

Approved: Feb. 10, 1998  
Date

MINUTES OF THE Senate Committee on Financial Institutions and Insurance.

The meeting was called to order by Chairperson Don Steffes at 9:00 a.m. on February 3, 1998 in Room 529-S of the Capitol.

All members were present except:

Committee staff present: Dr. William Wolff, Legislative Research Department  
Fred Carman, Revisor of Statutes  
Nikki Feuerborn, Committee Secretary

Conferees appearing before the committee:

Others attending: See attached list

The Committee was presented with a copy of Opinion No. 98-5 received from the Attorney General dated February 2, 1998, in which she declares the list of state banks which have formed subsidiaries is subject to the Kansas Open Records Act and is therefore open to the public (Attachment 1). A letter from Senators Steffes and Feleciano is being prepared to send to Newton Male, State Banking Commissioner, requesting this information on the 79 participating state banks as well as the date the subsidiary was established. The question of how many State Bank Board members have banks which have formed subsidiaries was discussed. Does this constitute a conflict of interest?

Dr. Wolff presented a list of the 45 Kansas national banks with investment operating subsidiaries and a breakdown of their loans and investments (Attachment 2). This information was gathered from the internet and it was not possible to identify those banks which do business in other states as well as Kansas. It is not known if they own subsidiaries in other states also. It is possible to determine the approximate income from the banks as well as what their approximate tax should be if they did not have subsidiaries. This "snap shot" of the banks is based on information as of September 30, 1997, which is the last quarter reported. The lending characteristics of the banks were discussed and it was pointed out that even though loans to deposits seemed about average, it should be noted that an extremely high percentage of the loans were in real estate rather than in higher risk categories such as commercial, agricultural, and individual loans which are very important for economic development. It appears the banking industry has become involved in the same real estate market which was once the business of savings and loans. Mortgage companies are available to handle this market. It was also pointed out that some of the banks which had the lowest loan ratio were banks in which public funds were kept. These banks then formed subsidiaries and invested in federal securities which are almost all tax exempt under the corporation laws. The subsidiaries were not subject to privilege taxes. The Department of Revenue will be asked to extrapolate from the existing information what their tax liabilities would be if they did not have subsidiaries.

The Committee discussed the problem of Kansas' dismantling of the existing economic development programs such as Kansas Venture Capital. Startup money is difficult for the small investor to obtain in this state unless they go through SBA and other like institutions. Banks are shifting from commercial loans and some require a statement of the past three year earnings which eliminates new businesses from applying for money.

The meeting adjourned at 9:50 a.m. The next meeting will be held on February 4, 1998.





State of Kansas

Office of the Attorney General

301 S.W. 10th Avenue, Topeka 66612-1597

CARLA J. STOVALL  
ATTORNEY GENERAL

February 2, 1998

MAIN PHONE: (785) 296-2215  
FAX: 296-6296  
TTY: 291-3767

ATTORNEY GENERAL OPINION NO. 98- 5

The Honorable Don Steffes  
State Senator, 35th District  
State Capitol, Room 128-S  
Topeka, Kansas 66612-1504

The Honorable Paul Feleciano, Jr.  
State Senator, 28th District  
State Capitol, Room 452-E  
Topeka, Kansas 66612-1504

Re: Banks and Banking; Trust Companies--Banking Code; Supervision;  
Commissioner--Examination Records of Commissioner Confidential

Public Records, Documents and Information--Records Open to Public--  
Public Policy that Records be Open; Records Maintained by Bank  
Commissioner

Synopsis: Routine information submitted to the Office of the State Bank Commissioner by state chartered banks notifying the Commissioner of formation of a subsidiary is not information generated in making an investigation or examination and is not confidential information pursuant to K.S.A. 9-1712. Because no other exemption to the Kansas Open Records Act applies, such information is mandatorily open to the public. Cited herein: K.S.A. 45-216; K.S.A. 1997 Supp. 45-221; K.S.A. 9-1712; K.S.A. 1997 Supp. 9-1715.

\*

\*

\*

*Senate F&D*  
*Attachment 1*  
*2/3/98*

Dear Senators Steffes and Feleciano:

As Senator for the 35th District and Senator for the 28th District you ask our opinion concerning whether certain information submitted to the Office of the State Bank Commissioner by state chartered banks is confidential pursuant to K.S.A. 9-1712.

