



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

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20-OMD-035

March 6, 2020

In re: Lyn Warner/Graves County School Board

**Summary:** The Graves County School Board's ("Board") untimely response to an emailed Open Meetings Act ("Act") complaint violated KRS 61.846(1). The Board met its burden of proof that it complied with the special meeting notice and agenda requirements of KRS 61.823(3) and (4), but it failed to provide fair notice that the budget would be a particular topic to be discussed or acted upon.

*Open Meetings Decision*

On February 11, 2020, Lyn Warner ("Appellant") emailed a complaint to Board Chairman Jim Wurth, at his official Kentucky Schools email address, in which she alleged the Board violated the Act by failing to pre-announce a special meeting on the Board website and in editions of *The Mayfield Messenger*. Appellant also alleged that the Board violated the Act by failing to list "Budget" on the special meeting agenda, but discussed the item during the special meeting. Having received no response to the emailed complaint, Appellant initiated this appeal on February 18, 2020.

The Board responded to the appeal, stating that the Board Chairman responded to the complaint on February 19, 2020 after learning of its existence through this appeal. The Board argued that the appeal should be dismissed because Appellant failed to comply with the requirements of KRS 61.846(1), stating

it “does not waive the requirement of a written complaint and does not accept e-mailed submissions regarding allegations of violations of the [Act].”

Regarding the allegations, the Board stated it complied with all special meeting notice requirements, and provided emails and exhibits for verification. The Board showed that it sent timely notice to *The Mayfield Messenger*, but stated that it could not control whether the media elects to announce the meeting. The Board showed that it posted its notice and agenda in conspicuous places, but argued that the Act does not require posting on websites. Finally, the Board argued that the special meeting agenda item, “XV. Plan Agenda for next January, 2020 Board Meeting” was “sufficiently specific to provide the public with fair notice that matters typically contained in the agenda for monthly meetings would be discussed, including but not limited to budgetary...matters[.]”

**A Written Complaint Submitted Via Email to the Presiding Officer of a Public Agency Complies with KRS 61.846(1).**

The Board’s primary argument is that complaints submitted via email to a presiding officer do not comply with KRS 61.846(1) because emails are not “written complaints.” For authority, the Board relies on footnote 2 in 18-OMD-163. There, this Office opined that an email did not constitute a “written complaint,” but the agency waived its argument that the complaint was deficient because the agency responded to the email. *Id.* Therefore, this Office found that discussion of “this procedural issue” was “unwarranted.” *Id.* However, in 18-OMD-212, this Office simply stated “KRS 61.846(1) requires a complaining party to ‘submit a written complaint to the presiding officer of the public agency,’ but places no limitations on the manner of submission.” With its own footnote, 18-OMD-212 modified all previous decisions by this Office that stated otherwise. 18-OMD-212 n. 1. In reaching that conclusion, this Office cited a footnote in 06-OMD-68. There, this Office would not “belabor the issue” because the agency admitted this to be a procedural error. 06-OMD-68 n. 3.

This Office will now explain, based on the statutory text as written, that a “written complaint” may be submitted to the presiding officer of a public agency by email.

Prior to seeking enforcement of the Open Meetings Act to this Office, “[t]he person shall submit a written complaint to the presiding officer of the public agency suspected of the violation of KRS 61.805 to 61.850. The complaint shall state the circumstances which constitute an alleged violation of KRS 61.805 to 61.850 and shall state what the public agency should do to remedy the alleged violation.” KRS 61.846(1). The statute does not define “written complaint.” However, “the plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.” *Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (quotations omitted). The plain meaning of “written complaint” is that the complaint be in writing – i.e., in any written form and not orally communicated. Contrary to an oral complaint, the difference between a letter and an email is not that one is a writing and the other is not, rather, it is the means of transmitting the writing to another person. Therefore, the question is not whether an email is a “written complaint.” Rather, the question is *how* must a person “submit a written complaint to the presiding officer”? On this question, KRS 61.846(1) is silent.

When construing statutes, the courts and this Office “presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.” *Shawnee Telecom Resource, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). Only when a statute is silent or ambiguous will this Office “resort to extrinsic aids such as the statute’s legislative history [or] the canons of construction[.]” *Id.*; see also *Travlers Indem. Co. v. Reker*, 100 S.W.3d 756, 764 (Ky. 2003). KRS 61.846(1) only requires a written complaint to be submitted to the presiding officer. However, the word “submit” means “to present or propose to another for review, consideration, or decision,” according to Merriam-Webster’s Dictionary. Thus, the plain meaning of the word “submit” provides no direct guidance on how to transmit the written complaint to the presiding officer. Indirectly, however, the expansive meaning of the word “submit” indicates that transmission of the written complaint can occur by email.

