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23-OMD-078

April 3, 2023

In re: Daniel Konstantopoulos/Winchester-Clark County Industrial Development Authority

Summary: The Winchester-Clark County Industrial Development Authority ("the Authority") did not violate the Open Meetings Act ("the Act") when it discussed a specific proposal from a business entity in closed session under KRS 61.810(1)(g). The Authority was not required to state the reason for the closed session in detail because KRS 61.815(2) exempts discussions under KRS 61.810(1)(g) from the requirements of KRS 61.815(1). The Authority did not violate KRS 61.835 with regard to the recording of actions taken because it took no action in closed session.

Open Meetings Decision

On March 10, 2023, in a written complaint submitted under KRS 61.846(1), Daniel Konstantopoulos ("Appellant") alleged that the Authority had violated the Act at its regular meeting on October 17, 2022, when it held a closed session under KRS 61.810(1)(g). Specifically, the Appellant claimed the exception to the Act under KRS 61.810(1)(g) did not apply because no representative of a business entity was present in the closed session and because there was "no perceived threat that open discussions would jeopardize the siting, retention, expansion, or upgrading of the business."[1] The Appellant further alleged the Authority gave only a "generic or vague" notice of the general nature of the business to be discussed, "did not state the reason for the closed session," and took final action in closed session by "determin[ing] this opportunity was not a good fit for the industrial park," all in violation of KRS 61.815(1). Finally, the Appellant alleged the minutes of the meeting did "not reflect the action taken" when the Authority made that determination in closed

[1] On appeal, the Authority explains a business entity has made a proposal "to locate a large solid waste transfer facility and associated offices in Clark County, Kentucky."

session, in violation of KRS 61.835. As a remedy for the alleged violations, the Appellant requested that the Authority hold a special meeting "to consider the proposal in open session in the presence of the public."

In a timely response, the Authority denied any violation of the Act. Specifically, the Authority stated its discussions were within the scope of KRS 61.810(1)(g) because they were "discussions concerning a specific proposal" on "private or proprietary matters which might jeopardize the business if disclosed to competitors." The Authority admitted no representative of "the industrial prospect" was present in the closed session, but asserted "that is not a requirement under KRS 61.810(1)(g)." Furthermore, the Authority stated it could not give more specific information about the business to be discussed because it must "keep confidential all of the prospect's proprietary information" and allowing that information to become public would "jeopardiz[e] the siting, retention, expansion, or upgrading of the business." The Authority admitted the Executive Director had stated in an email that "it was determined this opportunity was not a good fit for the industrial park," but denied that the Authority had taken final action in the closed session. Rather, the Authority characterized the Executive Director's statement as "merely his impression of the consensus of the discussions of the" Authority regarding the proposed location. Finally, the Authority stated it would be willing to consider the matter again in a closed session, or in open session "if the entity waives the privacy of its proprietary information," and to "render a final decision by 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," subject to certain exceptions. Among these exceptions is KRS 61.810(1)(g), which exempts "[d]iscussions between a public agency and a representative of a business entity and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business."

The Appellant claims a public agency's "discussions concerning a specific proposal" from a business entity are not exempt under KRS 61.810(1)(g) unless they are "discussions between a public agency and a representative of a business entity." This Office disagrees. Since the enactment of KRS 61.810(1)(g), this Office has consistently construed the exception as applying to a public agency's discussions of a proposal from a business entity, "with or without the representative" present, as long as the stated conditions apply. 05-OMD-148; *see also* 16-OMD-129; 03-OMD-089; 99-OMD-104; 94-OMD-119. The Appellant, however, argues this construction is impermissible because KRS 61.810(1)(g) uses the conjunctive "and," so that all exempt "discussions concerning a specific proposal" must *also* be "between a public agency and a representative of a business entity." But it is a well-established rule that a conjunctive word "may and should" be construed disjunctively "whenever such

conversion is required . . . to effectuate the obvious intention of the Legislature and to accomplish the purpose or object of the statute." *Duncan v. Wiseman,* 357 S.W.2d 694, 698 (Ky. 1961); *see also Chilton v Gividen,* 246 S.W.2d 133, 135 (Ky. 1952) (citing *Commonwealth v. Bartholomew,* 97 S.W.2d 591 (Ky. 1936)).

