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**20-OMD-163**

October 15, 2020

In re: *The State Journal*/Frankfort Board of Commissioners

**Summary:** Frankfort Board of Commissioners (“Board”) engaged in conduct prohibited under the Open Meetings Act (“the Act”) by conducting a series of less-than-quorum meetings where the members attending collectively constituted a quorum and discussed public business. Even so, insufficient evidence exists to establish the Board’s intent to violate the Act.

***Open Meetings Decision***

On September 21, 2020, *The State Journal* (“Appellant”) submitted a written complaint to Mayor William May pursuant to KRS 61.846(1), alleging that the Board had violated KRS 61.810(2) and proposing remedies for the alleged violation. Specifically, Appellant alleged that a quorum of the Board had held a series of less-than-quorum meetings to discuss the dismissal of City Manager Keith Parker, which was an agenda item for the upcoming Board meeting on August 10, 2020. As evidence of the alleged violation, Appellant stated that on August 7, 2020, Commissioner Scott Tippet told Parker “that the mayor had three votes” for his dismissal.

In response to the complaint, the mayor did not deny that a quorum of the members had discussed Parker’s dismissal prior to the meeting, but asserted that “there was no intent to violate KRS 61.810(2)” and that the Board had not taken any action. He further stated that the discussions were “informational and

educational updates only” and that “[t]here was no promise or discussion of how each commissioner was going to vote.” This appeal followed.

Under KRS 61.810(1), “[a]ll 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[.]” Furthermore, KRS 61.810(2) provides:

Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section, shall be subject to the requirements of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.

Thus, the Act not only prohibits a quorum from *taking action* in private, but also “prohibits a quorum from *discussing public business* in private or meeting in number less than a quorum for the express purpose of avoiding the open meeting requirement of the Act.” *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998) (emphasis added). “Public business is the discussion of the various alternatives to a given issue about which the board has the option to take action.” *Id.*

On appeal, the Board admits that “individual members of the [Board] met in a series of meetings that collectively would constitute a quorum.” The Board further admits that a discussion of whether the City Manager should be dismissed would constitute discussion of “public business” under KRS 61.810(1). The question, therefore, is whether the members’ discussions related to the merits of Parker’s proposed dismissal.

The Board asserts that the members discussed placing Parker’s dismissal on the agenda for the August 10 meeting, which would not constitute a violation of the Act. *See, e.g.*, 20-OMD-072 (finding that a discussion of whether to place an item on the agenda is not a discussion of “public business”). However, the Board also asserts that the members discussed certain “prior actions or omissions of the

City Manager” – which, presumably, the members considered relevant to the proposal to terminate him. Although the Board attempts to draw a bright line between “merely factual” statements that were relevant to the proposed termination and a “commitment or promise to terminate the City Manager,” the Act makes no such distinction. The “merely factual” statements about the City Manager’s actions or omissions are fundamental to any decision to terminate the City Manager for those actions or omissions. As such, these statements concerned matters of public business. In other words, they related to the various solutions available to the Board in response to the City Manager’s alleged actions or omissions. *See Yeoman*, 983 S.W.2d at 474.<sup>1</sup> Because the Board admits to having had these discussions, and because these were discussions of public business that were subject to the requirements of the Act, it is unnecessary to determine whether the Board members also discussed how they would vote on the proposal.

Although the statements regarding the City Manager’s actions or omissions were statements of public business, to violate the Act, a series of less-than-quorum meetings must be held “for the purpose” of avoiding the obligations of the Act. KRS 61.810(2). In essence, KRS 61.810(2) contains a *mens rea* requirement. *See Elm Street/McCracken Pike Preservation Alliance, Inc. v. Siegelman*, No. 2005-CA-002079, 2007 WL 3228090 \*5 (Ky. App. 2007) (unpublished). This Office has not hesitated to find a violation of the Act when there is evidence that the members of a public agency intended to circumvent the Act. *See, e.g.*, 18-OMD-153; 94-OMD-106. However, when evidence on this element is lacking, this Office has acknowledged its inability to determine the members’ intent. In those circumstances, this Office has found that the meetings “otherwise fell within the zone of conduct prohibited by KRS 61.810(2)” to advise agencies that similar conduct should not recur. *See, e.g.*, 13-OMD-067; 09-OMD-093; 05-OMD-026. Here, there is insufficient evidence to conclude that the members intended to violate the Act.

For these reasons, this Office finds that a quorum of the Board engaged in conduct prohibited by KRS 61.810, consisting of a series of less-than-quorum meetings to discuss public business outside of a public meeting. Due to insufficient

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<sup>1</sup> KRS 61.810(1)(f) permits such discussions to occur in a closed session of the meeting. However, a motion to enter closed session must be made during the open meeting and conform to the requirements of KRS 61.815.

evidence of intent, however, this Office does not find that the Board violated the Act.<sup>2</sup>

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

Daniel Cameron  
Attorney General

/s/ James M. Herrick

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Distributed to:

Mr. Steve Stewart  
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Hon. William I. May, Jr.

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<sup>2</sup> The Board also contends that the meetings were merely held for the purpose of "educating and informing members." KRS 61.810(2) permits "discussions between individual members where the purpose of the discussions is to educate the members on specific issues." Because there is insufficient evidence to conclude that the Board intended to avoid the requirements of the Act, it is unnecessary to determine whether these discussions were made for the purpose of educating other members.