

OPINION NO. 87-040**Syllabus:**

A township that chooses to provide fire protection without the creation of one or more fire districts cannot exclude portions of the township from the area to which fire protection is provided. Such a township must provide fire protection to persons traveling on portions of the Ohio Turnpike that are included within the township. (1966 Op. Att'y Gen. No. 66-114 approved and expanded.)

To: Anthony L. Gretick, Williams County Prosecuting Attorney, Bryan, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 4, 1987

I have before me your request for an opinion concerning the provision of firefighting services by a local fire department to travelers on the Ohio Turnpike. It is my understanding that the fire department in question is the fire department of a township that includes, within its boundaries, a municipal corporation. The department is a volunteer fire department whose members are paid a certain amount each time they are called to render services. See R.C. 505.37; R.C. 505.38.

Your letter of request states, in part:

The Ohio Turnpike transects [the township in question]. From time to time, Turnpike authorities or officers of the Turnpike Patrol encounter vehicles which may be automobiles, tractor trailers, campers, mobile homes being transported, etc., which are on fire. They then call the local fire department for assistance. Quite often, although the fire department bills the owner of the property which was on fire for services rendered, as that owner is not a local person, the bill goes unpaid.¹

¹ You have not raised any questions concerning this billing system, and I am not considering any such

The fire department recognizes its duty to preserve the property and life of taxpayers of [the township, including the municipality within the township] as it is their tax dollars that are supporting the fire department. However, the Ohio Turnpike is not a taxpayer. Also, the Ohio Turnpike Commission has the authority to charge travelers a toll in a sufficient amount to cover its expenses.

The [purpose] of this opinion request is to inquire whether the [township fire department] can deny firefighting services to the toll paying travelers of the Ohio Turnpike without a specific [contractual] arrangement by which the Ohio Turnpike Commission agrees to compensate the said fire department for providing those services. (Footnote added.)

R.C. 505.37(A) provides that a board of township trustees "may establish all necessary regulations to guard against the occurrence of fires and to protect the property and lives of the citizens against damage and accidents," may purchase or otherwise provide fire apparatus, and may employ persons to maintain and operate firefighting equipment. A township is also permitted to obtain fire protection by contract with a firefighting agency or private fire company. See R.C. 9.60. Use of the word "may" indicates that the provision of firefighting services is discretionary, rather than mandatory. See 1943 Op. Att'y Gen. No. 5798, p. 44; cf. 1979 Op. Att'y Gen. No. 79-042 (syllabus, paragraph four) ("[a] county, township or municipality is not required to provide emergency medical service, since R.C. 505.71, 505.443 [now R.C. 505.44] and 307.051 [now R.C. 307.05] are permissive, not mandatory").

R.C. 505.37(C) provides that a board of township trustees may, by resolution, "whenever it is expedient and necessary to guard against the occurrence of fires or to protect the property and lives of the citizens against damages resulting from their occurrence, create a fire district of any portions of the township that it considers necessary." See 1943 Op. No. 5798 (considering earlier version of the statute, then G.C. 3298-54). R.C. 505.39 authorizes the levy of a tax upon property within a fire district to pay for fire protection expenses, and R.C. 505.40 authorizes the issuance of bonds for such purposes. See also R.C. 5705.01; R.C. 5705.19; R.C. 5705.191. In the situation with which you are concerned, no fire districts have been created. Rather, the township has provided fire protection services for the entire township, including the municipality contained within the township.

It has generally been concluded, on the basis of statutory language enacted by the General Assembly, that, if a political

questions. See generally R.C. 505.391; 1984 Op. Att'y Gen. No. 84-048 (syllabus, paragraph one) ("[p]ursuant to R.C. 505.84, township trustees may establish reasonable charges for the use of ambulance or emergency medical services....An arrangement to charge nonresidents but provide free services for residents will satisfy the rational basis test for equal protection if it bears a reasonable relationship to the achievement of a legitimate governmental purpose"); 1981 Op. Att'y Gen. No. 81-023; 1977 Op. Att'y Gen. No. 77-053 (overruled by Op. No. 81-023).

subdivision chooses to provide fire protection services, or such similar services as emergency medical protection, without the creation of a taxing district with a limited territorial area, the subdivision must provide such services to all the territory within the subdivision.² See, e.g., 1985 Op. Att'y Gen. No. 85-059 (syllabus) ("[a] board of county commissioners which is providing ambulance and emergency medical services pursuant to R.C. 307.05 may not exclude a portion of the county from the provision of such services"); 1944 Op. Att'y Gen. No. 6682, p. 53 (township trustees may not contract for the provision of fire protection exclusively to public school buildings located within the township).

