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

21-OMD-226

November 22, 2021

In re: Robert J. Flaherty/City of Crescent Springs

Summary: The City of Crescent Springs ("the City") violated the Open Meetings Act ("the Act") when it failed to issue a timely response to a complaint. However, the City did not violate the Act when members of the City Council commented on a post published to a Facebook group.

Open Meetings Decision

On October 6, 2021, Robert J. Flaherty ("the Appellant") submitted a complaint to the presiding officer of the City, the Mayor, in which he alleged a violation of the Act spanning multiple days in September and suggesting a remedy. Specifically, the Appellant alleged that the City violated the Act when three of the six members of the City Council commented on a post published in a Facebook group. On October 19, 2021, the City issued its final response denying the Appellant's complaint, stating that the activity the Appellant described did not constitute a "meeting" under the Act. This appeal followed.

Under KRS 61.846(1), a person seeking enforcement of the Open Meetings Act must first submit his or her complaint to the presiding officer of the public agency. After receiving a complaint, the public agency "shall determine within three (3) [business] days . . . whether to remedy the alleged violation pursuant to the complaint and shall notify in writing the person making the complaint, within the three (3) day period, of its decision." KRS 61.846(1).[1]

[1] Although, during the 2021 Regular Session, the General Assembly amended the Open Records Act to extend a public agency's time to respond to a request to inspect records from three business days to five business days, it did not extend the deadline for a public agency to

Here, the City received the Appellant's complaint on October 8, 2021, but instead of issuing a final response within three business days, the City asked the Appellant to provide the statutory authority upon which he relied to assert that a violation had taken place. There is no basis under KRS 61.846(1) for a public agency to extend its deadline to respond, nor are complainants required to provide legal reasoning to support their complaints. It is the public agency's duty to review the complaint and issue its final response within three business days notifying the complainant whether the public agency will deny the complaint or remedy the alleged violation. Despite that duty, the City did not issue its final response to the Appellant until October 19, 2021, well beyond the three-day deadline. Accordingly, the City violated KRS 61.846(1).

Turning to the merits of the Appellant's complaint, the Appellant alleges that the City violated the Act when, over the course of three days, three of the six members of the City Council posted comments on a post published in a Facebook group. Although it is questionable whether such activity could ever constitute a "meeting" under KRS 61.805(1)—at least where there is no evidence that the activity was taken to avoid the requirements of the Open Records Act, *see* KRS 61.810(2)—it is unnecessary to answer that question because there is no evidence here that a quorum of the City Council was present during the discussions that occurred in the Facebook group.

"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." KRS 61.810(1) (emphasis added). During regular, in-person, meetings, it is readily apparent whether a quorum is present. Typically the presence of the members is recorded in the meeting minutes, and witnesses can state how many members they saw in attendance.

However, Facebook groups, by their very nature, make it difficult to determine whether a quorum is present. Here, five of the six City Council members are also members of the Facebook group. But a member's mere admission to a Facebook group is not evidence that he or she was aware of matters being discussed, much less whether he or she was actually present when discussions occurred. If mere admission to the group was sufficient to trigger the Act, then public officials could not be members of Facebook groups that discuss public matters because their presence in the group would establish

---

respond to a complaint submitted under the Open Meetings Act. *See* 2021 Ky. Acts ch. 160, §. 5 (amending KRS 61.880(1)).

a perpetual, and virtual, meeting. That could not have been the intent of the General Assembly. "[O]ur common sense approach guides us . . . with the maxim that courts should construe a statute according to its plain meaning, unless that meaning leads to an absurd result which is contrary to the intent of our legislative authority." *Ky. Ret. Sys. v. Brown*, 336 S.W.3d 8, 15 (Ky. 2011). Moreover, such a rule would have the practical effect of preventing public servants from engaging their constituents where they are located—on Facebook and other social media platforms. And that chilling effect would limit the public's access to their public servants, which itself diminishes government transparency. Thus, if the discussion of public business on Facebook could ever constitute a "meeting" under KRS 61.805(1), there must be some affirmative evidence in the record that a quorum of the public agency was present (*i.e.*, that there was a "gathering" as required by KRS 61.805(1)) while the discussions were occurring. *See, e.g.*, 14-OMD-015 (finding no violation of the Act because, although a quorum of the public agency received the email discussing public business, a quorum of the public agency did not respond to the email).

In the Facebook or email context, there is no way to positively determine whether a member was present for a discussion unless that member actually contributes to the discussion. Thus, whether a member of a public agency contributes to the discussion is *evidence* of his or her presence at the discussion. Here, only three members of the City Council commented on the discussion of public business. Thus, the only finding that can be made based on the evidence in the record is that three members were present. There are six members of the City Council, which means four members must be present for a quorum to exist. Yet there is no evidence that a fourth member was aware of, much less present for, the discussion. Therefore, a quorum of the City Council did not engage in such discussions. And for that reason, this Office cannot find that the City violated the Act.[2]

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a) within 30 days from the date of this decision. 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

---

[2] There is also no basis to conclude that the City engaged in a series of less than quorum meetings in violation of KRS 61.810(2). First, as has already been noted, a quorum was never reached. Second, there is no evidence that the City Council members engaged in these discussions with the intent to violate the Act. To the contrary, many of the comments made by members encouraged the public to attend the City Council meetings to learn more about the topic that was being discussed.

subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

/s/Marc Manley
Marc Manley
Assistant Attorney General

#358

Distributed to:

Robert J. Flaherty
Michael L. Baker
Justin Hartfiel