exceptions in K.S.A. 45-217(e) and (f) and the independent contractor status of CPA firms contracting under K.S.A. 1990 Supp. 46-1122 persuade us that the working papers in question are not public records subject to the KORA. See also Memorial Hospital Assoc., Inc. v. Knudson, 239 Kan. 663, 671 (1986); Attorney General Opinion No. 91-150. Thus, access to such records must occur pursuant to authority set forth in K.S.A. 46-1101 et seq.

Thus, in summary, it is our opinion that, pursuant to the definitions of public record and public agency set forth at K.S.A. 45-217, the independent contractor relationship contemplated by K.S.A. 1990 Supp. 46-1122 and the declaration of ownership set forth in K.S.A. 1-401, working papers created and maintained by a private CPA firm whose only connection with a state agency is a service contract entered into pursuant to K.S.A. 1990 Supp. 46-1122, are not subject to the provisions of the Kansas open records act (KORA). However, post audit may review such working papers in accordance with the oversight duties dictated by K.S.A. 1990 Supp. 46-1127(a), the audit authority and powers of the division of legislative post audit and as recognized by general legal principles applicable to the accountant/client relationship. Access to working papers by post audit does not automatically alter the nature of the records which may be closed by post audit if the records in question are subject to a duty of confidentiality.

Very truly yours,



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Theresa Marcel Nuckolls  
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