A question similar to yours was considered in 1966 Op. Att'y Gen. No. 66-114. There the issue was whether a township fire department was required to answer fire calls in connection with vehicles traveling on a limited access federal highway within the township when there was no entrance to the highway within the boundaries of the township. Op. No. 66-114 states, at 2-206 through 2-207:

It seems apparent that if a fire occurs in connection with a vehicle traveling on a portion of a limited access interstate highway within a township, or within the fire district of such township as provided in Section 505.37, Revised Code, then such fire deserves the same action by the township fire department as would be accorded any other fire within said township or fire district. The availability of convenient access to the highway does not determine whether such a fire is within the physical area to be protected by the township fire-fighting facilities. When fire protection is available in a township or a fire district pursuant to Section 505.37...it must be furnished to all on an equal basis. This should be true notwithstanding that the one benefiting from the fire protection may not be a taxpayer in the township or fire district, but was merely traveling upon a highway located in said township or district.

Consideration should be given to Informal Opinion No. 220, Informal Opinions of the Attorney General for 1953, issued January 22, 1953, where it was said:

****I believe it clear that the General Assembly proceeded on the long and well-founded assumption that the political entity involved would afford fire protection to all of the property located therein without reference to its ownership.

"I am in full accord with the statement of one of my predecessors, as contained in Informal Opinion No. 21, issued to the State Fire Marshal on February 20, 1946, which reads:

² I am aware that, in 1976 Op. Att'y Gen. No. 76-057, my predecessor stated that, without the establishment of a fire district, a board of township trustees could exclude from fire protection a metropolitan park district located within the township. I disagree with that statement.

"****If the township itself maintained a fire department, it would hardly be open to question that it would be as much its duty to furnish protection to a public building located within its limits as it would be to furnish such protection to privately owned buildings. Fire protection is not for certain individuals or properties but for all within the corporate territory.'

"The fact that some property may be exempted from real estate taxes does not alter the obligation of the political entity to furnish fire protection without discrimination.****"

Thus it seems that the township fire department has an obligation to furnish the same protection to a vehicle traveling upon the limited access highway as would be accorded to a vehicle traveling anywhere within the township or fire district. It does not matter that the township fire-fighting equipment must leave the township or fire district to enter the limited access highway and then reenter the township via the highway to fight the fire.

I agree with my predecessor that, if a township chooses to provide fire protection without the creation of one or more fire districts, it cannot exclude portions of the township from the area to which fire protection is provided. I find that this conclusion is contemplated by the statutory scheme governing the provision of fire protection, see R.C. 9.60; R.C. 505.37, and that the adoption of this conclusion has the effect of avoiding issues relating to equal protection that might otherwise arise. See generally 1984 Op. Att'y Gen. No. 84-048.

As noted above, the area to which fire protection is provided may be limited if the fire protection is furnished through the creation of one or more fire districts. In such a case, expenses for fire protection for each such district are borne by the district and services extend to the territory within the district.³ See R.C. 505.37(C); R.C. 505.39; R.C. 505.40; R.C. 5705.01; R.C. 5705.19; R.C. 5705.191; 1944 Op. No. 6682; 1943 Op. No. 5798. Such services may be extended beyond the district as provided by law. See, e.g., R.C. 9.60.

You have suggested that the situation presented in your question differs from that considered in Op. No. 66-114 because the Ohio Turnpike is different from a federal highway. The Ohio Turnpike was constructed as a project of the Ohio Turnpike Commission, pursuant to the provisions of R.C. Chapter 5537. The Ohio Turnpike Commission is a body corporate and politic. R.C. 5537.02. It has power to finance and construct turnpike

³ Factors to be considered in determining whether it is appropriate for a township to establish a fire district were discussed in 1943 Op. Att'y Gen. No. 5798, p. 44 and 1976 Op. Att'y Gen. No. 76-057. See note 2, supra. See generally 1984 Op. Att'y Gen. No. 84-048.

projects. See, e.g., R.C. 5537.03; R.C. 5537.04; R.C. 5537.08. In particular, the Ohio Turnpike Commission may, pursuant to R.C. 5537.04:

(E) Construct, maintain, repair, police, and operate turnpike projects, and establish rules for the use of any such turnpike project;

...
(K) Make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under sections 5537.01 to 5537.23 of the Revised Code;

....
R.C. 5537.16 authorizes the Commission to adopt rules "for the control and regulation of traffic on any turnpike project, for the protection and preservation of property under its jurisdiction and control, and for the maintenance and preservation of good order within the property under its control." See 9 Ohio Admin. Code Chapters 5537-1 through 5537-6. R.C. 5537.17 makes the Commission responsible for the maintenance and operation of projects that it has constructed, as follows:

Each turnpike project, when constructed and opened to traffic, shall be maintained and kept in good condition and repair by the Ohio turnpike commission. Each such project shall also be policed and operated by such force of police, tolltakers, and other operating employees as the commission employs.

