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22-OMD-057

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In re: WCLU News/City of Glasgow

Summary: The City of Glasgow ("the City") violated the Open Meetings Act ("the Act") when it failed to issue a timely response to a complaint. The City also has not carried its burden of proof that KRS 61.810(1)(g) or the Model Procurement Code authorized the City to enter closed session to discuss a real estate development project.

Open Meetings Decision

On March 15, 2022, WCLU News ("the Appellant") submitted a written complaint to the presiding officer of the City Council alleging that the City had violated the Act when it entered closed session to discuss plans for developing a "Downtown Park." At the meeting on March 14, 2022, the City provided notice during open session that it would be entering closed session "to look at some information about the Downtown Park." The City provided no other information, other than citing to, and reading the text of, KRS 61.810(1)(g) as the basis for entering closed session. In its complaint, the Appellant notified the City that the Appellant had obtained a copy of the proposed development plan. Therefore, the Appellant claimed that the proposed plan was already publicly known and that the City had no basis to discuss the plan in closed session.

On March 21, the City responded and claimed that it did not realize the Appellant possessed the proposed plan and that, had it known, it "may have taken a different approach." The City also committed to refrain from discussing

the project in closed session at future meetings.[1] The City nevertheless maintained that KRS 61.810(1)(g) authorized it to enter closed session at its March 14 meeting. The City also claimed, for the first time, that provisions of the Open Records Act and Model Procurement Code authorized it to conduct the discussions in closed session. This appeal followed.

Under KRS 61.846(1), upon receiving a complaint under the Act a public agency must determine whether to remedy the alleged violation or deny the complaint, and notify the complainant of its decision with three business days of receiving the complaint. Here, the Appellant submitted his complaint on March 15, but the City did not respond to the complaint until March 21. Accordingly, the City violated the Act when it failed to respond within three business days.

KRS 61.815(1) provides the procedure for a public agency to follow prior to entering closed session. In most instances, "[n]otice shall be given in regular open meeting of the general nature of the business to be discussed in closed session, the reason for the closed session, and the specific provision of KRS 61.810 authorizing the closed session." KRS 61.815(1)(a). However, if a public agency enters closed session under an exemption listed in KRS 61.815(2), then it is not required to provide notice of the general nature of the topic being discussed. *See* KRS 61.815(2); *see also Cunningham v. Whalen*, 373 S.W.3d 438, 441 n.12 (Ky. 2012) (An exemption listed in KRS 61.815(2) releases a public agency "from the requirements of announcement of a closed session and a public vote on holding a closed session, as well as the requirement that no final action be taken.").[2] Among the exemptions listed in KRS 61.815(2) for which no prior notice is required is KRS 61.810(1)(g), the exemption on which the

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[1] It should be noted that the City took no final action during closed session, and only discussed the project. The Appellant's suggested remedy was for the City to refrain from conducting future discussions about the project in closed session, and for the City to admit its violation at a future public meeting.

[2] In 05-OMD-148, this Office opined that KRS 61.815(2) had no meaning. In that decision, this Office refused to give any meaning to the actual text of the statute as written by the General Assembly, and instead substituted its own judgment for what the legislature must have intended when enacting KRS 61.815(2). But of course, the only way to ascertain legislative intent is to give meaning to the text the legislature uses. *See Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 749 (Ky. 2014) ("when a statute is unambiguous, we need not consider extrinsic evidence of legislative intent and public policy"). The refusal, in 05-OMD-148, to acknowledge the text of KRS 61.815(2) cannot withstand the Kentucky Supreme Court's recognition in *Cunningham,* 373 S.W.3d at 441 n.12, that KRS 61.815(2) means what it says. If a public agency relies on one of the exemptions enumerated in KRS 61.815(2), it is not required to conform to the procedures for conducting a closed meeting as established in KRS 61.815(1). This Office rejects 05-OMD-148 to the extent it says otherwise.

City originally relied. Thus, because the City was not required to explain the general nature of the discussion that would occur in closed session when invoking this particular exception, this Office cannot find that the City's minimal description of "look[ing] at some information about the Downtown Park" prior to entering closed session was a violation of the Act.

