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ATTORNEY GENERAL OPINION NO. 92- 132

Robert J. Watson
City Attorney
City Hall, 8500 Santa Fe Drive
Overland Park, Kansas 66212

RE: Public Records, Documents and Information --
Records Open to Public -- Inspection of Records;
Certain Records Not Required to be Open; Personnel
Record; Employee Benefit Plans; Payments to
Participant; Salary

State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Secret Ballots; Binding Action in Closed or
Executive Sessions; Discretionarily Closed Record
Discussed or Acted Upon in an Open Meeting

Synopsis: The city of Overland Park board of trustees, which administers that city's police department retirement plan, is an entity subject to the provisions of the Kansas open records act (KORA), K.S.A. 45-215 et seq. As a public agency subject to the KORA, that entity may discretionarily close records which pertain to individual city employees and that otherwise qualify as personnel records under K.S.A. 1991 Supp. 45-221(a)(4). However, as set forth in that statute, salaries of public employees must be disclosed. It is our opinion that, for the purposes of this KORA provision, the term salary includes all forms of monetary compensation actually paid out by the city to individual

employees in return for services rendered. Thus, the amount of money actually paid as a pension benefit is part of the employee's salary and must therefore be disclosed. Furthermore, public records which might otherwise be permissibly closed pursuant to K.S.A. 1991 Supp. 45-221(a)(4) must be disclosed if such records are reviewed and discussed by a public body during an open meeting subject to K.S.A. 75-4317 et seq., or if the public body takes binding action on such a record. Cited herein: K.S.A. 45-215; 45-217, as amended by L. 1992, ch. 321, § 22; K.S.A. 1991 Supp. 45-221; K.S.A. 75-4317; 75-4318; 75-4319, as amended by L. 1992, ch.312, § 39 and ch. 318, § 9.

* * *

Dear Mr. Watson:

As city attorney for the city of Overland Park you request our opinion on several issues involving the Kansas open records act (KORA), K.S.A. 45-215 et seq. The specific record in question is possessed by a board of trustees. This board was created by city charter ordinance and administers the city's police department retirement plan and trust agreement. The record at issue contains the amount and the method of distribution of retirement benefits to a specific participant. We must assume that the specific participant is a current or former city employee. You ask the following questions:

"1. Is the trustee a 'public agency' whose records are open for inspection in accordance with the Kansas open records act?"

"2. Is the information relating to the amount and the method of distribution of a participant's retirement benefit which is contained in the records of the trustee subject to disclosure under the Kansas open records act?"

We concur with you that the board of trustees is a public agency, within the definition set forth at K.S.A. 45-217, as amended by L. 1992, ch. 321, § 22.

"(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."

The entity in question was created by the city to carry out city functions. It acts solely pursuant to authority delegated to it by the city and is supported in whole or in part by public funds provided by the city. Thus, in answer to your first question, this entity is a public agency subject to the KORA.

The KORA generally declares that public records shall be open for inspection by any person unless otherwise provided. It defines public records at K.S.A. 45-217(f), as amended. Such records include "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency. . . ." Thus, any record in the possession of this specific public agency (unless falling within the parameters of K.S.A. 45-217(f)(2), as amended) is a public record. Public records are presumed open for inspection unless permissibly or mandatorily closed pursuant to a specific law applicable to the specific record.

You inform us that the record in question contains information on retirement benefit amounts and methodology for benefit distribution options. You cite to K.S.A. 1991 Supp. 45-221(a)(4) as potential closure law. This statute provides:

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

. . . .

"(4) Personnel records, performance rating or individually identifiable records pertaining to employees or applicants for employment except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such." (Emphasis added).

Attorney General Opinions No. 91-50, 90-136, 89-107, 89-106, 88-61, 87-169 and 87-10 discuss K.S.A. 45-221(a)(4). Pursuant

to the above emphasized language in the statute, public agencies subject to the KORA are required to disclose the names, positions, salaries and lengths of service of public officers and employees. Disclosure of this information is not discretionary. Thus, the issues become (1) does the record in question qualify as a personnel record, and if so, (2) is the information in the record nevertheless exempted from permissive closure?

As discussed in Attorney General Opinion No. 87-10, personnel means employees of public agencies. Personnel exceptions to public openness laws generally promote and serve protection of personal privacy. See State v. U.S.D. No. 305, 13 Kan.App.2d 117, 119 (1988): "The KOMA does not define 'personnel matters'; however, it has been suggested that the purpose of this exception is to protect privacy rights of the employees, save personal reputations, and encourage qualified people to remain in public employ." See K.S.A. 75-4319(b)(1), as amended by L. 1992, ch. 312, § 39 and ch. 318, § 9. As evidenced by K.S.A. 1991 Supp. 45-221(a)(4) and 75-4319(b)(1), as amended, the legislature weighs public employees' privacy rights against public interest in personnel records or discussions on public employees.

In order to qualify as a personnel record, information or matters discussed must necessarily concern individual public employees. See also Attorney General Opinions No. 81-39, 88-25, and 80-102. Not every record with a person's name in it is automatically a personnel record. See Attorney General Opinion NO. 89-106. Furthermore, closing public records not specific to individual public employees does not further protection of personal privacy. It is our opinion that K.S.A. 1991 Supp. 45-221(a)(4) permits closure of those records which are personnel records and contain information specific to applicants, current or former individual public employees. However, policy or procedural records generally concerning personnel matters may be presumed open, unless otherwise closed pursuant to authority other than K.S.A. 1991 Supp. 45-221(a)(4).