Here, *both* "[d]iscussions between a public agency and a representative of a business entity *and* discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business" are exempt under KRS 61.810(1)(g) (emphasis added). If KRS 61.810(1)(g) applied only when a representative of the business were present, as the Appellant asserts, then the statute would not use the conjunctive "and." Rather, it would exempt from the Act's requirements "[d]iscussions between a public agency and a representative of a business entity . . . if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business." To interpret the statute as the Appellant suggests, the Office would be required to ignore the omitted text, which is "and discussions concerning a specific proposal." To omit this language, however, would ignore a core principal of statutory construction, which is to give meaning to every word the legislature uses. *See Ky. Unemployment Ins. Comm'n v. Wilson*, 528 S.W.3d 336, 340 (Ky. 2017). Thus, KRS 61.810(1)(g) applies to "discussions concerning a specific proposal" from a business entity, even when a representative of the business is not present, so long as open discussion of such a proposal "would jeopardize the siting, retention, expansion, or upgrading of the business."

Next, the Appellant argues the conditions were not present for KRS 61.810(1)(g) to apply because the Authority has not specified the manner in which "open discussions would jeopardize the siting, retention, expansion, or upgrading of the business." On appeal, the Authority explains that the business entity "provided detailed proprietary information about its plans for expansion and relocation" and "wished that its information be kept private." The Authority further states "breaches of confidentiality jeopardize location decisions." The Appellant has presented no evidence that the nature of the entity's proposal is public knowledge. *See, e.g.,* 16-OMD-129; 94-OMD-119 (finding KRS 61.810(1)(g) inapplicable when the business proposal was publicly known). When the record is inconclusive as to whether open discussions would jeopardize the siting, retention, expansion, or upgrade of a business under KRS 61.810(1)(g), this Office cannot find a violation of the Act. *See, e.g.,* 17-OMD-044. Thus, in the absence of any evidence countering the Authority's position, this Office cannot find that the Authority violated KRS 61.810(1) by conducting a closed session under KRS 61.810(1)(g).

Turning to the Appellant's procedural arguments, the Appellant claims the Authority violated KRS 61.815(1)(a) and (c). Under KRS 61.815(1)(a), "[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)(c) provides that "[n]o final action may be taken at a closed session." However, even assuming the Authority did not comply with those provisions, such noncompliance would not have violated the Act. Under KRS 61.815(2), "[p]ublic agencies and activities of public agencies identified in paragraphs (a), (c), (d), (e), (f), but only so far as (f) relates to students, (g), (h), (i), (j), (k), (l), and (m) of subsection (1) of KRS 61.810 shall be excluded from the requirements of" KRS 61.815(1). Here, the Authority's activity in closed session occurred pursuant to KRS 61.810(1)(g), which is one of the exemptions provided in KRS 61.815(2). In *Cunningham v. Whalen,* 373 S.W.3d 438, 441 n.12 (Ky. 2013), the Supreme Court of Kentucky stated that an exemption listed in KRS 61.815(2) relieves 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." *See also* 22-OMD-057. In light of these authorities, this Office cannot find that the Authority violated the Act by failing to comply with KRS 61.815(1).

Finally, the Appellant claims the Authority violated KRS 61.835, which requires that "[t]he minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded." Although KRS 61.815(2) relieves a public agency from the requirements of KRS 61.815(1), it does not relieve the agency from the requirements of KRS 61.835. Here, the Appellant argues the Authority took "action" when it determined the business entity's proposal "was not a good fit for the industrial park" and subsequently failed to record that action in its minutes. Under the Act, "action taken" means "a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body." KRS 61.805(3). This Office has recognized that a public agency's final decision to take no further action on a matter is a "final action" for purposes of KRS 61.815(1)(c) *See* 22-OMD-187 n.3. Thus, such a decision would also constitute "action taken" within the meaning of KRS 61.805(3). The Authority, however, states it did not make a collective decision on the entity's proposal on October 17, 2022, but expressed a consensus "that the Executive Director [should] work with the industry to find another location and assist the industry in any way possible." The Authority characterizes the October 17 meeting as "merely the first step in negotiation on the proposal" and states it is still attempting to reach an agreement with the entity on a location in Clark County. The Authority thus did not take any action in the closed session and, accordingly, was not required to record such action in the meeting minutes. Therefore, the Authority did not violate the Act.

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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ James M. Herrick
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Assistant Attorney General

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Distributed to:

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