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OAG 19-001

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Subject: Whether the Finance and Administration Cabinet violated KRS Chapter 13A in promulgating emergency administrative regulation 200 KAR 3:020E, which restricts access to all state-owned facilities and grounds, including the Kentucky State Capitol Building Annex Capitol.

Requested by: Representative Patti Minter, Kentucky House District 20

Written by: Laura Tipton and Sam Flynn, Assistant Attorneys General

Syllabus: The Finance and Administration Cabinet promulgated 200 KAR 3:020E in violation of KRS 13A.100 and 13A.190.

Statutes construed: KRS 13A.100; KRS 13A.190; KRS 13A.270; KRS 13A.280; KRS 13A.290

OAGs cited: OAG 18-09

Opinion of the Attorney General

State Representative Patti Minter has requested an opinion of this office as to whether 200 KAR 3:020E, the emergency regulation filed by the Finance and Administration Cabinet, which restricts access to all state-owned facilities and grounds, is valid. For the reasons set forth below, we find that the emergency regulation is not valid because the Finance and Administration Cabinet violated KRS 13A.100(1)-(2) and KRS 13A.190 in promulgating it. Further, we note that the language of 200 KAR 3:020E may lead to violations of the Kentucky Open Meetings Act and is also vulnerable to as-applied constitutional challenges.

Background

On January 4, 2019, William Landrum III, Secretary of the Finance and Administration Cabinet, and Robert Burnside, Commissioner of the Cabinet's Department for Facilities and Support Services (collectively, "the Cabinet"), filed with the Legislative Research Commission ("LRC") 200 KAR 3:020E, an emergency administrative regulation titled "Use of state-owned facilities and grounds." The language of 200 KAR 3:020E places restrictions on public use of and activities that may be conducted at all state-owned facilities and grounds, including the current State Capitol building and Capitol Annex.

Notably, prior to this opinion request, on June 4, 2018, members of the Kentucky Poor People's Campaign sought entry into the State Capitol building following an outdoor rally. OAG 18-09. At that time, they were advised of a new "policy" whereby, among other things, members of the group could only enter the building two at a time. *Id.* Although the policy was not reflected in an administrative regulation or other writing, it was nevertheless enforced on two subsequent occasions. As a result, 32 members of the Kentucky General Assembly asked this Office to opine on the process by which rules and policies for public access to the State Capitol building may be implemented or altered. *Id.*

On July 2, 2018, this Office issued an opinion finding that the Cabinet and the Kentucky State Police violated KRS Chapter 13A by implementing and enforcing policies regarding entry to the Capitol building that were not contained in properly adopted administrative regulations. *Id.* Based on this opinion, the new "policy" restrictions were lifted.

The Cabinet took no immediate action in response to OAG 18-09, nor did it begin the regulatory process during the next six months. Then, late in the day on January 4, 2019, less than two business days before the start of the General Assembly's 2019 Regular Session, the Cabinet promulgated 200 KAR 3:020E. The Cabinet included a "Statement of Emergency," claiming that the purpose of the emergency administrative regulation is to "protect the health, safety, and welfare of visiting members of the public, as well as staff at state-owned facilities and grounds." The Cabinet states that 200 KAR 3:020E "is necessary . . . to provide clear and comprehensive guidelines in regard to items and activities that pose a threat to public health, safety, and welfare at state-owned facilities and grounds."

Significantly, the Cabinet admits that it was aware of public interest in and a "steady increase in attendance of regular sessions" of the Kentucky General Assembly *"[o]ver the years."* 200 KAR 3:020E (emphasis added). Yet, the Cabinet waited until the 2019 Regular Session was imminent before promulgating a regulation affecting public access to the public buildings that house the legislature. The Cabinet thereby deprived the public of the opportunity to comment on its new restrictions prior to the Session commencing, and prior to public access actually being restricted.

Analysis

Although the Cabinet availed itself of the administrative regulation process, it violated KRS Chapter 13A in doing so. Specifically, this Office finds that the Cabinet violated KRS 13A.190 because conditions did not exist that necessitate the promulgation of an emergency administrative regulation, and the statutory requirements for lawful promulgation of an emergency administrative regulation were not met. We further find that 200 KAR 3:020E, Section 3(1)(p), a catch-all provision, unlawfully gives the Cabinet discretion to create and enforce policies at-will, outside of and in addition to those expressly laid out in the emergency administrative regulation, in violation of KRS 13A.100(1)-(2).

KRS 13A.190 provides the conditions upon which an emergency administrative regulation may be promulgated and the requirements for lawful promulgation. It states, in relevant part:

> (1) An emergency administrative regulation is one that:
> (a) Must be placed into effect immediately in order to:
> 1. Meet an imminent threat to public healthy, safety, or welfare[.]

Further, each emergency administrative regulation must contain a statement providing, among other things: "[t]he nature of the emergency [and] [t]he reasons why an ordinary administrative regulation is not sufficient[.]" KRS 13A.190(6)(a)-(b). Significantly, emergency administrative regulations are effective "upon filing," KRS 13A.190(2), without the public comment period and hearing that precedes the adoption of an ordinary administrative regulation.

