



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 25, 1998

Mr. Craig D. Pedersen
Executive Administrator
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

Letter Opinion No. 98-080

Re: Regional water planning groups established
by section 16.053, Water Code (RQ-1135)

Dear Mr. Pedersen:

You have asked this office several related questions concerning the status and authority of entities called "regional water planning groups," established by the Seventy-fifth Legislature in section 16.053 of the Water Code. As we understand it, the principal concern which gives rise to your inquiry is the potential personal liability of individuals serving on such bodies for acts undertaken within the scope of such authority as they possess. In the view of this office, while the precise nature of these entities is somewhat ambiguous, regional water planning groups are plainly engaged in carrying out a governmental function, namely devising in the first instance the elements of the state water plan contemplated by chapter 16 of the Water Code. Accordingly, the members of the regional water planning groups, who are performing duties enjoined upon them by statute, are entitled to the common law defense of official immunity. "Official immunity shields government officers and employees 'from personal liability in performing discretionary duties in good faith with the scope of their authority.'"¹ *Drogin v. Campbell*, 928 S.W.2d 205, 206 (Tex. App.--San Antonio 1996, no writ); *accord Medina County Comm'rs Court v. Integrity Group, Inc.*, 944 S.W.2d 6, 9 (Tex. App.--San Antonio 1996, no writ).

Water Code chapter 16, subchapter C concerns water planning. Subsection 16.051(a) requires the Water Development Board (the "board") to "adopt a comprehensive state water plan." The plan is to be adopted "[n]o later than September 1, 2001, and every five years thereafter." Water Code § 16.051(a). The state plan "incorporates the regional water plans approved under section 16.053" of the code. *Id.*

Section 16.053 inaugurates the regional water planning groups, which are charged with preparing regional water plans which provide "for the orderly development, management, and conservation of water resources" in order "to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of that particular region."

¹We caution that we are only concerned with immunity for official acts taken in good faith within the course and scope of these persons' duties, and that there may be a multitude of factual situations in which such persons may be subject because of their own wilful conduct or gross negligence to personal liability.

Id. § 16.053(a). Members of a regional water planning group are to represent “the interests comprising that region, including but not limited to the public, counties, municipalities, industries, agricultural interests, environmental interests, small businesses, electric generating utilities, river authorities, water districts, and water utilities.” *Id.* § 16.053(c). The statute further outlines the elements which must form part of each regional water plan, and provides certain requirements for opportunities for public input in the preparation of the plan. The group prepares the plan and submits it to the board. The board’s principal responsibilities are to examine the plan to insure that it meets the statutory requirements, and to adjudicate any disputes which arise between plans for different regions, in the event that the regional planning groups involved cannot resolve such disputes between themselves.

While the statute, then, outlines the general duties of regional water planning groups, it is largely silent about their authority and entirely silent as to the nature of these entities. Representatives of the political subdivisions which form parts of these groups are, of course, already clothed with official immunity in so far as they are acting *ex officio*. However, you report that a number of the private persons who represent the interests mandated for inclusion by subsection 16.053(c) have expressed concerns about the extent to which they might be subject to personal liability for acts taken as members of the planning groups.

We note that the legislature has, in other contexts analogous to this one, explicitly provided exemption from such liability. For example, in the Development Corporation Act, article 5190.6, V.T.C.S., both sections 4A and 4B provide explicitly that corporations formed under them are governmental units for Tort Claims Act purposes, and that directors of them are “not liable for damages arising from the performance of a governmental function.” V.T.C.S. art. 5190.6, §§ 4A(j), 4B(m). The legislature did not, however, include such an explicit limitation on liability in section 16.053 of the Water Code.

While the Water Code is silent, we believe that regional water planning groups are engaged in the business of government, and their members, insofar as they are making the decisions and taking the actions contemplated by section 16.053, are acting in a governmental capacity. In this instance, regional water planning groups come into existence by virtue of the Water Code, a law passed by the legislature, and, to the extent that they have power to engage in planning the use of a natural resource, are engaged in a governmental function. Accordingly, the members of such groups possess immunity from personal liability for the good faith performance of their official duties.

