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26-OMD-475

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In re: Vivian Miles/Kentucky Personnel Board

Summary: The Kentucky Personnel Board ("the Board") did not violate the Open Meetings Act ("the Act") when it went into closed session under KRS 61.810(1)(k) and KRS 11A.080(2) to discuss a preliminary investigation referred to it by the Executive Branch Ethics Commission ("the Commission").

Open Meetings Decision

In a complaint under KRS 61.846(1), Vivian Miles ("the Appellant") alleged that the Board violated the Act by invoking KRS 61.810(1)(k), KRS 11A.080, and KRS 11A.110(1) to go into closed sessions during its January 2018 meeting and its January, February, March, April, and May 2019 meetings. The Appellant argues that KRS 11A.080 only authorizes the Commission to enter closed session to discuss its preliminary investigations. As a proposed remedy, the Appellant asked that the Commission acknowledge its violations, release records documenting the discussions in the closed sessions, make corresponding corrections to public records related to the underlying investigations, and conduct internal training related to the Act.

In response, the Board denied that its closed sessions violated the Act, explaining that it was authorized to enter closed session under KRS 61.810(1)(k) and KRS 11A.080(2) because the Commission had referred the underling matters to it under KRS 11A.070. 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 exemptions. Among these exemptions is KRS 61.810(1)(k), which applies to "[m]eetings which federal or state law specifically require to be conducted in privacy." The Board explains that the closed sessions at issue were authorized by KRS 11A.080(2), which states that "[a]ll commission proceedings and records relating

to a preliminary investigation shall be confidential until a final determination is made by the commission."

The Board explains that the investigation that was discussed in closed session "was a request from the [Commission] to the Board for the use of its investigative services pursuant to KRS 11A.070." That statute provides that the Commission "may also make use of the services and facilities of the office of the Attorney General or of any other state agency." KRS 11A.070. According to the Board, when it acts on behalf of the Commission, pursuant to KRS 11A.070, it is subject to the confidentiality requirements of KRS 11A.080(2). The Office agrees. Under KRS 11A.070, the Commission was "making use of the services" of the Board in relation to the underling investigation. At that time, the Board acted on behalf of the Commission, and so any action it undertook related to that investigation was a "commission proceeding" within the meaning of KRS 11A.080(2).

Next, the Board explains that the investigation it discussed during the closed sessions remains a "preliminary investigation" that has not been subject to a "final determination." The Office has previously considered the meaning of KRS 11A.080(2) in the context of the Open Records Act.[1] In 02-ORD-044, the Office held that "a finding of no probable cause is not a final determination such as that reached at the conclusion of a full-blown adjudicatory hearing conducted under KRS 11A.100(3)." Here, the Board explains that the investigation that was discussed during the closed sessions did not result in a finding of an ethics violation. Therefore, the Office agrees that the Board's closed sessions were authorized by KRS 11A.080(2) and KRS 61.810(1)(k), and therefore, the Board did not violate the Act.

A party aggrieved by this decision may appeal it by initiating an 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.

[1] The Open Records Act should not be conflated with the Open Meetings Act, as the two Acts are entirely distinct and carry different statutory rights, agency obligations, and remedies. *See Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 868–69 (Ky. App. 2021). However, KRS 11A.080(2) is unique in that it simultaneously mandates that "proceedings" and "records" related to the Commission's preliminary investigations be kept confidential. Only because KRS 11A.080(2) applies to *both* meetings of the Commission—or an agency it is "making use of"—and to related records can it be relied upon in the context of both Acts.

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