The emergency regulation violates the above-quoted provisions of KRS 13A.190(1) and (6). First, the Cabinet failed to comply with the requirements of KRS 13A.190(6)(a) in promulgating 200 KAR 3:020E because it did not adequately identify "[t]he nature of the emergency." The emergency administrative regulation states only that public participation during regular sessions of the General Assembly has increased,". . . to the extent that concerns have arisen regarding the health, safety, and welfare of visiting members of the public and staff." 200 KAR 3:020E. The Cabinet fails to provide any detail about what those concerns are, let alone if and how such concerns might relate to the "health, safety, and welfare of visiting members of the public and staff." In short, a "concern" about "health, safety, and welfare," does not itself constitute an "emergency" regarding the same. Moreover, 200 KAR 3:020E applies to all state-owned facilities and grounds, but only states that an "emergency" exists at one such location: the State Capitol and its immediate surrounding buildings and grounds. Thus, the Cabinet did not state "the nature of the emergency" at any other state-owned facility or grounds that would be subject to application of 200 KAR 3:020E. Accordingly, we find that the Cabinet failed to comply with KRS 13A.190(6)(a).

Second, we find that in promulgating 200 KAR 3:020E the Cabinet failed to comply with KRS 13A.190(6)(b). A review of 200 KAR 3:020E reveals that the Cabinet has not made *any* statement that an ordinary administrative regulation is insufficient. Nor has the Cabinet provided any statement in which such sentiment could be reasonably discerned.

Third, we find that 200 KAR 3:020 violates KRS 13A.190(1)(a). Despite the conclusory language of the emergency regulation, we find no "*imminent* threat to public health, safety, or welfare" that justifies the promulgation of 200 KAR 3:020E. *See* KRS 13A.190(1)(a)(1) (emphasis added). Again, the Cabinet has not even articulated any specific "threats" to public health, safety, and welfare that led to the creation of the emergency regulation. Further, to the extent any unidentified threats are "imminent," it is an emergency of the Cabinet's own making.

By the emergency regulation's terms, the Cabinet was aware of the "steady increase in attendance of regular sessions" of the General Assembly. Indeed, the Cabinet notes that public interest in and attendance at sessions of the

General Assembly have increased "*[o]ver the years.*" 200 KAR 3:020E (emphasis added). Yet, the Cabinet waited until the 2019 Regular Session was imminent before promulgating 200 KAR 3:020E. The only reason for any "emergency" is the Cabinet's own failure to act in the intervening period between legislative sessions and after issuance of OAG 18-09.

Furthermore, by filing its emergency regulation at 4 p.m. on a Friday, fewer than two business days before the Session, the Cabinet changed the rules of access to the Capitol – the very seat of government – and its surrounding buildings and grounds for the duration of the Session, barring public input or challenge. As we explained in OAG 18-09, KRS Chapter 13A governs the process by which administrative regulations are promulgated. With respect to ordinary administrative regulations, it is an open and transparent process, which allows the public to weigh in prior to the regulation taking effect. *See* OAG 18-09 (citing KRS 13A.270 and 13A.280). In fact, "a committee of the legislature must review and hear the regulations in a public forum." *Id.* (citing KRS 13A.290). While the Cabinet promulgated an identical ordinary administrative regulation, 200 KAR 3:020, simultaneously with 200 KAR 3:020E, the public hearing for the ordinary regulation will not occur until February 22, 2019, and the public comment period will run through February 28, 2019, after which the General Assembly's Regular Session will be all but over.

As we stated in OAG 18-09, "[T]he process for rulemaking set forth in KRS Chapter 13A allows a state agency to 'develop[] coherent and rational codes of conduct so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance[.]'" OAG 18-09 (quoting *General Assembly v. Byrne*, 90 N.J. 376, 386, 448 A.2d 438 (1982) (cited favorably in *Legislative Research Comm'n by and through Prather v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984) (hereinafter "*LRC v. Brown*")). By waiting until the legislative session was imminent and using that manufactured imminence to justify promulgating 200 KAR 3:020 as an "emergency" administrative regulation, the Cabinet prevented the public from knowing the rules in advance.

Under the circumstances, where the Cabinet has wholly failed to detail the nature of the emergency and the reasons why an ordinary emergency regulation is not sufficient, we must conclude that the Cabinet has violated KRS 13A.190(1) and (6)(a)-(b). In accordance with KRS Chapter 13A, the Cabinet should have

promulgated its rules for use of state-owned facilities and grounds solely as an ordinary administrative regulation.

Next, we find that 200 KAR 3:020E, Section 3(1)(p) violates KRS 13A.100, because it unlawfully allows the Cabinet to create and enforce policies outside of and in addition to those expressly set forth in the emergency administrative regulation. *See* OAG 18-09. The language of 200 KAR 3:020E, Section 3 relates to "Conditions Governing Use of State Facilities and Grounds." Subsection (1) provides "[g]eneral conditions governing all state facilities and grounds to which visitors, applicants, and other persons visiting under application agree to abide." Subsection (1)(p) provides that "[i]n addition to any use limitations imposed by this administrative regulation, within areas assigned to its use, an agency may impose ***such additional use restrictions as are necessary*** and proper to ensure: (1) [e]fficient operation and conduct of state business; (2) [t]he safety of state employees and visitors; (3) [t]he security of public assets and data; and (4) [r]estrictions necessary to conform to requirements of state and federal law." (Emphasis added).

