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June 27, 2023

ATTORNEY GENERAL OPINION NO. 2023- 3

The Honorable Vicki Schmidt, Commissioner of Insurance
Kansas Insurance Department
1300 SW Arrowhead Road
Topeka, KS 66604

Re: Insurance—Miscellaneous Provisions—Apportionment or Assignment of Risk of Certain Motor Vehicle Bodily Injury and Property Damage Liability Insurance; Filing of Plan; Requirements; Governing Board of Plan; Membership; Review of Plan; Approval; Disapproval; Procedure; Preparation of Plan by Commissioner; Unreasonable or Unfair Activities by Insurer or Rating Organization

Insurance—Kansas Automobile Injury Reparations Act—Assigned Claims Plan; Availability of Personal Injury Protection Benefits Under Plan; Powers of Commissioner; Participation by Insurers and Self-Insurers Required

Public Records, Documents and Information—Records Open to Public—Definitions—Inspection of Records

State Departments; Public Officers and Employees—Public Officers and Employees—Open Public Meetings—Open Meetings Declared Policy of State—Meetings of State and Subdivisions Open to Public

Synopsis: The Kansas Automobile Insurance Plan and Kansas Automobile Assigned Claims Plan are subject to the Kansas Open Records Act and the Kansas Open Meetings Act. Cited herein: K.S.A. 40-2102; 40-3116; 45-217; 45-218; 75-4317; 75-4318; K.A.R. 40-3-35.

* * *

Dear Commissioner Schmidt:

As the Commissioner of Insurance, you ask whether the Kansas Automobile Insurance Plan (KAIP) and the Kansas Automobile Assigned Claims Plan (KAACP) are subject to the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, and the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.* Since they act as arms of the Commissioner under the Commissioner's supervision, they are subject to KORA. Likewise, because they are subordinate to the Commissioner, they are also subject to KOMA.

To answer your questions, we must construe various statutes. The interpretation of statutory provisions begins with the statutory text, giving words their ordinary, everyday meanings. Only when the language is ambiguous is it appropriate to use tools of statutory interpretation or consider legislative history.¹

The KAIP is a statutorily created entity made up of various insurers and rating organizations that conduct business in Kansas.² It is charged with formulating a plan "for the equitable apportionment among insurers of applicants for insurance who are in good faith, entitled to but who are unable to procure through ordinary methods, such insurance."³ In plainer terms, the KAIP is "the state's residual market for individuals or businesses who are unable to obtain coverage through the regular voluntary insurance markets."⁴

The KAIP is administered by a "governing board."⁵ All nine members of the board are appointed by the Commissioner.⁶ The board must adopt a plan and submit it to the Commissioner for her review pursuant to certain statutory criteria.⁷ The Commissioner can either approve or disapprove the plan, and if the board does not submit a satisfactory plan, the Commissioner must prepare one that meets the requisite statutory standards.⁸ Once a plan is approved, the Commissioner monitors the plan to ensure no insurer or rating organization engages in any prohibited

¹ *Bruce v. Kelly*, 316 Kan. 218, 224 (2022).

² K.S.A. 40-2102.

³ *Id.*

⁴ <https://www.kaipins.org/>.

⁵ K.S.A. 40-2102(e).

⁶ *Id.*

⁷ K.S.A. 40-2102(a)-(d).

⁸ K.S.A. 40-2102.

activity.⁹ Costs to operate the plan are assessed to members based on the number of policies written in Kansas.¹⁰

The KAACP is a plan that, in essence, assigns to insurers personal injury claims of people injured by uninsured or unidentified motorists under certain conditions.¹¹ The KAACP is made up of various Kansas insurers and managed by a “governing committee.”¹² Like the KAIP’s governing board, the entire committee is appointed by the Commissioner, and the committee must formulate a plan in accordance with law, otherwise the Commissioner may reject it or create her own plan.¹³ The plan assesses fees to its members, which must be approved by the Commissioner.¹⁴

KORA

With this background in mind, we turn to the question of whether the KAIP and KAACP are subject to KORA,¹⁵ which generally requires a “public agency” to make public records open for inspection.¹⁶ Public agency is defined as:

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 the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.¹⁷

In *State v. Great Plains of Kiowa County, Inc.*,¹⁸ the Kansas Supreme Court used the ordinary, everyday definition of “instrumentality” (“a thing used to achieve an end or purpose, or a means or agency through which a function of another entity is accomplished”) to hold that a not-for-profit corporation operating a county hospital was an instrumentality of the county government.¹⁹ There was “no question,” the

⁹ *Id.* If the Commissioner suspects that such an activity is taking place, she may conduct a hearing in accordance with the Kansas Administrative Procedure Act, K.S.A 77-501, *et seq.*, and enter a written order “requiring discontinuance of such activity or practice.” *Id.*

¹⁰ <https://kaipins.org/PlanManagerApplicants.asp>.

¹¹ <http://www.kaacp.org/KAACPHistory.asp>.

¹² K.S.A. 40-3116(e); K.A.R. 40-3-35(a).

¹³ K.A.R. 40-3-35.

