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ATTORNEY GENERAL OPINION NO. 90- 43

The Honorable Frank D. Gaines
State Senator, Sixteenth District
State Capitol, Room 140-N
Topeka, Kansas 66612

Re: Legislature--Joint Committee on Governmental
Technology--Powers and Duties; Separation of Powers
Doctrine

Synopsis: Section 1(a) of Substitute for 1990 House Bill No. 2877 prescribes, in part, that no state agency shall enter into any contract or other commitment of moneys for the acquisition of any data processing equipment or programs for that state agency or any other state agency until the expiration of 30 days after such acquisition has been presented to the joint committee on governmental technology. Such requirement, if enacted, would not, in our opinion, violate the constitutional doctrine of separation of powers. It should be stressed, however, that Substitute for 1990 House Bill No. 2877 does not require prior approval of the joint committee on governmental technology before a state agency may purchase or rent data processing equipment or programs, nor does it require prior legislative approval of vendors with whom state agencies seek to satisfy their data processing needs. Such requirements would be constitutionally suspect. Cited herein: Sub. for 1990 House Bill No. 2877.

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Dear Senator Gaines:

You request our opinion as to whether section 1(a) of 1990 Substitute for House Bill No. 2877 violates the constitutional doctrine of separation of powers. Subsections (a) and (b) of section 1 provide as follows:

"(a) On and after the effective date of this act, prior to any acquisition of any data processing equipment or programs by a state agency, the state agency shall present each such proposed acquisition to the joint committee on governmental technology, as a condition precedent to such acquisition. No state agency shall enter into any contract or other commitment of moneys for the acquisition of any data processing equipment or programs for that state agency or any other state agency until the expiration of 30 days after such acquisition has been presented to the joint committee on governmental technology under this section.

"(b) Any contract entered into on or after the effective date of this act by any state agency for acquisition of any data processing equipment or programs without such acquisition first being presented to the joint committee on governmental technology in accordance with this section and any such contract which is entered into after such presentation but prior to the expiration of the thirty-day period prescribed by this section are hereby declared to be and are void."

In State ex rel. v. Bennett, 219 Kan. 285 (1976), the Kansas Supreme Court was called upon to determine whether powers conferred upon the state finance council by state law constituted a violation of the constitutional doctrine of separation of powers. In resolving the issue, the Court said:

"The constitution of Kansas contains no express provision requiring the separation of powers, but all decisions of this Court have taken for granted the constitutional

doctrine of separation of powers between the three departments of the state government -- legislative, executive and judicial. The separation of powers doctrine was designed to avoid a dangerous concentration of power and to allow the respective powers to be assigned to the department most fitted to exercise them." Id. at 287.

The Court, in Bennett, continued that the problem in any case involving an alleged violation of the separation of powers doctrine is:

"[T]o determine whether or not a usurpation of powers has taken place. That term has not heretofore been clearly defined. It has been suggested that to have a usurpation one department of the government must be subject directly or indirectly to the coercive influence of the other. (State ex rel. v. Fadley, supra, at page 696; Leek v. Theis, supra, at page 807.) It seems to us that to have a usurpation of powers there must be a significant interference by one department with the operations of another department. In determining whether or not an unconstitutional usurpation of powers exists, there are a number of factors properly to be considered. First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be attained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially

executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available. We do not wish to imply that these are the only factors which should be considered but it seems to us that they have special significance in determining whether a usurpation of powers has been demonstrated." 219 Kan. at 290-291.

Applying the factors set forth in the above-quoted excerpt to Substitute for 1990 House Bill No. 2877, it is clear that the essential nature of the power being exercised (i.e. negotiation and execution of contracts to acquire data processing equipment or programs) is primarily executive. However, the degree of control by the legislative department under House Bill No. 2877 is minimal; the joint committee on governmental technology has no authority to reject a proposed acquisition of data processing equipment by any state agency. Under section 1 the agency is only required to present each proposed acquisition to the joint committee and wait until the expiration of 30 days after such presentation before acquiring the equipment or programs.

A much greater degree of legislative control over executive department spending was upheld in Manhattan Buildings, Inc. v. Hurley, 231 Kan. 20 (1982). In that case, the legislature prohibited the expenditure of moneys appropriated to any state agency for the lease of a particular office building, and the Supreme Court found no violation of the separation of powers doctrine, stating as follows:

"The assignment of office space for executive agencies in both state owned and leased buildings is traditionally a function of the executive branch, and the actual leasing of space is also a executive function. The legislature, however, appropriates the funds which are expended by all branches of government, and it is concerned with the overall picture and cost of housing state government. New buildings cannot be acquired by construction or purchase without specific legislative authorization through the appropriation process. As we

have seen, the 1981 legislature was concerned with the new ten year lease at hand, since it was considering the construction or purchase of a new facility. The legislature appropriated funds for the leasing of various buildings, including one or more properties owned by Manhattan, but stopped short when it came to the funding of this new long term lease of the Women's Club building. It thus limited the executive branch in one specific and isolated area, and for various stated reasons. No similar legislation during the past several years has been called to our attention, and we know of no attempt by the legislature to regularly limit or direct the executive branch in the specific area." 231 Kan. at 32-33.

In regard to the objective sought to be attained by the legislature in enacting Substitute for 1990 House Bill No. 2877, the legislative history indicates that the purpose of the bill is to bring some measure of accountability to the acquisition of computers and computer related products purchased with state funds. It appears that the legislature is concerned with the overall picture and cost of data processing facilities, and there is no indication that it intends to establish its superiority over the executive department in this area.

In accordance with our findings relative to the factors set forth above, it is our opinion that Substitute for 1990 House Bill No. 2877 is not a significant interference by the legislative branch with the executive branch, and does not constitute a usurpation of powers. It should be stressed, however, that Substitute for 1990 House Bill No. 2877 does not require prior approval of the joint committee on governmental technology before a state agency may purchase or rent data processing equipment or programs, nor does it require prior legislative approval of vendors with whom state agencies seek to satisfy their data processing needs. Such requirements would be constitutionally suspect. See In re Opinion of the Justices, 532 A.2d 195 (New Hampshire 1987).

In summary, section 1(a) of Substitute for 1990 House Bill No. 2877 prescribes, in part, that no state agency shall enter into any contract or other commitment of moneys for the

acquisition of any data processing equipment or programs for that state agency or any other state agency until the expiration of 30 days after such acquisition has been presented to the joint committee on governmental technology. Such requirement, if enacted, would not, in our opinion, violate the constitutional doctrine of separation of powers.

Very truly yours,



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