Thus, the regulation allows the Cabinet to impose limitations not expressly stated in the regulation.[1] But the statutes of KRS Chapter 13A "were designed to prevent administrative agencies from abusing their authority." *See Baker v. Commonwealth,* 2007 WL 3037718, at * 35 (Ky. App. Oct. 19, 2007) (unpublished). And KRS 13A.100(1) specifically "require[s] the adoption of a regulation every time an agency desires to give legal effect to its issuance of any 'statement of general applicability'...that the agency intends to impact any group of individuals other than that agency's own personnel." *Baker,* 2007 WL 3037718, at*35. Accordingly, we find that the regulation violates KRS 13A.100.[2]

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[1] For example, since the promulgation of 200 KAR 3:020E, State Capitol security and facilities management have generated lists of additional items to be prohibited from the State Capitol and Annex, but that are not listed in the emergency regulation. The public and news outlets have posted photos of these lists via social media. Capitol security has enforced these prohibition lists, which expand restrictions, demonstrating the potential for misuse by this section. The public is still unable to know what restrictions are in place until they show up to a state owned facility on any given day, once again violating KRS 13A.

[2] As this office has determined that 200 KAR 3:020E was promulgated in violation of KRS Chapter 13A, we urge the Administrative Regulation Review Subcommittee, or any other subcommittee as defined in KRS 13A.010(15), to recommend that the Governor withdraw the emergency regulation, in accordance with KRS 13A.190(13).

Additional Considerations

This office further notes that the language of 200 KAR 3:020E may lead to violations of the Kentucky Open Meetings Act, KRS 61.800, *et seq.* The emergency regulation defines a "public meeting" as a "[m]eeting" as defined by KRS 61.805(1). 200 KAR 3:020E Section 1(13). Under KRS 61.805(1), the term "[m]eeting" means "all gatherings of every kind, including video teleconferences, regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting."

The Open Meetings Act applies to the General Assembly. 17-ORD-228. Thus, any public meeting under the emergency regulation, as well as any meeting of the General Assembly or any committee or subcommittee thereof, must comply with all requirements of the Act. This includes the Act's requirements regarding public notice of and public availability at public regular and special meetings. *See* KRS 61.820; KRS 61.823.

Under 200 KAR 3:020E Section 3(2)(e), no visitor may enter or remain on state facilities or grounds after normal business hours of operation without express approval, except: state employees; contract workers for the state; or members of the public who are meeting with an agency or legislator regarding a public matter, attending a scheduled public meeting, or escorted by a state employee to conduct state business. 200 KAR 3:020E Section 3(2)(f) provides that, "any time period during which a state facility hosts a legislative session, public meeting, or court session shall be considered normal business hours in addition to any regular posted hours of operation. "Normal Business Hours" means "the hours in which a facility is declared or posted as open and accessible to individuals other than employees or agents of the Commonwealth." 200 KAR 3:020E Section 1(14).

However, 200 KAR 3:020E Sections 3(1)(p) and (4)(b) raise concerns regarding how these provisions of the regulation may be enforced. Again, under 200 KAR 3:020E Section 3(1)(p), within areas of an agency's assigned use, the agency may impose additional use restrictions. Pursuant to 200 KAR 3:020E Section 3(4)(b), "The commissioner, agency head of a tenant agency, officers of the Kentucky State Police, contract security staff, or other state or local law

enforcement officers may place limitations on the area in which an event may be conducted, or may direct the clearing of groups, in order to ensure compliance with applicable health and safety standards, to maintain public order, and to ensure that normal public business may be conducted." Under 200 KAR 3:020E Section 1(9), the definition of "[e]vent" includes any "meeting" held in a state facility or on state grounds. As applied, 200 KAR 3:020E Sections 3(1)(p) and (4)(b) give agencies, the Commissioner of the Department for Facilities and Support, Kentucky State Police officers, and the other listed individuals broad discretion to place limitations on public meetings. As a result, application of the emergency administrative regulation may violate the Open Meetings Act.

Similarly, we find that 200 KAR 3:020E Section 3(1)(p) and (4)(b) may render it vulnerable to as-applied constitutional challenges if these subsections are used to restrict access based on the causes advanced by groups or the reputation of the group itself. Furthermore, the permit requirements of the regulation may be subject to an as-applied challenge to the extent they apply to individuals or groups small in size. *See e.g., American-Arab Anti-Discrimination Committee v. City of Dearborn,* 418 F.3d 600, 608 (6th Cir. 2005) (stating, "Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring."); *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004).

For the reasons set forth above, we find that the Finance and Administration Cabinet violated KRS 13A.190 and KRS 13A.100 in promulgating 200 KAR 3:020E. Moreover, we find that application of certain provisions of 200 KAR 3:020E may lead to violations of the Open Meetings Act or as-applied constitutional challenges.

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