



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON  
ATTORNEY GENERAL

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

20-OMD-040

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In re: Ann Marie Pavlik Rosen/Kentucky Municipal Energy Agency

*Summary:* Kentucky Municipal Energy Agency (“KYMEA”) complied with KRS 61.820(2) in providing for a schedule of regular meetings by resolution and making the schedule publicly available; likewise, the record establishes that committees of KYMEA have complied with the notice requirement in KRS 61.820(2). A KYMEA committee improperly relied upon a provision of the Open Records Act to justify holding a closed session. KYMEA committees are not permitted to exclude the public from their meetings because “no final action was taken.” KYMEA can establish full compliance with KRS 61.826 only if members of the public can see and hear Directors who participate in the meeting via video teleconference. There is insufficient evidence in the record to determine whether KYMEA violated KRS 61.810(2) by discussing public business in secret telephonic conference calls.

*Open Meetings Decision*

The question presented in this appeal is whether the KYMEA<sup>1</sup> Board of Directors violated provisions of the Act during its December 18, 2019, meeting for the reasons alleged in Appellant’s written complaint, directed to KYMEA Chairman Ron Herd in accordance with KRS 61.846(1). Because the Appellant has

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<sup>1</sup> The record on appeal establishes that KYMEA was created in September 2015 pursuant to the Kentucky Interlocal Cooperation Act, KRS 65.210 through 65.300. It has eleven members, all of which are Kentucky municipal energy distributors located throughout the Commonwealth.

acknowledged that KYMEA successfully resolved two items in her original written complaint, those items will not be discussed in this decision. In substance, Appellant's remaining allegations are that:

- 1) Two committee meetings, one conducted shortly before the December 18, 2019, KYMEA regular meeting and one conducted after, were not publicly noticed;
- 2) The All Requirements Projects Committee ("ARPC") meeting on December 18, 2019, was improperly closed to the public;
- 3) KYMEA improperly conducts meetings via video teleconferencing because members of the public cannot always see and hear KYMEA members participating remotely;
- 4) KYMEA improperly relied on provisions of the Open Records Act to close a portion of the regular meeting and KYMEA failed to cite the specific federal law that required the meeting to be closed pursuant to KRS 61.810(1)(k) when it invoked that exception;
- 5) KYMEA conducts telephonic conference calls with a quorum present (or collectively constituting a quorum) and discusses public business without providing notice to the public; and
- 6) The ARPC's report from its August 22, 2019 meeting, presented to the full KYMEA Board on December 18, 2019, did not accurately reflect the discussions of the committee.

Counsel for KYMEA responded timely to Appellant's complaint pursuant to KRS 61.846(1). In substance, KYMEA countered Appellant's assertions as follows:

- 1) KYMEA establishes its regular meeting locations, dates, and times pursuant to resolutions. The date for the meeting in question had been established by resolution on October 24, 2018, and this resolution was published in the newspaper and

on the KYMEA website. Notices of committee meetings (or “workshops”) are also posted on the KYMEA website.

- 2) The ARPC meeting was closed because the members were discussing “preliminary recommendations and preliminary memorand[a] expressing the opinions of the KYMEA staff . . .” For support, KYMEA relied on KRS 61.878(1)(j).
- 3) KRS 61.826 authorizes KYMEA to conduct meetings via video teleconferencing. KYMEA provides notice that the meeting will be conducted via video teleconference at the beginning of the meeting. Remote KYMEA Directors are able to view and hear the Board proceedings and the entire Board is able to see and hear the remote Director when they speak. KRS 61.826 does not require a split screen be maintained “at all times” by the Board and remote Director.
- 4) KYMEA specifically sets forth by resolution the reasons for entering into closed session. Because KYMEA routinely disseminates records which are excepted from disclosure to the general public due to their confidentiality, KYMEA cites the Open Records Act exceptions to identify that those records are confidential and therefore not subject to dissemination outside of the closed session. . . .

Regarding the request of invoking KRS 61.810(1)(k), currently KYMEA is involved in a “de-pancaking” proceeding before the Federal Energy Regulatory Commission (“FERC”). Certain information from that proceeding has been determined to be confidential. In an abundance of caution, KYMEA cites KRS 61.810(1)(k) as one of the reasons for entering closed session and has often stated in its meetings that the closed session discussion revolves around that proceeding. In the future, and per Appellant’s request, KYMEA will specifically mention the FERC proceeding.

- 5) Appellant failed to identify specific telephonic conferences she alleged constituted improper meetings.
- 6) KYMEA disputes that the ARPC's report to the full KYMEA did not accurately reflect discussions conducted by the committee.

The Attorney General "shall review the complaint and denial and issue . . . a written decision which states whether the agency violated the provisions of KRS 61.805 to 61.850." KRS 61.846(2). However, with regard to item 6, the parties have presented widely disparate narratives and this Office is unable to resolve the related factual question regarding the disputed accuracy of the ARPC's report to the KYMEA. *See, e.g.* 11-OMD-092 (Where this Office was unable to determine the exact time a meeting began with two conflicting narratives of when the meeting began).

