

16-OMD-102

May 19, 2016

In re: *The Courier-Journal*/Energy and Government Cabinet – Lead in Drinking Water Work Group

Summary: Weight of legal authority supports complainant's position that the Energy and Environment Cabinet's Lead in Drinking Water Work Group is a public agency for open meetings purposes and that its unpublicized March 2016 telephonic meeting constituted a violation of the Open Meetings Act. Work Group presents no arguments supporting the propriety of the unpublicized telephonic meeting or its position on the application of the Open Meetings Act to it.

Open Meetings Decision

Courier-Journal reporter James Bruggers appeals the Energy and Environment Cabinet's Lead in Drinking Water Work Group's response to his April 5, 2015, complaint alleging multiple violations of the Open Meetings Act. Specifically, Mr. Bruggers complained that the Work Group's unannounced telephonic meeting conducted in March:

- was a special meeting for which no prior written notice, consisting of date, time, place, and agenda, was provided in contravention of KRS 61.823(3) and (4);
- violated KRS 61.810(1) insofar as the public was excluded; and
- was prohibited by Kentucky caselaw and Attorney General open meetings decisions because it was conducted by telephone.

As a means of remedying the alleged violations, Bruggers proposed that the Work Group “admit to violating the open meetings law, and promise to hold all future meetings of this Work Group in full compliance with that law.”

The Work Group responded to Mr. Bruggers’ complaint, through counsel, on April 5. The Work Group advised:

The Cabinet has cancelled the April 6, 2016, scheduled meeting of the Lead in Drinking Water Workshop. Any future meeting time, date, and location for this work group will be made public as appropriate.

Shortly thereafter, Mr. Bruggers initiated this open meetings appeal.

In supplemental correspondence directed to this office, Energy and Environment Cabinet General Counsel John G. Horne described Mr. Bruggers’ complaint as lacking “any merit,” disputing his “characterizations regarding prior meetings of the work group in question.” Mr. Horne asserted that Mr. Bruggers’ proposal that the Work Group remedy the violation by admitting that the March meeting violated the Open Meetings Act contradicts KRS 61.846(1).¹ The statute describes the process by which open meeting disputes are initiated and provides, in part:

The person shall submit a written complaint to the presiding officer of the public agency suspected of the violation of KRS 61.805 to 61.850. The complaint shall state the circumstances which constitute an alleged violation of KRS 61.805 to 61.850 and shall state what the public agency should do to remedy the alleged violation. The public agency shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of the

¹ Proposed remedies that include agency admission of its violation of the Open Meetings Act are common. Such proposed remedies do not contradict KRS 61.846(1), relating to the evidentiary irrelevance of agency efforts to remedy an alleged violation in an administrative or judicial appeal. On those occasions when the agency implements the proposal that it remedy the violation by admitting the violation, the complaint is generally resolved and administrative or judicial proceedings are unnecessary.

complaint whether to remedy the alleged violation pursuant to the complaint and shall notify in writing the person making the complaint, within the three (3) day period, of its decision. *If the public agency makes efforts to remedy the alleged violation pursuant to the complaint, efforts to remedy the alleged violation shall not be admissible as evidence of wrongdoing in an administrative or judicial proceeding.* An agency's response denying, in whole or in part, the complaint's requirements for remedying the alleged violation shall include a statement of the specific statute or statutes supporting the public agency's denial and a brief explanation of how the statute or statutes apply. The response shall be issued by the presiding officer, or under his authority, and shall constitute final agency action.

(Emphasis added.) In closing, Mr. Horne noted that “[t]he Cabinet responded in writing to Mr. Bruggers stating that it would hold future meetings in accordance with the Kentucky Open Meetings Law.” The Cabinet did not, however, respond to Mr. Bruggers’ allegations by identifying “the specific statute or statutes supporting the [Work Group’s implicit] denial” or provide “a brief explanation of how the statute or statutes apply.” KRS 61.846(1).

The questions presented on appeal are whether the Energy and Environment Cabinet’s Lead in Drinking Water Work Group is a public agency as defined in KRS 61.805(2), and, if so, whether its March 2016 unpublicized telephone meeting violated the Open Meetings Act. In a press release issued by the Energy and Environment Cabinet, the Cabinet’s Division of Water “announced that it has proactively created a work group whose main goal will be to prevent lead from entering the state’s drinking water.” According to the press release, the Work Group consists of “[t]hirteen experts from a broad spectrum of Kentucky’s water infrastructure,” including the Kentucky Rural Water Association, the KY/TN Section of the American Water Works Association, the Division of Water, the Association of Municipal Water Agencies, and the University of Louisville. The Work Group, the press release continues, “will develop a report and present recommendations to the Division of Water.” These representations, made by the Energy and Environment Cabinet itself, and

not modified on appeal, describe a public agency as defined in KRS 61.805(2)(g).² Accordingly, we find that the Work Group is a public agency and its meetings are subject to all requirements imposed by the Open Meetings Act.