Nevertheless, the City did explain that the discussions would involve the development project. The City also provides additional information on appeal in support of its reliance on the claimed exemption. On this basis, there is sufficient information to determine whether the City properly invoked KRS 61.810(1)(g) in the first instance. This Office finds that it did not.

On appeal, the City explains that the development project at issue is a "public-private project" in which a private contractor will develop an amphitheater and farmer's market pavilion in the downtown area. The City does not claim that the developer will continue to own and operate the amphitheater as a business, or that it will own and operate the farmer's market pavilion as a business. Based on the City's description of the plan, the plan appears to be more like a real estate development project than an ongoing business of concern that will be owned and operated by the developer. Amphitheaters and farmer's markets are locations where the public may gather for various private ventures, *i.e.*, each farmer selling his or her crops, or playwrights and actors performing a show. Perhaps a private owner will lease the use of these facilities for these purposes, but the City does not claim that will be the case. KRS 61.810(1)(g) applies expressly to businesses, not real estate development projects.[3] *Compare* KRS 61.810(1)(g) (permitting closed session discussions that would jeopardize the siting, expansion, upgrade, or retention of a business) *with* KRS 61.810(1)(b) (permitting closed session discussions when a public agency intends to acquire real estate).

Moreover, even if the plan could be considered an ongoing business of concern, as opposed to a real estate development project, the City has not carried its burden that open discussions of the project would "jeopardize the siting, retention, expansion, or upgrading of *the* business." KRS 61.810(1)(g) (emphasis added). Although the specific details of the plan might not be widely

[3] This is not to say that an owner of real estate engaged in the business of leasing space for profit is not engaged in "business." An apartment complex, hotel, or other similar project could be both a business and a real estate development project. But the City describes this project as a "public-private project." And the activities that occur in amphitheaters and farmer's markets are seemingly "public-private"—public space is made available for multiple, individually owned and private, business ventures.

known by the public, it is safe to say that the public knows the project's location—downtown Glasgow.[4] Thus, the "siting" of the venture is not in jeopardy. Nor is the "expansion" or "upgrade" of the venture in jeopardy because the project does not already exist. If the park does not already exist, it cannot be expanded or upgraded.[5] Thus, KRS 61.810(1)(g) would only apply if open discussion would jeopardize the "retention" of the venture. On this point, the City claims that it could "reopen the [request for proposal] to receive other proposals" for the project. According to the City, the developer would be at a disadvantage in such a scenario because the developer's prior confidential proposals would have been made publicly available. Competitors could then use such information to undermine the current developer's bids on such changes to the project. This, however, is merely speculative. Public agencies may discuss business proposals in closed session "if open discussions *would* jeopardize" the retention of the business. KRS 61.810(1)(g) (emphasis added). No evidence has been presented, at this juncture, to conclude that the City will reopen the bidding process. Accordingly, the City has failed to carry its burden that KRS 61.810(1)(g) authorized it to discuss the development project in closed session.

Finally, the City heavily relies on provisions of the Open Records Act, and the Model Procurement Code, as alternative reasons for conducting the discussions in closed session. When entering closed session on March 14, however, the City did not rely on these authorities to conduct the closed session discussions. Under KRS 61.810(1)(k), "[m]eetings which federal or state law specifically require to be conducted in privacy" may be conducted in closed session. And as discussed previously, an exemption to the Act enumerated in KRS 61.815(2) relieves a public agency of the requirement to provide public notice, in an open meeting, that discussions conducted under such an

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[4] On appeal, the Appellant claims that the plans are widely known by the public because it possesses a copy of the plans. The City responds that the Appellant was erroneously provided a copy of the plans in response to a previous open records request, but that the general public does not have access to the plans and the plans are not widely known. The Appellant, a media organization, provides no proof that it actually published the plans such that they were widely available prior to the March 14 meeting.