**KYMEA provided appropriate notice that committees would meet.**

Pursuant to KRS 61.820(2), "[a]ll public agencies shall provide for a schedule of regular meetings by ordinance, order, resolution, bylaws, or by whatever other means may be required for the conduct of business of that public agency. The schedule of regular meetings shall be made available to the public." The record on appeal confirms that KYMEA complied with KRS 61.820(2) by providing a schedule of regular meetings pursuant to resolutions, the most recent of which it adopted on October 24, 2018. A copy of the resolution and the minutes of the October 24, 2018, meeting at which KYMEA adopted the resolution are both of record. Appellant does not dispute this fact nor does Appellant dispute that a notice summarizing the resolution appeared in *The Courier-Journal* on November 7, 2018, or that KYMEA also posts the dates, times, and locations of its committee meetings on its website.

This Office may not add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used. *Beckham v. Bd. of Educ.*, 873 S.W.2d 575, 577 (Ky. 1994). Likewise, KRS 446.080(4) requires that "[a]ll words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be

construed according to such meaning.” KRS 61.820(2) does not provide a technical or particular meaning to the phrase, “made available to the public.” Accordingly, this Office must construe it according to common and approved usage. In other words, the Attorney General is not at liberty to construe “made available to the public,” to require the specific usage that Appellant proposed as a remedy, *i.e.*, publication of meeting notices in the local newspapers of KYMEA member communities. KYMEA’s method of publishing notice in *The Courier-Journal* and on its website, as well as posting notice of committee meetings on its website, is sufficient to comply with KRS 61.820.

**KYMEA violated the Act when it excluded the public from the ARPC meeting.**

KYMEA excluded members of the public from its ARPC meeting on December 18, 2019. The KYMEA argued that it would be reviewing a power point and spreadsheets, as well as discussing information related to “preliminary rate recommendations for FY 2021.” It further argued that the ARPC meeting was merely informational and no final action was taken. In support of its position that discussion of preliminary information is permitted in a closed meeting, KYMEA cited KRS 61.878(1)(j), which exempts “preliminary recommendations and preliminary memoranda” from disclosure under the Open Records Act. However, KRS 61.810 provides the only exceptions to the Open Meetings Act. The only exception that references the Open Records Act is contained in KRS 61.810(1)(m), which generally exempts records that relate to potential terrorist attacks or plans to prevent them. There is no provision of KRS 61.810 that permits a public agency to discuss preliminary matters in secret. In fact, almost everything a public agency discusses is by its nature preliminary until a vote to take action on the matter is called.

KYMEA’s additional argument, that no final action was taken, also fails. KRS 61.810(1) provides that “[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[.]” (Emphasis added.) The fundamental purpose of the Act is to recognize that “[t]he formation of public policy is public business and shall not be conducted in secret . . .” KRS 61.800. The text of the Act is clear. If a quorum of members *discuss any* public business, the provisions of the Act apply. KRS 61.810(1). Likewise, KRS 61.820 provides that all meetings of all public agencies, “and any committees or subcommittees thereof, shall be held at specified times and places which are convenient to the public.”

The term “meeting” is broadly defined at KRS 61.805(1) as “all gatherings of every kind . . . 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.” (emphasis added.) Thus, all gatherings of a quorum of the KYMEA committees where they discussed public business, such as “informal presentations,” in preparation for a future public meeting, were meetings of a public agency. KRS 61.805(1); KRS 61.810(1). Because KYMEA discussed public business during the ARPC meeting, and excluded the public without invoking an appropriate exemption contained in KRS 61.810, it violated the Act.

**KYMEA complies with KRS 61.826 only if the public can see and hear remote Directors.**

Appellant’s third objection was her inability to hear or see the KYMEA Directors participating by video teleconferencing. Appellant’s proposed remedy was for KYMEA to update its equipment to ensure all remote Directors can be seen *and* heard.

KRS 61.805(5) defines “Video teleconference” as “one (1) meeting, occurring in two (2) or more locations, where *individuals* can see and hear *each other* by means of video and audio equipment.” (emphasis added). Noticeably, KRS 61.805(5) uses the word “individuals” and not “members.” More specifically, KRS 61.826 establishes the procedures for conducting meetings via video teleconferencing. KRS 61.826(2) requires the public agency to provide notice that a video teleconference will occur. That notice must “[p]recisely identify a primary location of the video teleconference where *all members can be seen and heard* and the public may attend in accordance with KRS 61.840.” KRS 61.826(2)(b) (emphasis added). Although this provision does not explicitly state *who* shall be able to see and hear the member, the General Assembly answers this question by incorporating KRS 61.840 by reference. KRS 61.840 provides that “all agencies shall provide meeting room conditions, including adequate space, seating, and acoustics, which insofar as is feasible allow effective *public observation* of the public meetings.” (emphasis added). Again, the primary purpose of the Act is for public business to be conducted in the open and subject to observation by the public. Because KRS 61.840 requires sufficient accommodations to facilitate “public observation,” and the General Assembly has permitted *video* teleconferencing but not ordinary teleconferencing, it is clear the General Assembly intended the *public* to be able to see the remote members.

