



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

20-OMD-117

August 10, 2020

In re: WDRB News/Board of Directors of University Medical Center, Inc.

Summary: Board of Directors of University Medical Center, Inc. (“Board”) violated the Open Meetings Act (“the Act”) when it improperly relied on KRS 61.810(1)(g) to discuss public business in closed session.

Open Meetings Decision

On June 24, 2020, WDRB News (“Appellant”) submitted a written complaint to Board Chair Jeffrey Bumpous pursuant to KRS 61.846(1). Appellant alleged that during the Board’s regular meeting on June 23, 2020, the Board improperly relied on KRS 61.810(1)(g) to discuss its “Downtown Medical Campus Strategic Plan” in closed session. Appellant further alleged that the Board violated the Act by conducting a closed session that was not listed as such on the meeting agenda. The Board responded by denying any violation of the Act. This appeal followed.

The Board conducted its June 23 regular meeting was conducted pursuant to the new video teleconferencing procedures established in response to the novel coronavirus public health emergency. The General Assembly enacted Senate Bill 150 (“SB 150”) to address the emergency, and it became law on March 30, 2020, following the Governor’s signature. SB 150 permits an agency to conduct a regular meeting by video teleconference so long as it complies with the notice provisions in KRS 61.823(3)-(5) and provides “specific information on how any member of the public or media organization can access the meeting.” SB 150 § 1(8)(b)3.

On appeal, the Board claims that it was not required to provide an agenda because, in ordinary circumstances, the Act does not require agencies to provide an agenda in advance of a regular meeting. Therefore, according to the Board, it is irrelevant that the closed session was not listed as an agenda item. However, SB 150 establishes that the contents of the required notice are the same as those set forth in KRS 61.823(3), which “shall consist of the date, time, and place of the meeting and an agenda.” Therefore, agencies electing to conduct their regular meetings under SB 150 are required to create an agenda and distribute it along with the notice.

However, even though SB 150 requires that the notice of a regular meeting conducted via video teleconferencing contain specific information, including an agenda, SB 150 does not convert regular meetings into special meetings. “Discussions and action” at a *special* meeting must be limited to the items listed in the agenda accompanying the notice of a special meeting. KRS 61.823(3). But that limitation does not apply to regular meetings. *See* March 31, 2020, OAG Advisory.¹ Therefore, the Board’s failure to list the closed session on the agenda for its regular meeting did not prohibit the Board from entering closed session. Nevertheless, the Board violated the Act when it discussed public business in closed session that it was required to discuss in open session.

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,” with certain enumerated exceptions. The exceptions under KRS 61.810(1) “shall be strictly construed.” KRS 61.800; *see also Floyd County Bd. of Education v. Ratliff*, 955 S.W.2d 921, 923 (Ky. 1997) (affirming that courts “must narrowly construe and apply the exceptions so as to avoid improper or unauthorized closed, executive or secret meetings”).

Among those discussions that may occur in closed sessions are “[d]iscussions between a public agency and a representative of a business entity

¹ Available at <https://ag.ky.gov/Documents/03.31.20%20OAG%20Advisory%20-%20Senate%20Bill%20150.pdf> (last accessed August 7, 2020).

and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business[.]” KRS 61.810(1)(g) (emphasis added). The definite article “the” prior to “business” indicates that “the business” means “the business entity” with which the public agency is having discussions. KRS 61.810(1)(g) does not permit a public agency to discuss its own business strategy among its own members in closed session, because such discussions are public business. *See Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998) (“Public business is the discussion of the various alternatives to a given issue about which the board has the option to take action.”).

At the June 23 Board meeting, the Board member’s proffered justification to enter closed session was that “[w]e have many items here that are business proposals that we’ll be considering and items in regard to upgrading of our business entities and so these are all still draft proposals and so we need to go into executive session to review those.” The Board does not dispute that the matters it discussed in closed session were its own business proposals, as opposed to those of a private business entity seeking to locate, expand, or upgrade its business. Therefore, KRS 61.810(1)(g) does not apply. *See, e.g.*, 92-OMD-1735 (holding that the business proposals of a public hospital board are not within the scope of KRS 61.810(1)(g) because “services being rendered or to be rendered by a public hospital are a matter of public interest”).

Furthermore, a public agency may only rely on this exception “if open discussions *would jeopardize* the siting, retention, expansion, or upgrading” of a business.” KRS 61.810(1)(g) (emphasis added). The Board has not claimed that its plans to upgrade the downtown medical campus would be jeopardized by open discussion of its proposals. In its motion to enter closed session, the Board merely stated that its proposals were “draft proposals,” which is not sufficient grounds for a closed session under KRS 61.810(1)(g).²

While the Board asserts that it took no action in the closed session, it does not deny that it discussed public business. The Act applies to any meeting of a quorum “at which any public business is discussed *or* at which any action is taken by the agency.” KRS 61.810(1) (emphasis added). Therefore, the Board violated the

² Although “preliminary drafts” are exempt from public inspection under the Open Records Act, KRS 61.878(1)(i), there is no corresponding exception under the Open Meetings Act authorizing a public agency to meet in closed session to discuss draft proposals.

Act by discussing public business in a closed session without statutory authorization.

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

James M. Herrick
Assistant Attorney General

#234

Distributed to:

Mr. Chris Otts
James P. Rayome, Esq.
Jeffrey M. Bumpous, M.D.
Ms. Norma Racine