As the Texas Supreme Court explained in *Kassen v. Hatley*, “[t]he purpose of official immunity is to insulate the functioning of government from the harassment of litigation, not to protect erring officials. . . . The public would suffer if government officers, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions.” 887 S.W.2d 4, 8 (Tex. 1994). We do not believe that this rationale alters merely because it is difficult to categorize particular persons who are carrying out discretionary functions given them by statute in the familiar terms of officer or employee. Here it is the members of the regional group who are, in the first instance, making essentially governmental decisions concerning water policy.

The public would be as ill-served if those decisions could subject their makers to civil liability as if decisions of the Water Development Board itself could do so².

The elements of the affirmative defense of official immunity are that “[g]overnment employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The same case defines discretionary action as “an action [that] involves personal deliberation, decision and judgment.” *Id.* at 654.

In our view, acts taken in furtherance of the statutory scheme by the members of the regional groups will generally be discretionary, and will be covered by the defense of official immunity. We caution, however, that whether such acts are taken in good faith is generally a question of fact upon which we cannot opine. More significantly, because, as we will discuss further hereafter, the nature and political character of the groups is somewhat ill-defined, it may from time to time be difficult to ascertain whether particular acts taken by group members have indeed been within the course and scope of their authority. The difficulties presented by this lack of definition, as well as by the lack of specific immunizing language in the statute, are ultimately better addressed by legislative action than by our advisory opinion.

You have asked this office two further questions about regional water planning groups. You ask whether such groups may enter into contracts with other governmental entities, and what type of entity a regional water planning group may be. In our view, the answer to the first of these two questions is in the negative. As to the second, the nature of these entities is sufficiently ambiguous that, absent specific indication by the legislature or direction by a court of law, this office cannot answer the question, and believes the board would be better advised to seek clarification from the legislature in the next session.

As to any general authority of the regional water planning groups to make contracts, the Water Code is silent. The sole contracting provision of which we are aware is section 15.4061, which provides, “The board may enter into contracts *with political subdivisions designated as representatives of a regional water planning group . . .* to pay from the research and planning fund all or part of the cost of developing or revising regional water plans” Water Code § 15.4061 (Emphasis added.) This provision appears designed to implement the mandate of subsection 16.053(g) that, “[t]he board shall provide technical and financial assistance to the regional water planning groups in the development of their plans.” In our view, the statutory scheme provides for such arrangements to be made through the board or the political subdivisions, rather than the planning groups. Accordingly, the groups do not have independent authority to enter into interlocal agreements.

²We note that this opinion is limited to the case before us, in which a governmental function required by statute would not be performed but for the acts of the regional group members.

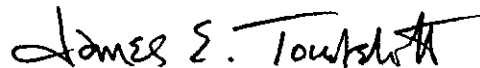
Again the statute is silent concerning the nature of these entities, and the question is a murky one. This office has not described regional entities as part of "state government" for the purpose of subsection 101.001(5) of the Civil Practice and Remedies Code, because they lack the statewide jurisdiction required thereby. Further, while the legislature has defined certain regional entities as political subdivisions--*e.g.*, regional planning commissions, *see* Local Gov't Code § 391.003(c)--it has failed to do so in this case. Nor is the nature of the planning group's independent authority entirely clear. While the board has, in a telephone conversation between its general counsel and a representative of this office, taken the position that the regional groups are more than merely advisory, since their decisions will generally be adopted unless the board deems them not to follow the statutory guidelines, or in the event of an interregional conflict, the argument can certainly be made that ultimate decision-making authority inheres in the board. *Cf.* Letter Opinion No. 96-50 (1996); Attorney General Opinion DM-135 (1992).

Given the ambiguous nature of these entities and the lack of explicit statutory definition of them, it is the view of this office that the board would be best advised to seek clarification by the legislature concerning these matters in the next legislative session. We are persuaded of this particularly because a legislative determination of such matters would provide more security to individual group members than can an advisory opinion of ours. The determination of the nature and function of bodies designed to exercise governmental authority is, in the first instance, a power and duty of the legislature, rather than of this office.

S U M M A R Y

Members of regional water planning groups as constituted by section 16.053 of the Texas Water Code are exempt from personal liability for acts taken in their official capacity. Absent specific statutory authority, such entities may not enter into intergovernmental contracts. The nature of such entities is a matter for the determination of the legislature.

Yours very truly,

A handwritten signature in black ink that reads "James E. Tourtelott". The signature is written in a cursive style with a long horizontal flourish extending to the right.

James E. Tourtelott
Assistant Attorney General
Opinion Committee