We have been provided the following information. Pursuant to K.S.A. 1997 Supp. 9-1715, the Commissioner has authority to issue special orders allowing state banks to engage in any activity in which such banks could engage were they operating as national banks. Federal chartered banks were previously allowed to form subsidiaries for purposes which are part of or incidental to banking. 12 C.F.R. § 5.34. In 1995 the Commissioner issued Special Order 1995-6 providing:

"[A] Kansas state bank may own the stock of a subsidiary established and operated for the purpose of owning, holding, and managing all or part of the parent bank's securities portfolio."

The special order and the formation of subsidiaries pursuant thereto enables banks to realize a state tax advantage.

Pursuant to the special order, prior written notification was to be provided to the Commissioner of a bank's intent to establish and operate a subsidiary. The notification was required to include the following information:

"IT IS FURTHER ORDERED, that the required notification shall detail the establishment and operation of the subsidiary, including without limitation, the proposed date of establishment of the subsidiary, the expected costs of establishment and operation of the subsidiary, the proposed name and location of the subsidiary, the staffing requirements of the subsidiary, and any additional information deemed necessary by the commissioner."

Counsel for the Commissioner, William Grant, has informed us that in no case did the Commissioner request additional information from any bank pursuant to this special order.

In 1996 the Commissioner issued Special Order 1996-4 broadening the authority of banks to form subsidiaries:

"IT IS THEREFORE ORDERED, that subject to the limitations set forth in this special order, a Kansas state bank is hereby authorized to establish or acquire operating subsidiaries for the purpose of engaging in any activities which are a part of or incidental to the business of banking."

Again, approval of the Commissioner was not required; the special order provided for notification only. This time the only information required of all notifying banks was "the proposed activities of the operating subsidiary and the specific location at which each activity will be conducted." Again, the Commissioner retained the right to request additional information. We do not know if the Commissioner ever requested such additional information pursuant to Special Order 1996-4.

William Wolfe, Associate Director of the Legislative Research Department, at the direction of Senator Steffes, requested from the Commissioner:

"[A] copy of the information required to be filed with the commissioner for each of the Kansas state chartered banks which have availed themselves of the authority granted by the two cited Special Orders [1995-6 and 1996-4]."

Mr. Grant, on behalf of the Commissioner, responded by denying the request, stating:

"K.S.A. 9-1712 makes confidential the information this department gathers in investigating or examining the banks subject to OSBC [Office of the State Bank Commissioner] jurisdiction. This statute is interpreted to encompass any information that a bank is required to provide to the OSBC in pursuit of the department's regulatory responsibility. The information you have requested was prepared and placed in the OSBC custody for the express purpose of complying with Kansas law and this agency's supervisory authority. . . ."

Mr. Grant went on to state that K.S.A. 9-1712 allows the Commissioner discretion to disclose confidential information, and he requested additional information on the proposed use of the records.

We note that in response to a Freedom of Information Act request made by Mr. Wolfe, the Office of the Comptroller of Currency provided a list of national banks which had formed subsidiaries for the purpose of holding the banks' securities portfolios.

The Kansas Open Records Act (KORA) declares the public policy of the State to be that "public records shall be open for inspection by any person" and the KORA is to be "liberally construed and applied to promote such policy." K.S.A. 45-216(a). The effect of this statute is that all public records are open unless otherwise permissibly or mandatorily closed by law. "The burden of proving an exemption from disclosure is on the agency not disclosing the information." ***Southwest Anesthesia Service v. Southwest Medical Center***, 23 Kan.App.2d 950, 953 (1996).

K.S.A. 1997 45-221(a) sets forth exemptions from the KORA:

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

"(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court to restrict or prohibit disclosure."

K.S.A. 9-1712 provides for closure of certain information held by the Commissioner:

"(a) All information the state bank commissioner generates in making an investigation or examination of a state bank or trust company shall be confidential information.

"(b) All confidential information shall be the property of the state of Kansas and shall not be subject to disclosure except upon the written approval of the state bank commissioner.

"(c) The commissioner shall give 10 days prior written notice of intent to disclose confidential information to the affected bank or trust company, except that, such confidential information shall not apply to reports filed pursuant to K.S.A. 9-2014, and amendments thereto.

"(d) Any bank or trust company receiving notice as provided in subsection (c), may object to the disclosure of the confidential information and shall be afforded the right to a hearing in accordance with the provisions of the Kansas administrative procedure act.

"(e) As used in this section, 'information' means, but is not limited to, all documents, oral and written communication and all electronic data.

"(f) Any person who violates this section, upon conviction, shall be guilty of a class C misdemeanor."

If the information requested is "confidential information" within the meaning of K.S.A. 9-1712, it is exempt from disclosure under KORA. If it is not "confidential information," disclosure is mandatory under KORA.

