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21-OMD-018

February 4, 2021

In re: Jason Reed/Cold Spring City Council

Summary: The Cold Spring City Council ("Council") violated the Open Meetings Act ("the Act") when it took action on an item discussed in closed session after publicly stating that no such action would be taken. The Council also violated the Act's procedural requirements.

Open Meetings Decision

On January 12, 2021, Jason Reed ("Appellant") submitted a written complaint to the mayor of Cold Springs in which he alleged that the Council had violated the Act when it conducted two special meetings—one on December 17, 2020, and one on December 30, 2020. Because the Council did not respond in writing to the complaint, this appeal followed.

The Act provides that when a public agency receives a complaint, it must "determine . . . whether to remedy the alleged violation pursuant to the complaint" and respond in writing to the person making the complaint within three business days. KRS 61.846(1). The Council failed to respond to the complaint at all. On appeal, it provides no valid basis for its failure to respond as the Act requires. Thus, the Council violated the Act when it failed to respond to the Appellant's complaint.

The Council violated the Act in another way. The Act requires that a public agency must provide written notice of a special meeting. That notice must include

"the date, time, and place of the special meeting." KRS 61.823(3) Under KRS 61.823(4)(a), the public agency must provide such notice at least 24 hours prior to the special meeting. The public agency must also provide notice to members of the agency and media organizations that have requested such notice. KRS 61.823(4)(b). And the agency must post the notice "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." KRS 61.823(4)(c).

In response to the novel coronavirus emergency, the General Assembly enacted Senate Bill 150 ("SB 150"), which became effective on March 30, 2020. Section 1(8)(b) of SB 150 provides that during the state of emergency, "[n]otwithstanding KRS 61.826, a public agency may conduct any meeting . . . by live audio or live video teleconference." For meetings conducted by teleconference, SB 150 expressly incorporates the notice requirements for special meetings under KRS 61.823. But along with the notice requirements stated in KRS 61.823, during the current public health emergency, the agency must "[p]rovide specific information on how any member of the public or media organization can access the meeting." SB 150 § 1(8)(b)3. That is important information. Without it, the public has no other way to attend a public meeting when the General Assembly has otherwise suspended the requirement to provide a primary physical location at which the public may attend the meeting. Therefore, when a public agency conducts a meeting by virtual means, the "specific information" required in the notice must include a phone number or website link or, at a minimum, directions for how the public may access the meeting.

Here, the Council's notice provided that its December 17 special meeting would be "conducted by video conference" using Zoom.[1] The Council's notice, however, did not provide "specific information on how any member of the public or media organization can access the meeting." SB 150 § 1(8)(b)3. Although the Council notified the public of the special meeting through the Council's Facebook page, the Council needed to provide specific information on how to access the

[1] For posterity's sake, Zoom's 2019 SEC FORM 10-K describes it as a "video-first communications platform that delivers happiness and fundamentally changes how people interact. We connect people through frictionless video, phone, chat, and content sharing and enable face-to-face video experiences for thousands of people in a single meeting across disparate devices and locations." During the health pandemic that began in 2020 and continues through 2021, Zoom and similar options such as Microsoft Teams, Skype, WebEx, and others largely replaced in-person meetings in many facets of life, including in the workplace.

meeting in the notice itself.[2] That is because the notice must also be posted "conspicuously" at the agency's headquarters, KRS 61.823(4)(c), and delivered to members of the media who have requested such notice, KRS 61.823(4)(a). If the notice does not contain the specific information required under SB 150 § 1(8)(b), then a person reviewing the notice would not know how to access the meeting.

The Council's notice for the December 30 special meeting was similarly deficient. That notice stated only that the meeting would be "conducted by video conference" using Zoom. It contained no information on how the public or media could access the broadcast. In this way, the Council twice violated the Act when it failed to provide proper notice for either of its two special meetings, as required by SB 150 § 1(8)(b).

The Council's violations are not limited to the technical deficiencies in its meeting notices. The Appellant also objects to the Council's taking action on an agenda item following its closed session discussion because the agenda did not expressly provide that such action might occur. At special meetings, public agencies may only take action on "items listed on the agenda in the notice." KRS 61.823(3). The best practice for public agencies is for the agenda to state expressly that action may be taken on items discussed in closed session. But this Office has found that an agency's failure to adhere to this best practice does not, by itself, violate the Act. *See, e.g.*, 17-OMD-044; 16-OMD-011; 02-OMD-022.

Here, the agenda for the December 17 meeting only states, "Executive Session 61.810(1)(b) - acquisition of property." The December 30 meeting agenda similarly states, "Executive Session 61.810(1)(c) – Litigation." The agendas do not state whether the City would take action on these items. In fact, the next item on both agendas is "adjournment." In the context of these barebones agendas, the Council's decision to act at the December 17 special meeting is all the worse because it had affirmatively informed the public that it would take no action at that meeting.[3] The Council violated the Act at the December 17 meeting when it

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[2] But in that same social media post, the Council stated: "The only thing on the agenda is an executive session, therefor[e] this will not be streamed LIVE on Facebook."

[3] Even if this statement were "inadvertent," as the Council claims, a reasonable person viewing the Facebook post could conclude that no action would take place at the meeting.

took action on the item following the closed session after it had represented to the public that no such action would be taken.

Finally, the Appellant alleges that the Council failed to broadcast the December 17 special meeting until after it had concluded its closed session. If true, that would violate multiple provisions of the Act. *See*, *e.g.*, KRS 61.810(1) ("All 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," unless a statutory exception permits discussion to occur in closed session); KRS 61.815(1)(a) (requiring a public agency, before entering closed session, to give notice "in regular open meeting of the general nature of the business to be discussed in closed session, the reason for the closed session, and the specific provision of KRS 61.810 authorizing the closed session"); KRS 61.815(1)(b) ("Closed sessions may be held only after a motion is made and carried by a majority vote in open, public session[.]"). But this Office cannot resolve this factual dispute on this record.

In sum, the Council violated the Act when it failed to respond to a complaint under KRS 61.846(1). It again violated the Act twice when it failed to provide sufficient notice as required by SB 150 for the special meetings that it held on December 17 and December 30. And it again violated the Act when it publicly stated that it would take no action following executive session at the December 17 special meeting, yet proceeded to take action nevertheless.

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
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Distributed to:

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