[5] The City claims that revealing confidential information shared by the developer could cause the developer to refuse expanding or upgrading its business in the City in the future. But the City does not claim that the developer actually maintains a business presence in the City (*i.e.*, a permanent location). Construction, by its nature, is the expansion and upgrade of real estate. There is a difference between the services this developer provides (expanding or upgrading other real estate) and expanding or upgrading the developer *itself*. KRS 61.810(1)(g) applies to the expansion or upgrade of an ongoing business concern, not the expansion or upgrade of other real estate.

exemption are about to occur in closed session. KRS 61.810(1)(k) is one such exemption enumerated in KRS 61.815(2). Therefore, even though the City did not invoke KRS 61.810(1)(k) prior to entering closed session, it was not required to do so under KRS 61.815(2) and it may assert this exemption on appeal, notwithstanding its failure to do so previously.

Again, the public may be excluded from "[m]eetings which federal or state law *specifically require* to be conducted in privacy," KRS 61.810(1)(k) (emphasis added), and the public agency is not required to provide notice of such meetings prior to entering closed session, KRS 61.815(2). Thus, to carry its burden, the City must demonstrate that the Open Records Act or the Model Procurement Code "specifically require" these discussions "to be conducted in privacy." The City has failed to carry that burden.

None of the exemptions unique to the Open Records Act "specifically require" confidential meetings. The Open Records Act governs inspection of public records, and it does not require the discussion of any public record at any meeting, regardless of whether it is a meeting open or closed to the public. In fact, the prefatory language to the exemptions in the Open Records Act states that "[t]he following public records are excluded from the application of *KRS 61.870 to 61.884* and shall be subject to inspection only upon order of a court of competent jurisdiction." KRS 61.878(1) (emphasis added). That is to say, the records are exempt from the application of the *Open Records Act*. The only provision of the Open Records Act that is expressly incorporated into the Open Meetings Act is KRS 61.810(1)(m), which permits closed-session discussions about records exempt under KRS 61.878(1)(m)—the "terrorist act" exemption, which has no application here. Therefore, the City's reliance on KRS 61.878(1)(c), which exempts confidential business records from public inspection, does not provide an independent basis for entering closed session under the Open Meetings Act. The Open Meetings Act corollary to KRS 61.878(1)(c) is KRS 61.810(1)(g), which as discussed above, does not apply here.

That leaves only the City's reliance on the Model Procurement Code. KRS 45A.370 provides the procedure for local agencies when proposing and accepting "competitive negotiations." Under KRS 45A.370(3), "[w]ritten or oral discussions shall be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award. Discussions shall not disclose any information derived from proposals submitted by competing offerors." Thus, KRS 45A.370(3) requires two things from local agencies. First, the local agency must have a written or oral discussion with each responsible offeror who submits a proposal. Second,

when having that mandatory discussion with the responsible offeror, the local agency "shall not disclose any information derived from . . . competing offerors." *Id.*

Here, the City does not claim that the discussions that occurred on March 14 were with the "responsible offeror." In fact, there is no evidence that the offeror (*i.e.*, developer) was present at the meeting.[6] Nor is there any evidence in this record that the City received competing offers, and that those competing offers were being discussed in front of the selected developer. KRS 45A.370(3) requires local agencies to discuss the offeror's bid with that offeror, but without disclosing *other* competing bids to that offeror. It says nothing about a local agency discussing amongst its members the specifics of any particular bid. Thus, the City has not carried its burden that KRS 45A.370(3) applies here.

At bottom, KRS 61.815(2) enumerates several exceptions to the general rule that notice must be given in an open meeting about the nature of the forthcoming closed-session discussion. But that privilege evaporates if the underlying exception does not actually apply to the discussions being conducted. Here, the City was not required to give notice of entering closed session when it relied on KRS 61.810(1)(g) or (k). *See* KRS 61.815(2). But the City was nevertheless mistaken that those exemptions applied. Thus, the City violated the Act when it discussed public business in closed session when no exception to the Act authorized those specific discussions to be conducted in closed session. The City also violated the Act when it failed to timely respond to the Appellant's written complaint.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a) within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

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[6] KRS 61.810(1)(g) does not require the presence of a representative of the business entity for the public agency to discuss matters that might jeopardize the siting, retention, expansion, or upgrading of the business. *See, e.g.*, 94-OMD-119. KRS 45A.370(3), however, does require the private discussion to be with the business entity.

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