



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. 90- 124

Joe L. Norton, Counsel
Kansas Municipal Gas Agency
Gilmore and Bell
One Main Place, Suite 800
Wichita, Kansas 67202-1398

Re: State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Definitions;
Municipality; Separate Legal Entity Created by
Interlocal Agreement

Cities and Municipalities -- Interlocal
Cooperation; General -- Separate Legal Entity;
Status Under the Kansas Tort Claims Act

Synopsis: It is our opinion that the Kansas Municipal Gas
Agency, created pursuant to K.S.A. 12-2901 et
seq., falls within the definition of a
municipality under the Kansas tort claims act.
Cited herein: K.S.A. 12-885; 12-2901; K.S.A. 1989
Supp. 12-2904; 12-2904a; K.S.A. 75-6101; 75-6102,
as amended by L. 1990, ch. 329, § 2; 75-6103.

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Dear Mr. Norton:

As legal counsel for the Kansas Municipal Gas Agency (agency)
you request our opinion on the applicability of K.S.A. 75-6101
et seq., the Kansas tort claims act (KTCA) to that
agency. You indicate that the agency is a separate legal
entity created pursuant to an interlocal cooperation

agreement entered into as of August 1, 1990 under the provisions of K.S.A. 12-2901 et seq. You enclose for our information a copy of that agreement.

The parties to this interlocal agreement are all Kansas cities. The agreement acknowledges the creation of a separate legal entity known as the Kansas Municipal Gas Agency, discusses the powers and duties of this agency and generally relates to the cooperative provision of natural gas services by the agency on behalf of the cities. Thus, the cities have contractually created a separate legal entity which will perform governmental duties and services on behalf of the cities. The issue is whether such an entity falls within the provisions of the KTCA.

K.S.A. 75-6103 extends applicability of the KTCA to ". . . each governmental entity. . . ." K.S.A. 75-6102, as amended by L. 1990, ch. 329, § 2, defines "governmental entity" to mean "state or municipality". "Municipality means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution, or other instrumentality thereof." (Emphasis added). K.S.A. 75-6102(b), as amended.

The agency created by the interlocal agreement in question is not a county, township, city or school district. It is not a political or taxing subdivision of the state. However, the agency may meet the definition of a municipality set forth in the KCTA if it can be determined that the agency is "any agency, authority, institution or instrumentality" of the cities that created it. There is obviously a close relationship between the cities who are parties to the interlocal agreement and the agency. However, the cities clearly intended to create a separate legal entity. We must determine whether this separation from the city negates defining it as an agency, authority, institution or instrumentality of the cities. This requires consideration of the legal status of such a separate legal entity.

K.S.A. 1989 Supp. 12-2904a sets forth the nature, powers and duties of a separate legal entity created pursuant to the interlocal cooperation act:

"(a) Any interlocal agreement entered into under the provisions of K.S.A. 12-2901 et seq., and amendments thereto, may authorize the creation of a separate legal entity to conduct the joint

or cooperative action provided for in the agreement. Such separate legal entity shall constitute a body corporate and politic, and shall have, in addition to any other powers reasonably necessary to the exercise of its function under the agreement, the following powers to:

"(1) Sue and be sued in its corporate name;

"(2) take and hold any property, real or personal, in fee simple or otherwise;

"(3) sell, lease, lend or otherwise transfer any property or interest in property owned by it;

"(4) make contracts; and

"(5) have and use a corporate seal.

"Any such separate legal entity shall not constitute a municipality within the meaning of K.S.A. 10-1101, and amendments thereto, or a political subdivision of the state under any provision of the law of this state establishing limits on bonded indebtedness. . . ." (Emphasis added).

K.S.A. 1989 Supp. 12-2904a specifically states that a separate legal entity created pursuant to an interlocal agreement is not a municipality for purposes of the cash basis law and that such a separate legal entity is not a political subdivision of the state for provisions establishing limits on bonded indebtedness. However, K.S.A. 1998 Supp. 12-2904a recognizes such a separate legal entity as a body corporate and politic. The state did not directly create this body politic. Rather, the statute permits creation of separate legal entities by affirmative action of a city. Cities clearly meet the definition of a municipality as set forth in the KCTA. In creating such a separate legal entity under the interlocal cooperation act the cities arguably may have created an "agency, authority, institution or other instrumentality" of the cities.

K.S.A. 1989 Supp. 12-2904(e) prohibits the use of an interlocal agreement to relieve any public agency of any

obligations or responsibility imposed upon it by law. A governmental entity may not delegate its statutory duties to a private contractor and thus avoid liability for negligent performance of a statutory duty. Trout v. Koss Construction Company, 240 Kan. 86, 94 (1986). However, K.S.A. 1989 Supp. 12-2904(e) permits a public agency to offer actual and timely performance of a legally imposed duty by "a joint board or other legal or administrative entity created by an agreement. . . ." Thus, acts which could give rise to a tort action against a city may be performed by a separate legal entity.

The KCTA does not define "agency, authority, institution or other instrumentality." Rules of statutory construction dictate that "[w]ords and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings." K.S.A. 77-201 Second. The term agency has been defined as a "relation in which one person acts for or represents another by latter's authority, either in the relationship of a principle and agent, master and servant, or employer or proprietor and independent contractor. . . . The relation created by express or implied contract or by law, whereby one person delegates the transaction of some lawful business with more or less discretionary power to another, who undertakes to manage the affair and render to him an account thereof." Blacks Law Dictionary 57, 58 (5th ed. 1979). Because of the continuing interrelation between the agency and the cities, and the degree of control maintained by the cities, the interlocal agreement in question appears to create such an agency relationship.

Attorney General Opinion No. 86-177 examines the applicability of the KCTA to a municipal energy agency. This agency was not created pursuant to K.S.A. 12-2901 et seq., but rather, came into being pursuant to K.S.A. 12-885 et seq. This authority authorizes a municipal energy agency to take certain actions with regard to electric energy. Attorney General Opinion No. 86-177 recognized that such an agency is a quasi-municipal corporation and it was our opinion that this agency fell under the provisions of the KCTA. We find that the facts and circumstances surrounding creation and operation of the Kansas Municipal Gas Agency are similar to those examined in Attorney General Opinion No. 86-177. Moreover, it appears that, although the agency in question is

a separate legal entity, it is also an agency, authority, institution or instrumentality of the cities creating the agency through the interlocal agreement. It is therefore our opinion that the separate legal entity known as the Kansas Municipal Gas Agency created pursuant to K.S.A. 12-2901 et seq. falls within the definition of a municipality set forth at K.S.A. 1989 Supp. 75-6102, as amended by L. 1990, ch. 329, § 2. That agency is therefore covered by the provisions of the Kansas tort claims act.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

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