We recognize the general rule that an agency's interpretation of a statute which it has the duty to implement should be granted deference if the agency's interpretation is supported

by a rational basis. However, an agency's interpretation is not binding, especially if the agency is mistaken as to a question of law. ***Radke Oil Company, Inc., v. Kansas Department of Health and Environment***, 23 Kan.App.2d 774, Syl ¶ 1 (1997).

K.S.A. 9-1712 makes it crime to release confidential information in violation of the statutory procedures. As a criminal statute, it is to be interpreted strictly. The interpretation placed on it by the Commissioner is a very broad one--"This statute is interpreted to encompass any information that a bank is required to provide to the OSBC in pursuit of the department's regulatory responsibility." Given the Commissioner's interpretation, even the names of state chartered banks could be deemed confidential since it is information supplied by the banks.

The Commissioner argues that legislative amendments to K.S.A. 9-1712 support his interpretation. Prior to 1990, K.S.A. 9-1712 provided:

"All information which the commissioner shall gather or record in making an investigation or examination of any bank or trust company shall be confidential information and shall not be disclosed by the commissioner. . . ."

The minutes of the House Committee on Commercial and Financial Institutions contain the following written testimony of the then current counsel for the Commissioner:

"The present statute does not adequately describe what confidential information is, who owns it and when it can be released. . . . The amendments also define information to be all inclusive." Minutes, House Committee on Commercial and Financial Institutions, Feb. 20, 1990.

We do not believe that counsel was saying that the purpose of the amendment was to close all information. Rather, he appears to have been referring to part of the amendments adding the following subsection to K.S.A. 9-1712:

"(e) As used in this section, 'information' means, but is not limited to, all documents, oral and written communication and all electronic data."

In other words, confidential information may take many forms. But what information is confidential is then defined by subsection (a)--that which is generated in making an investigation or examination.

We believe that the purpose of the 1990 amendment to K.S.A. 9-1712, which essentially changed the words "gather or record" to "generates," was an attempt to clarify that *both* information received from the bank *and* documents and reports prepared or created by the Commissioner as part of an examination or investigation are closed. See ***Crandon v. State***, 257 Kan. 727 (1995) (holding that both are protected.) We do not view the

amendments to K.S.A. 9-1712 as an attempt to say that *all* information concerning state banks in the possession of or generated by the Bank Commissioner is confidential—the information still must be in relation to an investigation or examination of a bank. If the Legislature had intended for all information concerning state banks to be confidential, it could have easily said so.

The Commissioner concedes that this information is not from an examination. The Commissioner argues, however, that gathering this type of information is in the nature of an "investigation". The Commissioner relies on *Atchison, T. & S.F. Ry. Co. v. Kansas Com'n on Civil Rights*, 215 Kan. 911, 918 (1974), for the proposition that the word "investigation" is appropriately used with regard to nonjudicial functions of an administrative agency and the seeking of information for future use rather than proceedings in which action is taken." This A.T.S.F case, however, did not concern the difference between a routine administrative function verses an in-depth review of information.

A more relevant definition of investigation is found in *Baudin v. City of Crystal Lake*, 548 N.E.2d 110 (Ill. App. 1989), in which a law enforcement agency attempted to close certain information under the Illinois information act as "records . . . related to the detection and investigation of crime." 548 N.E.2d at 1112. The court said,

"An agency such as a police department cannot simply take the position that, since it is involved in investigatory work and some of its records are exempt from disclosure under the Act, every document in its possession somehow comes to share in that exemption. . . . Routine review of governmental functions is not sheltered, but when the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way." *Id.* at 1113.

"Investigate" is generally defined as:

"To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry." Black's Law Dictionary 825 (6th Ed. 1990).

We view the information required to be filed by the special orders as the product of a routine administrative function of the Commissioner, not as an investigation, because an investigation has a specific target from which detailed information is obtained. The one exception would be if the Commissioner required a bank to file additional information beyond the routine, that additional information might be closed as information generated from an investigation, depending on the nature and extent of the information.



This interpretation of the Commissioner's power to close investigatory materials is consistent with prior opinions of this office. In Attorney General Opinion No. 78-67, the Commissioner had argued that materials filed with a bank's initial application for incorporation were closed as gathered from an examination or investigation. The opinion said:

"The confidentiality required by K.S.A. 9-1712 extends by the terms of that statute only to information derived by the commissioner from the examination and investigation of banks. That confidentiality applies, as General Ferguson stated, to the examination required by K.S.A. 9-804. It does not apply, however, to any information other than that derived from such examinations. The information contained in articles of incorporation and in the application for a certificate of authority is not furnished to the Commissioner as a result of any examination, but is expressly required to be furnished by the incorporators. The confidentiality requirement of K.S.A. 9-1712 may not be construed to thwart the plain requirements of K.S.A. 45-201 [the predecessor to KORA]."

