



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 158

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

Re: Legislature -- Legislative Post Audit -- Additional  
Performance Audits at Direction of Post Audit  
Committee; Access to Records; Mortgage Credit  
Certificate Program; Duty of Confidentiality

Public Records, Documents and Information --  
Records Open to Public -- Definitions; Public  
Records; Mortgage Credit Certificate Program Records

Synopsis: It is our opinion that pursuant to K.S.A. 1990  
Supp. 46-1114(c)(1), 26 U.S.C.A. §§ 25 et  
seq., 26 C.F.R. §§ 1.25-1T et seq. and  
K.S.A. 1990 Supp. 74-5058 et seq., post  
audit should be given access to the records in  
question unless federal or state law concerning  
confidentiality of income tax returns prohibits  
post audit access. These records concern the  
mortgage credit certificate program which is being  
implemented and administered by a private entity on  
behalf of and pursuant to contracts with Kansas  
counties. Records obtained by post audit remain  
subject to any duty of confidentiality imposed by  
law. Cited herein: K.S.A. 1-401; 12-2901; K.S.A.  
1990 Supp. 12-2904; K.S.A. 19-101; 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; K.S.A. 46-1115;  
46-1116; K.S.A. 1990 Supp. 74-5058; 74-5060;  
74-5061; K.S.A. 77-201, as amended by L. 1991,  
ch. 33, § 37; K.S.A. 79-3234; 26 U.S.C.A. §§ 25;  
26 U.S.C.A. § 6103; 26 C.F.R. §§ 1.25-1T, 1.25-3T,  
1.25-4T.

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Dear Ms. Hinton:

As post auditor, you request our opinion regarding access to specific records. You inform us that, in April 1991, the legislative post audit committee (LPAC) authorized a performance audit whereby post audit was directed to examine the handling by the Kansas department of commerce of federal low-income housing and mortgage programs. You are now in the process of conducting this audit, as it relates to the department's role in the mortgage credit certificate program. In attempting to determine if the program would be more beneficial to home buyers and more effective if administered by the state, rather than a bond underwriter, post audit has requested information from public and private entities currently involved in implementing the mortgage credit certificate (MCC) program. The requested information includes:

"the names and address of each home buyer who received a mortgage credit certificate from the 1990 allocation  
the name of the lender (bank, savings and loan, mortgage company, etc.) for each certificate holder  
the indebtedness amount for each certificate holder  
the income level of each certificate holder  
the purchase price of each certificate holder's home."

You provide us with copies of letters from both public and private entities basically disavowing ownership of or control over the records in question, and thus, declining access to post audit. We have also obtained a copy of the contract between the private entity (acting as a bond underwriter and program administrator) and two Kansas counties. This contract declares the private entity to be "an independent contractor."

26 U.S.C.A. § 25 et seq. establish the mortgage credit certificate program. This authority permits governmental

entities to utilize existing state bond law to assist low and middle income first time home buyers. Individuals who obtain a mortgage credit certificate from a state or political subdivision are permitted a federal income tax credit. 26 C.F.R. 1.25-1T et seq. further regulate and delineate the restrictions and requirements associated with participation in this program. Both the federal act and the resulting regulations allow states and political subdivisions to issue mortgage credit certificates in lieu of qualified mortgage bonds. See 26 C.F.R. § 1.25-1T(a).

26 U.S.C.A. § 25 et seq. and 26 C.F.R. § 1.25-1T et seq. allow a state or political subdivision to participate in the MCC program. This authority requires that the governmental entity ensure compliance with federal law. See e.g. 26 C.F.R. §§ 1.25-3T(e)(3) and 1.25-4T(j)(A). These requirements cannot be fulfilled without a certain amount of oversight by the responsible governmental entities. K.S.A. 74-5058 et seq. likewise permit participation in the program by public entities. See e.g. K.S.A. 74-5060 and 74-5061. Thus, federal and state law contemplate and authorize a program implemented, overseen and administered by the state or a political subdivision.

In the situation at hand, the MCC program is largely conducted by a private entity, pursuant to a contract with the counties. While we find no specific statutory authority permitting such private administration of the MCC program, county and state entities generally enjoy powers which allow ministerial functions to be delegated to or contractually shared with a private entity. See 16 Am.Jur.2d Constitutional Law, § 332 et seq. (1979); K.S.A. 12-2901 et seq.; K.S.A. 1990 Supp. 19-101(a). Nevertheless, despite the contractual delegation of authority to a private entity, the federal act and regulations, and Kansas statutes, generally require that the MCC program remain one conducted by a governmental entity or be based upon authority legally delegated by such an entity. Public entities may not contractually insulate or absolve themselves from ultimate responsibility for the performance of powers or duties that are strictly governmental in nature. See e.g. K.S.A. 1990 Supp. 12-2904(e): "No agreement made pursuant to this act shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made here under, such performance may be offered in satisfaction of the obligation or responsibility." Thus, in

administering the MCC program on behalf of the county, a private entity may be contractually characterized as an independent contractor, but the program itself is governmental in nature. The creation of MCC program records and administration of the MCC program remain governmental functions which may be performed by a private entity only if delegated that authority by a governmental entity.