Notwithstanding the powers given to the Ohio Turnpike Commission and the fact that travelers on turnpike projects may be required to pay tolls, see R.C. 5537.04(G); R.C. 5537.13, it has been established that the Ohio Turnpike is a public highway. See, e.g., State v. Koder, 6 Ohio App. 3d 61, 453 N.E.2d 1116 (Wood County 1982); 1960 Op. Att'y Gen. No. 1658, p. 593.

You have suggested that, since the Ohio Turnpike Commission is authorized to charge tolls to persons who travel on the turnpike, it should use such tolls to cover the cost of providing fire protection services to travelers on the turnpike, and should contract with local fire departments for the provision of such services. While it is clear that such an arrangement would be beneficial to the local fire departments, it does not appear to be mandated by statute. As discussed above, the statutory scheme for the provision of fire services contemplates that, when a political subdivision provides such services without the creation of a taxing district with a limited territorial area, the political subdivision will provide the services throughout its territory. Whether the territory is private or public, tax-paying or tax-exempt, is irrelevant. See Op. No. 66-114; 1944 Op. No. 6682 at 56 ("school buildings are...entitled to whatever protection from fire is provided for the subdivision in which they are located..."). The Ohio Turnpike Commission is required by statute to see that each of its turnpike projects is policed and operated "by such force of police, tolltakers and other operating employees as the commission employs." See R.C. 5537.17. See also R.C. 5537.04. The Commission is not, however, expressly required to provide its own fire protection. It appears, therefore, that turnpike projects, like other state facilities, come within the general rule that

they are entitled to such fire protection services as are provided generally within the area in which they are located. Thus, if a turnpike project is located within a township that provides fire protection services throughout its territory, that township must provide such fire protection services also to persons who are traveling on the turnpike project.

I note, however, that this conclusion does not preclude a contractual arrangement for the provision of fire protection as permitted under R.C. 9.60, which states, in part:

(A) As used in this section:

(1) "Firefighting agency" means a municipal corporation, township, township fire district, joint ambulance district, or joint fire district.

(B) Any firefighting agency or private fire company may contract with any state agency or instrumentality, county, or political subdivision of this state or with a governmental entity of an adjoining state to provide fire protection, whether on a regular basis or only in times of emergency, upon the approval of the governing boards of the counties, firefighting agencies, political subdivisions, or private fire companies or the administrative heads of the state agencies or instrumentalities that are parties to the contract.

(C) Any county, political subdivision, or state agency or instrumentality may contract with a firefighting agency of this state, a private fire company, or a governmental entity of an adjoining state to obtain fire protection, whether on a regular basis or only in times of emergency, upon the authorization of the governing boards of the counties, firefighting agencies, political subdivisions, or private fire companies or administrative heads of the state agencies or instrumentalities that are parties to the contract.

It appears that the Ohio Turnpike Commission is an agent or instrumentality of the state for purposes of this provision. See generally R.C. 5537.02; R.C. 5537.20; Carney v. Ohio Turnpike Commission, 167 Ohio St. 273, 147 N.E.2d 857 (1958); 1951 Op. Att'y Gen. No. 219, p. 65. A contract for the provision of fire protection would appear to be particularly appropriate if all or a portion of a turnpike project were excluded from local fire protection (as, for example, through the creation of one or more fire districts that did not include the territory containing the project) or if the fire protection provided locally did not adequately serve the operations of the turnpike. See R.C. 9.60; R.C. 5537.04(K).

It is, therefore, my opinion, and you are hereby advised, that a township that chooses to provide fire protection without the creation of one or more fire districts cannot exclude portions of the township from the area to which fire protection is provided. Such a township must provide fire protection to persons traveling on portions of the Ohio Turnpike that are included within the township. (1966 Op. Att'y Gen. No. 66-114 approved and expanded.)