In summary, given KORA's presumption of openness, and strictly construing K.S.A. 9-1712, we believe that the information required to be submitted from all banks notifying the Commissioner of subsidiaries is not from an "examination or investigation," and may not be closed under K.S.A. 9-1712. We are unable to locate any other exception to the KORA which would allow closure of such information, so we believe it is mandatorily open under the KORA.

Very truly yours,



CARLA J. STOVALL  
Attorney General of Kansas



Steve Phillips  
Assistant Attorney General

CJS:JLM:SP:jm

**KANSAS NATIONAL BANKS WITH INVESTMENT OPERATING SUBSIDIARIES**

Banks	Total Assets	Total Deposits	Loans				Net Loans & Leases	Loans to Deposits	Securities U.S. Government	Securities Income
			Commercial	Agricultural	Individual	Real Estate				
The First Natl. Bank of Smith Center, Smith Center	\$ 38,036	\$ 34,145	\$ 2,479	\$ 5,031	\$ 904	\$ 8,213	\$ 16,524	48.4%	\$ 13,405	\$ 869
The Stockton National Bank	44,730	36,210	3,097	13,953	2,304	15,903	34,739	95.9%	6,361	355
First Natl. Bank in Wellington, Wellington	66,254	58,798	7,333	9,034	4,768	19,051	40,111	68.2%	14,771	1,102
First Natl. Bank of Olathe, Olathe	317,099	267,185	79,321	151	8,047	67,486	153,447	57.4%	117,853	6,270
The First Natl. Bank of Dighton, Dighton	40,551	32,927	2,015	18,800	1,013	644	23,225	70.5%	5,670	408
First Natl. Bank of Holcomb, Holcomb	30,250	27,079	3,286	1,833	10,050	6,140	21,002	77.6%	4,287	267
First Natl. Bank & Trust Company in Larned, Larned	57,422	46,490	3,195	16,912	2,470	9,290	32,136	69.1%	21,246	912
The First Natl. Bank of Scott City, Scott City	46,608	40,161	5,385	15,340	2,428	4,518	29,052	72.3%	12,575	625
Security Natl. Bank, Manhattan	103,979	90,766	7,590	1,301	7,855	48,221	64,141	70.7%	27,884	1,447
The First Natl. Bank in Quinter, Quinter	66,507	56,437	5,980	22,384	1,460	6,104	35,043	62.1%	20,068	1,304
The Peoples Natl. Bank and Trust Company, Burlington	47,977	40,839	2,323	563	1,666	9,385	14,442	35.4%	25,863	1,613
The Farmers Natl. Bank of Osborne, Osborne	33,919	29,671	1,730	5,739	1,366	5,022	14,517	48.9%	13,003	755
First United Natl. Bank & Trust Company, Great Bend	149,795	130,755	14,974	19,708	9,307	30,285	79,594	60.9%	28,393	2,376
The First National of Washington, Washington	47,412	35,751	1,872	2,875	1,710	5,052	10,746	30.1%	25,715	1,332
Exchange National Bank, Marysville	199,660	172,656	57,618	7,255	8,004	81,988	154,990	89.8%	24,211	1,242
Farmers Bank & Trust, National Association, Great Bend	183,114	151,254	27,762	22,562	8,835	27,899	85,843	56.8%	70,089	3,928
First National Bank, Palco	26,279	24,261	4,829	3,218	1,693	8,132	17,684	72.9%	5,220	236
Emprise Bank, National Associate, Hays	81,759	74,680	11,314	721	17,975	23,597	53,149	71.2%	12,272	639
First Natl. Bank, Abilene	95,094	85,147	4,098	5,715	3,983	40,655	55,067	64.7%	27,689	1,565
The First Natl. Bank, Beloit	44,691	39,540	3,487	5,099	2,255	9,201	19,753	50.0%	16,169	969
People Natl. Bank & Trust, Ottawa	76,065	69,684	5,665	2,588	2,419	29,119	40,248	57.8%	23,947	1,455
The Leavenworth Natl. Bank & Trust Company, Leavenworth	72,444	64,015	7,778	183	7,940	24,484	40,169	62.7%	20,003	1,415
First Natl. Bank & Trust Co. Of Leavenworth, Leavenworth	76,558	64,743	3,815	1,402	23,112	28,291	55,925	86.4%	9,496	500
The Exchange Natl. Bank & Trust Company, Atchison	104,561	88,418	6,853	3,814	44,358	26,221	78,242	88.5%	17,592	948
Sunflower Bank, National Association, Salina	609,374	506,514	91,436	36,451	61,062	249,041	437,879	86.4%	95,345	6,012
First Natl. Bank & Trust, Osawatomie	72,016	64,514	4,806	1,749	5,425	37,297	49,213	76.3%	12,861	781
First Natl. Bank, Independence	20,172	18,531	3,885	1,030	1,611	7,961	14,272	77.0%	3,491	173
UMB Natl. Bank of America, Salina	677,413	531,419	34,360	14,651	28,955	53,494	145,072	27.3%	444,239	16,088
Community Natl. Bank, Chanute	62,121	53,861	6,852	3,653	5,945	30,046	47,792	88.7%	5,745	255