For the purposes of this opinion we must assume that the methodology of computing benefits and the actual retirement benefit amounts in a personnel record relate to a specific city employee, not just to a general category of city employees. If such is the case, it is our opinion that such records may be closed pursuant to the terms of K.S.A. 1991

Supp. 45-221(a)(4), if not specifically exempted from permissible closure.

As you note in your opinion request letter, salaries are exempt from permissive closure. The issue becomes whether benefit amounts or the method of their distribution to the individual participant can be considered "salary" which is not entitled to the exemption for personnel records. This exception to discretionary closure recognizes that the public's interest in the amount of public money spent out weighs the individual employee's right to privacy concerning such matters.

Salary has been defined as "a reward or recompense for services performed. In a more limited sense, a fixed periodical compensation paid for services rendered. A stated compensation paid periodically as by the year, month, or other fixed period, in contrast to wages which are normally based on an hourly rate." Blacks Law Dictionary 1200 (5th ed. 1979). Case law supports the characterization of salary paid to a public employee as inclusive of benefits such as retirement, deferred compensation, vacation pay, sick pay and other such sources of supplemental income. See Wilson v. Southeastern Penn. Transp. Authority, 709 F.Supp. 623, 628 (Pa. 1989); Sweptston v. State Personnel Board, 195 C.A.3d 92, 240 Cal. Rptr. 470, 472 (1987); Rock v. Burris, 564 N.E.2d 1240, 1243 (Ill. 1990); Louisiana Public Employees Council 17 et al. v. City of Lake Charles, 567 S.2d 1185, 1187 (La. 1990); But see Hilligoss v. LaDow, 368 N.E.2d 1365, 1369 (Ind. 1977); Central Dauphin Ed. Ass'n. v. Central Dauphin School District, 367 A.2d 385, 387 (Pa. 1976); Garian v. City of Highland Park, 439 N.W.2d 368, 370 (Mich. 1979); Taylor v. McQuire, 420 N.Y.S.2d 248, 251 (N.Y. 1979). We have thus far not located Kansas case law on whether the term "salary" includes compensation other than the base salary or wage. However, it is our opinion that, given the purpose intended by K.S.A. 1991 Supp. 45-221(a)(4), actual payments of money by a public body to a public employee as part of a pension or retirement benefit fall within the scope of that statute and may be regarded as delayed payments of salary. See Swartwout v. City of New York, 369 N.Y.S.2d 865, 867 (1975); Michigan State Police Command Officers Assn., Inc. v. State Dept. of Public Safety, 263 N.W.2d 47, 48 (Mich. 1978); Morrisey v. Curran, 302 F.Supp. 32, 35 (N.Y. 1969); Duma v. Brandenburg, 324 F.Supp. 536, 544 (N.Y. 1971); Orban v. Allen, 241 N.E.2d 378, 380 (Ind. 1968). Such payments are not reimbursement for expenses, but rather, they constitute reward or recompense for

services performed. It is our opinion that K.S.A. 1991 Supp. 45-221(a)(4) requires the disclosure of pension or benefit monies and amounts actually paid out to public employees in return for services rendered. Thus, amounts actually paid by the city as retirement benefits to a city employee must be disclosed.

You raise a secondary issue with regard to disclosure of the amount and method of distribution of a benefit when such methodology and amounts have only been discussed and decided upon at a meeting of an entity subject to K.S.A. 75-4317 et seq., the Kansas open meetings act (KOMA). You note that, unlike K.S.A. 1991 Supp. 45-221(a)(20), (21) and (22), the KORA does not specifically provide for mandatory disclosure of records falling under the definition set forth at K.S.A. 1991 Supp. 45-221(a)(4) when such are cited or identified in an open meeting. We concur with that analysis. However, you go on to state: "arguably, if a personnel record is exempt from the disclosure pursuant to K.S.A. 45-221(a)(4) identification or citation of the record in an open meeting does not make the exemption inapplicable." We must take issue with the broad implications of this argument.

K.S.A. 75-4317 et seq. recognizes that a representative government is dependent upon an informed electorate and declares a policy of open public meetings. K.S.A. 75-4318(a) prohibits binding action by secret ballot. K.S.A. 75-4319, as amended, permits some matters to be discussed behind closed doors, however, (c) prohibits binding action during closed or executive recesses. Thus, while K.S.A. 75-4319(b)(1) permits a public agency to privately discuss a personnel matter involving a specific individual employee, binding action by that agency cannot occur secretly or in an executive session.

It is an oxymoron to say that you can conduct an open discussion on closed documents without opening those documents. It runs counter to the mandatory openness dictated by the KOMA to read the KORA to allow discretionary closure of records openly reviewed and discussed or officially acted upon by a public body at an open meeting. To read these two acts in such opposite manners is to permit the KOMA to be thwarted by the KORA to the point of allowing public meetings to be conducted in code; e.g. "Madam chair, I move we vote 'yes' on document A and 'no' on document B." Such a "discussion" violates the intent, spirit and letter of the KOMA. By discussing the record openly, the public body exercises its discretion in favor of opening the matter, and thus, the record. In taking binding action on a matter, the

public body must reveal the nature of the vote and the matter approved. If a public body wishes to close a public record, it must do so only in accordance with statutory authority and should refrain from waiving such closure authority through open discussion of the record.

Thus, it is our opinion that, if a public record is voluntarily discussed and reviewed by a public body at an open meeting, such a record mandatorily becomes an open public record despite possible discretionary authority under K.S.A. 1991 Supp. 45-221. This is especially true if the public body takes official action on such a document.

Very truly yours,


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