Post audit may potentially obtain access to records pursuant to either specific authority governing that agency or under general public records law. Thus, we must examine both acts. However, we note that K.S.A. 1990 Supp. 46-1106(g) [which is also adopted by reference in K.S.A. 1990 Supp. 46-1114(b) and 46-1108)] requires that post audit respect any duty of confidentiality imposed by law. See also K.S.A. 1990 Supp. 45-221(a)(1) and (30). Thus, records provided to post audit do not necessarily lose confidentiality; if a law makes such records confidential, post audit must maintain such confidentiality. You inform us that the IRS has declined your request for some of the information, and that such refusal was based upon laws closing income tax return information. Thus, if closure authority exists, and it applies to the records in question, post audit must comply with such confidentiality requirements. See K.S.A. 79-3234 and 26 U.S.C. § 6103. We do not at this time have sufficient information about the records to determine whether such closure is mandated.

K.S.A. 1990 Supp. 46-1106 and 46-1108 authorize post audit to perform audits of state agencies such as the Kansas department of commerce. K.S.A. 46-1114(c) further authorizes audits of other types of entities:

"Audits authorized under this section are the following:

"(1) Audit of any local subdivision of government or agency or instrumentality thereof which receives any distribution of moneys from or through the state.

"(2) Audit of any person who receives any grant or gift from or through the state.

"(3) Audit of the contract relationships and the fiscal records related thereto of any person who contracts with the state.

"(4) Audit of any person who is regulated or licensed by any state agency or who

operates or functions for the benefit of any state institution, except that this subsection (c)(4) shall not include audit of any person regulated by the state corporation commission." (Emphasis added).

Riley and Geary county receive and distribute money from the state. Thus, pursuant to K.S.A. 1990 Supp. 46-1114(c)(1), post audit may conduct an audit of the county, or any agency or instrumentality of the county.

When conducting an audit pursuant to K.S.A. 1990 Supp. 46-1114(c)(1), post audit has access to records as set forth in K.S.A. 1990 Supp. 46-1114(b):

"(b) Upon receiving any such direction, the post auditor with the division of post audit, shall make such audit and shall have 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. . . ."

K.S.A. 1990 Supp. 46-1106 provides in pertinent part:

"(g) In the discharge of the duties imposed under the legislative post audit, the post auditor or firm conducting a financial-compliance audit or conducting other financial-compliance audit work shall have access to all books, accounts, records, files, documents and correspondence, confidential or otherwise, of any person or state agency subject to the legislative post audit act or in the custody of any such person or state agency. . . ." (Emphasis added).

K.S.A. 77-201 Thirteenth, as amended by L. 1991, ch. 33, § 37, defines person to include bodies politic and corporate. A county is such a body. K.S.A. 19-101. Thus, pursuant to K.S.A. 46-1101 et seq., post audit must be given access to records of any state agency or the county being audited. We note that penalties for failure to provide such access include criminal sanctions under K.S.A. 46-1116 and the withholding of state funds pursuant to K.S.A. 46-1115.

In addition to the access authority granted to post audit pursuant to K.S.A. 46-1101 et seq. the Kansas open records act (KORA), set forth at K.S.A. 45-215 et seq., generally declares that all public records must be open and accessible unless the specific record is permissibly or mandatorily closed by law. Even though access to records by post audit is broader than the access granted under the KORA, that act may be helpful with regard to the definition of public records:

"(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." K.S.A. 45-217(f).

A county meets the definition of a public agency set forth 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. . . ."  
(Emphasis added).

There has been some difficulty in determining whether the public or private entity "owns" the specific records in question. Moreover, the contract between the county and the private entity states that the private entity is an independent contractor. This disclaimer appears to be an attempt to disavow any agency relationship. There may also be some argument that the private entity is connected to the county only by payment for services to the private entity, and thus excepted from the KORA by K.S.A. 45-217(e)(2)(A).

However, while it appears that neither the county nor the private entity wants to claim "ownership" of the records in question, the records are not only related to, but are solely created pursuant to a function, activity, program or operation that is governmental in nature and funded by public funds. See K.S.A. 45-217(f)(2). Moreover, in carrying out the MCC program, the private entity, while possibly retaining its independent contractor status, could arguably be acting as an instrumentality of the county. See K.S.A. 45-217(e)(1) and K.S.A. 1990 Supp. 46-1114(c)(1).

Despite its utilization of a private entity to carry out the duties and powers associated with conducting the MCC program, the county remains the entity with the primary authority and responsibility for that program. The private entity is merely carrying out the duties of the county. The records in question are made in furtherance of a governmental program which may only be conducted by a public agency.

The contract between the county and the private entity permits the private entity to carry out the official duties of the county. This authority may include custody of what would otherwise be public records. However, there is no specific law declaring these records to be privately owned. See e.g. K.S.A. 1-401. In addition, the provisions of K.S.A. 1990 Supp. 74-5058 et seq., 26 U.S.C.A. § 25 et seq., and the federal regulations do not speak to administration of the MCC program by a private entity, but rather, mandate that the program be overseen by the governmental entity. The governmental entity is required to insure compliance with federal requirements. Thus, despite the fact that the county does not actually have custody or control of the records, we believe that such records are in fact subject to the provisions of 46-1101 et seq. and may be obtained by post audit.

In summary, it is our opinion that pursuant to K.S.A. 1990 Supp. 46-1114(c)(1), 26 U.S.C.A. §§ 25 et seq., 26

C.F.R. §§ 1.25-1T et seq. and K.S.A. 1990 Supp. 74-5058 et seq., post audit should be given access to the records in question unless federal or state law concerning confidentiality of income tax returns prohibits post audit access. These records concern the mortgage credit certificate program which is being implemented and administered by a private entity on behalf of and pursuant to contracts with Kansas counties. Records obtained by post audit remain subject to any duty of confidentiality imposed by law.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Theresa Marcel Nuckolls  
Assistant Attorney General

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