2/3/98

Attachment 2

Senate FDs D  
Attachment 2 2/3/98

Banks	Total Assets	Total Deposits	Loans				Net Loans & Leases	Loans to Deposits	Securities U.S. Government	Secu Income
			Commercial	Agricultural	Individual	Real Estate				
The First Natl. Bank & Trust Company, Parsons	57,415	47,570	6,349	4,032	6,297	18,413	36,053	75.8%	14,502	816
The First Natl. Bank of Louisburg, Louisburg	44,806	35,342	1,795	470	1,694	15,209	21,404	60.6%	12,680	825
Citizens Natl. Bank, Fort Scott	138,545	115,916	28,584	3,683	5,912	55,860	97,684	84.3%	22,305	1,367
The Girard Natl. Bank, Girard	118,255	98,678	15,558	22,053	8,145	26,484	73,409	74.4%	29,001	1,694
INTRUST Bank, National Associate, Wichita	1,675,149	1,339,356	525,950	25,290	361,192	246,269	1,151,618	86.0%	244,914	11,736
First Natl. Bank, Derby	58,790	53,262	2,197	638	6,590	21,120	30,300	56.9%	15,358	853
Bankers' Bank of Kansas, National Association, Wichita	35,561	22,833	3,571	833	2,287	4,713	18,984	83.1%	3,793	164
The Peoples National Bank of Clay Center	69,365	58,547	5,502	8,413	4,299	19,327	37,453	64.0%	17,518	1,493
First Natl. Bank in Pratt, Pratt	49,247	43,287	8,884	8,273	6,290	5,725	29,023	67.0%	15,415	877
Citizens Bank of Kansas, National Association, Kingman	98,323	78,925	5,844	18,001	5,169	33,728	62,377	79.0%	24,309	1,163
The First Natl. Bank of Hutchinson, Hutchinson	278,815	227,302	34,930	6,915	12,361	53,903	122,184	53.8%	66,585	4,771
The Citizens Natl. Bank in Independence, Independence	90,241	73,521	7,979	3,703	9,636	27,953	48,679	66.2%	20,388	112
The Southwest Natl. Bank of Wichita, Wichita	119,320	106,647	9,410	45	36,716	27,094	72,878	68.3%	29,148	1,099
Twin Lakes Natl. Bank, Wichita	120,092	109,052	6,009	0	67,186	14,381	86,802	79.6%	22,898	994
First Natl. Bank, Elkhart	35,229	31,300	1,978	7,246	5,145	12,946	27,667	88.4%	4,213	199
First Natl. Bank, Liberal	161,329	136,636	23,543	29,369	7,386	20,569	83,175	60.9%	57,698	2,939
<b>TOTALS</b>	<b>\$ 6,642,342</b>	<b>\$ 5,514,625</b>	<b>\$ 1,103,221</b>	<b>\$ 382,679</b>	<b>\$ 825,225</b>	<b>\$ 1,516,434</b>	<b>\$ 3,863,707</b>	<b>70.1%</b>	<b>\$ 1,726,188</b>	<b>\$ 87,043</b>
<b>SUMMARY</b>										
Commercial Loans as a percentage of deposits	20%									
Agricultural loans as a percentage of deposits	7%									
Real Estate loans as a percentage of deposits	27%									
Individual loans as a percentage of deposits	15%									
All loans and leases as percentage of deposits	70%									

Source: FDIC Institution Directory, 9/30/97 (dollar figures in thousands).

8-8