Although KRS 61.826 does not “require a split screen to be maintained ‘at all times’ by the Board and the [remote] Director,” it does require that the remote Director be visible and audible to the public at all times. Because it is a question of fact as to whether the public can see and hear remote Directors, this Office cannot decide whether the December 18, 2019, video teleconference violated the Act. However, if KYMEA has not adopted procedures to ensure the public can see and hear remote Directors, its failure would be a violation of the Act.

**KYMEA cannot rely on the Open Records Act to close its regular meetings and must invoke an exception established in KRS 61.810 prior to entering closed session.**

Similar to Appellant’s second objection, she further alleges the KYMEA improperly closed a portion of its regular meeting by relying upon KRS 61.878(1)(j). For the reasons stated above, finding this to be a violation in the context of the ARPC meeting, the holding is the same regarding the KYMEA regular meeting. The Open Records Act does not provide KYMEA with additional justification to close its regular meeting to the public.

However, during the regular meeting KYMEA also invoked KRS 61.810(1)(k), which provides that “[m]eetings which federal or state law specifically require to be conducted in privacy” can be closed to the public. In its response to Appellant’s written complaint, KYMEA stated that the discussions during the closed meeting pertained to confidential portions of a pending “de-pancaking” proceeding before the FERC. KYMEA offered to specifically refer to this federal regulatory proceeding in the future prior to discussing the matter in closed session and invoking KRS 61.810(1)(k). On appeal, KYMEA did not provide any further explanation of this federal proceeding or why it required confidentiality. To the extent a federal regulatory body has ordered KYMEA to keep information regarding the proceeding confidential, KYMEA can properly rely on the order to invoke KRS 61.810(1)(k). Because Appellant’s notice of appeal specifically requested this Office to review KYMEA’s invocation of the Open Records Act in connection to her fourth allegation, and KYMEA has offered to specifically cite the FERC proceeding when discussing these topics in future closed sessions, it is unnecessary to determine whether KYMEA properly invoked KRS 61.810(1)(k).

**There is insufficient evidence in the record to determine whether KYMEA violated KRS 61.810(2).**

Appellant's fifth objection alleges that KYMEA conducts telephonic conferences without proper notice, and during these telephonic conferences public business is discussed. KYMEA argued that Appellant failed to identify when the alleged improper telephonic conferences took place. However, it did admit to conducting a telephonic conference on the Monday prior to the December 18, 2019, meeting. KYMEA stated the purpose of this call was to determine if an additional formal meeting of the Executive Committee was necessary prior to the December 18, 2019, regular meeting. KYMEA asserted no actual discussions took place regarding public business, but it occurred merely for the purposes of establishing scheduling.

KRS 61.810(2) provides that "any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section, shall be subject to the requirements of subsection (1) of this section." However, it further provides that "nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues." In construing KRS 61.810(1) and (2), the Kentucky Supreme Court has declared that "[t]he Act prohibits a quorum from discussing public business in private or meeting in number less than a quorum for the express purpose of avoiding the open meetings requirements of the Act." *Yeoman v. Commonwealth of Ky., Health Policy Board*, 983 S.W.2d 459, 474 (Ky. 1998).

The Court in *Yeoman* further observed that for a meeting to take place within the meaning of the Act, "public business must be discussed or action must be taken by the agency. Public business is not simply any discussion between two officials of the agency. Public business is the discussion of the various alternatives to a given issue about which the board has the option to take action." *Id.* Taking action "is defined by the Act as 'a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body.' KRS 61.805(3)." *Id.* See 00-OMD-171 (holding that City Manager contacting city commissioners to confirm they did not want him to place an item on the agenda was not a discussion of "public business"); 13-OMD-118 (discussion of whether to reschedule a special meeting did not amount



to a “substantive discussion” that would implicate the Act). Accordingly, the single conference call that KYMEA acknowledged it conducted did not violate KRS 61.810(1) or (2) *if* the only purpose or topic of discussion was “to determine if a formal meeting was required” and if so, what time it should be held. With no evidence to rebut KYMEA’s assertions that the telephonic conference occurred merely for scheduling purposes, this Office finds no violation of the Act with respect to Appellant’s fifth objection.

### **Conclusion**

In summary, KYMEA violated the Act when it relied on KRS 61.878(1)(j) as the authority for excluding the public from the ARPC meeting and regular KYMEA meeting. KYMEA did not violate the Act by failing to publish notice of its meetings and committee meetings in various local newspapers, and it has made the schedule of these regular meetings and committee meetings available to the public. Whether KYMEA’s video teleconferencing procedures comply with the Act, and whether the ARPC’s report to the KYMEA was accurate involve questions of fact that this Office cannot arbitrate. Nevertheless, KYMEA is required under the Act to ensure that members of the public can both see and hear remote Directors participating via video teleconferencing. Finally, there is insufficient evidence in the record to determine if KYMEA violated KRS 61.810(2) by participating in secret telephonic conferences.

Either party may appeal this decision 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/ Michelle D. Harrison

Michelle D. Harrison  
Assistant Attorney General

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Distributed to:

Anne Marie Pavlik Rosen

Ron Herd

Doug Buresh

Charles S. Musson