¹⁴ K.S.A. 40-3116. According to its Articles of Agreement, the KAACP assesses each insurer an annual fee, and all costs are shared by the members on a pro rata basis. <http://www.kaacp.org/pdf/KAACPArticlesOfAgreement.pdf>. Any insurer or self-insurer who refuses to participate in the plan “shall be assessed a civil penalty of not more than \$5,000 for each” violation. K.S.A. 40-3116.

¹⁵ Since the provisions detailing the duties of KAIP and KAACP are largely parallel, we assess the applicability of KORA and KOMA equally for the purpose of answering your questions.

¹⁶ K.S.A. 45-218(a).

¹⁷ K.S.A. 45-217(k)(1) (emphasis added).

¹⁸ 308 Kan. 950 (2018).

¹⁹ *Id.* at 954 (citing *Purvis v. Williams*, 276 Kan. 182 (2003) (citing Black’s Law Dictionary 802 (7th ed. 1999))).

Court concluded, that it was an arm of the county government given the county's statutory grant of authority to operate a public hospital, the terms of the lease agreement explaining the hospital was meant to operate for the benefit of the community, and the public funds the hospital received from a tax levy.²⁰

Just as a not-for-profit corporation operating a county hospital is an instrumentality of the county, KAIP and KAACP are instrumentalities of the Commissioner. The statutory language chosen by the Legislature shows it intended KAIP to serve as the institution through which the Commissioner ensures members of the public may obtain certain insurance coverage if they cannot otherwise do so through traditional voluntary markets.²¹ Similarly, the Legislature intended KAACP to serve as the body through which the Commissioner ensures those who have been injured by uninsured or unidentified motorists may receive personal injury protection benefits.²² The Commissioner's direct and extensive control over the KAIP and KAACP underscores the Legislature's intent to render them arms of the Commissioner.²³ And this office has found similar organizations are subject to KORA.²⁴ We thus conclude that KAIP and KAACP meet the definition of "public agency" and are subject to KORA.

KOMA

Next, you ask whether the same entities are subject to KOMA, which generally requires meetings of governmental bodies to be open to the public.²⁵ KOMA applies to the following entities: "all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds."²⁶

²⁰ *Id.* at 954-56.

²¹ *See* K.S.A. 40-2102.

²² K.S.A. 40-3116.

²³ *Cf. R.P. v. First Student Inc.*, 62 Kan. App. 2d 371, Syl. ¶ 3 (2022), *rev. denied* (Oct. 28, 2022) ("To qualify as an instrumentality under the Kansas Tort Claims Act, a private entity that contracts with a governmental entity must either be an integral part of or controlled by a governmental entity.").

²⁴ *See* Attorney General Opinion 2001-13 (Finney County Economic Development Corporation); Attorney General Opinion 1999-64 (Prairie Village Development Corporation); Attorney General Opinion 1988-61 (city hospital); Attorney General Opinion 1986-48 (Jobs Development Council created by local chamber of commerce, city, and county).

²⁵ This statutory scheme was enacted for the public benefit, so courts construe it broadly to fulfill this purpose. *State ex rel. Stephan v. Seward County Board of Commissioners*, 254 Kan. 446, 448, 866 P.2d 1024 (1994); *see* K.S.A. 75-4317(a) ("In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.").

²⁶ K.S.A. 75-4318(a).

Relevant here, KAIP and KAACP are subject to KOMA if they are subordinate groups of the Insurance Department, which spends, receives, or is supported by public funds.²⁷ We have no hesitation concluding that they are subordinate groups where KAIP is governed by a “board” and KAACP is governed by a “committee”—both of which are appointed entirely by the Commissioner and are under the Commissioner’s supervision.²⁸

Whether KAIP and KAACP spend, receive, or are supported by public funds is immaterial. The Kansas Supreme Court has held that “[s]o long as the parent state or local body meets the public funding test, all subordinate groups are automatically covered by the Kansas Open Meetings Act regardless of the degree or existence of public funding.”²⁹ Here, the “parent agency” is the Insurance Department, which receives, expends, and relies on public funds. Serving as subordinate groups, the KAIP’s and KAACP’s meetings are thus subject to KOMA.³⁰

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Kansas Attorney General

/s/ Kurtis K. Wiard

Kurtis K. Wiard
Assistant Solicitor General

²⁷ See *Memorial Hospital Association, Inc. v. Knutson*, 239 Kan. 663, 669 (1986) (citing *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 535 (1982)). Prior Attorney General Opinions have identified factors for identifying what constitutes an “agency.” *E.g.* Attorney General Opinion 1994-99. However, the “agency” at issue in this scenario is the Insurance Department.

²⁸ See, *e.g.*, Attorney General Opinion 2001-13 (Finney County Economic Development Corporation had sufficiently “strong[] ties to governmental entities” that appointed a majority of its directors).

²⁹ *Palmgren*, 231 Kan. 524, ¶ 9.

³⁰ See Attorney General Opinion 1993-73 (parental board is subordinate group of recreation commission); Attorney General Opinion 1984-81 (school advisory board is subordinate group of school district board).