COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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20-OMD-018

February 5, 2020

In re: Tanyqua Oliver/Fayette Circuit Judge Ernesto Scorsone

Summary: A circuit judge is not subject to the provisions of the Open Meetings Act and the Attorney General accordingly lacks jurisdiction over an appeal against a court.

Open Meetings Decision

The question presented in this appeal is whether Fayette Circuit Judge Ernesto Scorsone ("Judge Scorsone") violated the Open Meetings Act ("the Act") when, during a hearing on January 10, 2020, he ordered those present not to record or broadcast the proceedings with their cell phones. For the reasons that follow, this Office finds that Judge Scorsone is not subject to the Act.

On January 10, 2020, Tanyqua Oliver ("Appellant") submitted a complaint to the Fayette Circuit Clerk, stating the alleged violation and proposing remedies, pursuant to KRS 61.846(1). Having received no response by January 16, 2020, Appellant initiated this appeal. On January 27, 2020, the Administrative Office of the Courts responded to the appeal on behalf of Judge Scorsone.

A threshold issue is whether the Act applies to the proceedings of circuit courts. KRS 61.805(2) defines "public agency" as:

> (a) Every state or local government board, commission, and authority;

> (b) Every state or local legislative board, commission, and committee;
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> (c) Every county and city governing body, council, school board, special district board, and municipal corporation;
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> (d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
>
> (e) Any body created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act in the legislative or executive branch of government;
>
> (f) Any entity when the majority of its governing body is appointed by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a "public agency," a state or local officer, or any combination thereof;
>
> (g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and controlled by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection; and
>
> (h) Any interagency body of two (2) or more public agencies where each "public agency" is defined in paragraph (a), (b), (c), (d), (e), (f), or (g) of this subsection[.]

None of these subsections explicitly applies to courts. Kentucky's circuit courts are created by Section 112 of the Kentucky Constitution, not by an executive order or legislative act.

Even assuming that circuit judges were "public agencies" under the Act, KRS 61.810(1) governs only "meetings of a quorum of the members of any public agency." A circuit judge is an individual elected official, not a quorum of a body of members assembled for a meeting. Where there is no meeting under the Act, its provisions do not apply. 13-OMD-166.

Furthermore, to apply the Act to the courts would impinge upon the constitutional separation of powers under Sections 27 and 28 of the Kentucky Constitution. "[T]he separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" *Legislative Research Commission ex rel. Prather v. Brown,* 664 S.W.2d 907, 911 (Ky. 1984) (quoting *Arnett v. Meredith,* 275 Ky. 223, 121 S.W.2d 36, 38 (1938)).

"Courts have inherent power to act to preserve decorum and ensure the orderly administration of justice in the conduct of judicial proceedings…. This includes the authority to regulate the admission of the public to court proceedings." OAG 97-9 (citing *Smothers v. Lewis,* 672 S.W.2d 62 (Ky. 1984); *Jackson v. Commonwealth,* 38 S.W. 422 (Ky. 1896)).

The Supreme Court of Kentucky has observed "that our Constitution makes it the highest court of the state and gives it the authority to 'exercise control of the Court of Justice.'" *Ex parte Farley,* 570 S.W.2d 617, 622 (Ky. 1978) (quoting KY. CONST. § 110(2)(a)). It is instructive that the Court in *Farley* declared both substantive and procedural provisions of the Open Records Act to be "interferences that we regard as inconsistent with the orderly conduct of our own business," and thus unacceptable "as a matter of comity." 570 S.W.2d at 625.

In the view of this Office, the open meetings provisions of the Act are no less intrusive than the Open Records Act into "the sphere of authority that is constitutionally vested in the courts." *Id.* Thus, under both the constitutional separation of powers and the Act itself, Judge Scorsone is not subject to the requirements of the Act. Accordingly, this Office lacks jurisdiction over this appeal.

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 should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

Daniel Cameron
Attorney General

/s/ James M. Herrick

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Distributed to:

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