KRS 61.805(2)(g) defines the term "public agency" as:

Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and controlled by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection[.]

In *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884, 884 (Ky. 1987) the Kentucky Supreme Court determined that a body created by the University's Board of Trustees was a public agency, under the Open Meetings Act, even though it was "an advisory body only." Additionally, in 15-OMD-155 the Attorney General concluded that a committee, established by the Kentucky Board of Education to "narrow [] the search for a firm to assist the Board in finding a new commissioner of education," was a public agency pursuant to KRS 61.805(2)(g). These authorities are dispositive of the issue presented in Mr. Bruggers' appeal and further analysis is unnecessary.

Kentucky's courts have also determined that actions taken by public agencies in the course of telephonic meetings are void. *Fiscal Court of Jefferson County v. Courier-Journal and Louisville Times Co.*, 554 S.W.2d 72 (Ky. 1977). This conclusion was predicated on the recognition that the Open Meetings Act "is designed to require governmental agencies to conduct the public's business in such a way that the deliberations and decisions are accomplished in an

² The Work Group almost certainly qualifies as a public agency under KRS 61.805(2)(f), defining a public agency as "[a]ny entity when the majority of its governing body is appointed by a 'public agency' as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a 'public agency,' a state or local officer, or any combination thereof[.]" The Work Group provides no information about the manner in which Work Group members were selected, or by whom they were selected, frustrating our ability to conclusively resolve this question.

atmosphere wherein the public and the media may be present.” *Jefferson County Board of Education v. Courier-Journal and Louisville Times Co.*, 551 S.W. 25, 27 (Ky. App. 1977). In later years, the Attorney General adopted this reasoning in determining that telephonic meetings were wholly impermissible under the Open Meetings Act. See, e.g., 02-OMD-206 (determining that city council could not permit a voting member to participate in a public meeting by telephone); 11-OMD-018 (determining that a fiscal court violated the Open Meetings Act when it conducted a telephone poll of its members).

Having concluded that the Lead in Drinking Water Work Group is a public agency for purposes of the Open Meetings Act, we find that the Work Group violated KRS 61.823(3) and (4) by failing to give adequate notice of its March 2016 special meeting.³ Further, we find that the Work Group violated KRS 61.810(1)⁴ by excluding the public from its March meeting and conducting the meeting by telephone conference call. These acts contravene the mandate of the Act and the judicial recognition that public agencies must “conduct the public’s business in such a way that the deliberations and decisions are accomplished in an atmosphere wherein the public and the media may be present.” *Id.*, *Jefferson County Board of Education*, 551 S.W.2d at 27. Finally, we find that the Work Group violated KRS 61.846(1) by failing to respond to Mr. Bruggers’ complaint in a manner consistent with the statute’s strict legal requirements. The Work Group’s compliance with *all* requirements of the Open Meetings Act is not only warranted “as appropriate” but is legally mandated.⁵

³ Because the Work Group has not adopted a schedule of regular meetings, as required by KRS 61.820, the March meeting was a special meeting the requirements for which are found in KRS 61.823. See, e.g., 92-OMD-1840 (recognizing that “[i]f a public agency holds a meeting in addition to, outside of, or in place of the regular meeting schedule, that meeting is a special meeting”).

⁴ KRS 61.810(1) identifies the thirteen exceptions to the Open Meetings Act authorizing closed session discussion. It is prefaced by the following language:

All meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times[.]

This language summarizes the Act’s broad legal mandate.

⁵ To avoid future legal challenge, the Work Group should conduct its first meeting as a special meeting and strictly adhere to the special meeting notice requirements found at KRS 61.823(3) and (4). At this special meeting, the Work Group should adopt a regular meeting schedule, per the requirement found in KRS 61.820, and adhere to that schedule going forward. In all instances, except for those identified in KRS 61.810(1)(a) through (m), the Work Group should conduct its meetings in an open, public forum.

Either party may appeal this decision by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a). The Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

Andy Beshear
Attorney General

Amye L. Bensenhaver
Assistant Attorney General

#173

Distributed to:

James Bruggers
Greg Heitzman
R. Bruce Scott
John Horne