Looking to the Open Records Act, a comparable statute, KRS 61.872(2) provides that the official custodian of records “may require” a written application “be hand delivered, mailed, or sent via facsimile.” KRS 61.872(2)(a). The records custodian may also require the written application be sent by email. KRS 61.872(2)(c). It is instructive that the General Assembly granted a public agency’s

record custodian the discretion in how to accept written applications under the Open Records Act, but declined to grant the same discretion to the presiding officer of a public agency in accepting a written complaint under the Open Meetings Act. Likewise, in KRS 61.823(4), the General Assembly has provided the means by which agency members and the media may receive notice of a special meeting. The agency is required to transmit this notice via mail or facsimile. KRS 61.823(4)(a). However, agency members or the media, in their discretion, may elect to receive such notice by email by filing a written request to receive notice via email. KRS 61.823(4)(b). Here, the General Assembly has demonstrated it is willing to grant discretion over the means of receiving written notice to agency members and the media. It has not provided the discretion to presiding officers of public agencies in how they will accept written complaints. Based on these statutes, it is clear that if the General Assembly wants to give an agency such discretion, it knows how to do so. *See e.g. Hearn v. Commonwealth*, 80 S.W.3d 432, 438 (Ky. 2002) (“it is clear that the Legislature knows how to expressly provide” for something when it wants to).

Of course, if the presiding officer never receives the written complaint then it has not been submitted to him. But Appellant has provided proof that she sent her written complaint to the Board’s presiding officer at his official school board email account and the presiding officer has not argued that he did not receive the email. Instead, the Board argued it was not required to respond to written complaints via email and failed to issue any response until after this appeal was initiated. As such, its response was untimely and violated the Act. KRS 61.846(1) (requiring the public agency to notify the complainant whether it will remedy the complaint within three business days after receipt of the complaint.)

### **The Board Complied with the Scheduling and Notice Requirements for Special Meetings.**

KRS 61.823 provides in relevant part:

- (3) The public agency shall provide written notice of the special meeting. The notice shall consist of the date, time, and place of the special meeting and the agenda. Discussions and action at the meeting shall be limited to items listed on the agenda in the notice.

- (4)(a) As soon as possible, written notice shall be delivered personally, transmitted by facsimile machine, or mailed to every member of the public agency as well as each media organization which has filed a written request, including a mailing address, to receive notice of special meetings. The notice shall be calculated so that it shall be received at least twenty-four (24) hours before the special meeting. . . .
- (c) As soon as possible, written notice shall also be posted in a conspicuous place in the building where the special meeting will take place and in a conspicuous place in the building which houses the headquarters of the agency. The notice shall be calculated so that it shall be posted at least twenty-four (24) hours before the special meeting.

The record establishes that the Board issued notices and agendas that complied with the content requirements of KRS 61.823(3). Presuming *The Mayfield Messenger* elected to receive notices of special Board meetings via email pursuant to KRS 61.823(4)(b), the record shows that the notice and agenda were timely delivered to the media entity. The Board provided evidence that it posted the notice and agenda at conspicuous locations, per KRS 61.823(4)(c). And although such requirement may be useful in the modern era, KRS 61.823(4)(c) does not require an agency to post anything on its website and this Office must enforce the text of a statute as written – not based on policy preferences. Accordingly, the Board met its burden of proof that it complied with the notice requirements of KRS 61.823.

**The Board Violated the Act by Discussing Matters Not Part of the Special Meeting Agenda.**

“Discussions and action at the [special] meeting shall be limited to items listed on the agenda in the notice.” KRS 61.823(3). In her written complaint to the Board, Appellant objected to the Board’s discussion of the budget because the agenda did not indicate that any budgetary matters would be discussed. The Board argued that agenda item “XV. Plan Agenda for next January, 2020 Board Meeting” authorized the Board to discuss budgetary matters because it was “sufficiently specific to provide the public with fair notice that matters typically

contained in the agenda for monthly meetings would be discussed[.]” But that agenda item simply provided notice that the Board would plan an agenda for its next meeting, not that it would actively discuss the substance of the topics that would appear on that next agenda. If budgetary discussions extended beyond mere discussion of whether the budget should appear on the next January 2020 meeting agenda, the Board failed to provide proper notice it would engage in these discussions and, therefore, violated 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.

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/s/ John Marcus Jones

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Distributed to:

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