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16-OMD-154

July 25, 2016

In re: Lexington Herald-Leader/University of Kentucky

Summary: The University of Kentucky did not violate the Open Meetings Act in not creating an agenda for a regular meeting, but did violate the Open Meetings Act in not creating minutes for that meeting.

Open Meetings Decision

The questions presented in this appeal are whether the University of Kentucky ("UK") violated the Open Meetings Act in not creating an agenda for a regular meeting and in not creating minutes for that meeting. We find that UK did not violate the Open Meetings Act in not creating an agenda for a regular meeting, but did violate the Open Meetings Act in not creating minutes for that meeting.

The UK Board of Trustees ("Board") historically meets for dinner the night before its meetings. Since these dinners usually involve a quorum of the Board, and may involve discussions of public business, the Board treats these dinners as regularly scheduled meetings for the purposes of the Open Meetings Act.¹ On May 2, 2016, the Board held one of its dinner meetings prior to the full

¹ *Board and Committee Meeting Schedules*, UNIV. OF KY., <http://www.uky.edu/Trustees/meetings> (last visited July 1, 2016).

board meeting. It did not post an agenda for the meeting.² At this meeting, Washington, D.C. attorney David Douglass gave a PowerPoint presentation concerning federal billing problems with a cardiology practice in Hazard that was acquired by UK in 2013. The Board did not vote to go into closed session for the presentation; the only persons present were Board members, UK agents, and Mr. Douglass.

The Herald-Leader submitted a written complaint to UK under KRS 61.847(1) on June 8, 2016. It requested “the minutes for the dinner meeting and that, going forward, the University adhere to its regular practice of providing an agenda for all Board meetings, including those that take place during meal times.” It further argued that “the lack of any indication that the dinner constituted a meeting, and the University’s failure to provide an agenda for the dinner, meant that the Herald Leader had no notice that any official business would be discussed during that time.”

UK responded to the complaint on June 13, 2016, stating:

The Open Meetings Act does not require the University to produce a detailed agenda for its regularly scheduled dinner/lunch meetings or for any other regularly scheduled meeting. . . . Traditionally, the Board has not considered any action items at its regularly scheduled dinner/lunch meetings. If the Board were ever to consider a proposed action item at a regularly scheduled lunch or dinner meeting, the Board’s agenda would reflect the consideration of the proposed action item.

. . . With respect to minutes, . . . a public body must have minutes reflecting the actual actions and the votes for those actions. There is no statutory requirement to keep minutes reflecting general discussions or presentations by senior administrators that may take place in meetings.

The Herald-Leader initiated this appeal on June 14, 2016. It argued that “this is exactly the type of misleading conduct that this Office has excepted from

² *Board and Committee Meeting Agendas*, UNIV. OF KY., <http://www.uky.edu/Trustees/agenda/2016/may/index.html> (last visited July 1, 2016).

the general rule that agendas need not be prepared for regularly called meetings," that UK's assertion of attorney-client privilege is not consistent with the Open Meetings Act, and that minutes must be kept at every meeting. UK responded on June 24, 2016, arguing that "the Open Meetings Act does not require the University to produce a detailed agenda for its regularly scheduled dinner/lunch meetings or for any other regularly scheduled meeting." UK also invoked the attorney-client privilege, stating that "the report and the actual discussion were prepared and conducted for the purpose of giving and receiving legal advice. No one outside of legal counsel and the University's leadership team was present for the discussion." UK further argued that "discussions subject to attorney-client privilege—regardless of whether they concern proposed or pending litigation—are also exempt from the Open Meetings Act." Regarding the minutes, UK argued that "there is no statutory requirement to keep minutes reflecting general discussions or presentations by senior administrators that may take place in meetings."

KRS 61.820(2) provides that "all public agencies shall provide for a schedule of regular meetings," and that "the schedule of regular meetings shall be made available to the public." "KRS 61.820 does not require agencies to prepare an agenda for a regular meeting." 11-OMD-132. The Herald-Leader argues that UK's conduct in the presentation is misleading, based on 11-OMD-132. However, 11-OMD-132 held only that agencies may not "prepare agendas for regular meetings that are consciously misleading or entirely inaccurate." It did not require preparation of an agenda for a regular meeting. The May 2, 2016 dinner meeting of the Board was publicly noticed as a regularly scheduled meeting, and the Board was not required to provide an agenda for it. Accordingly, UK did not violate the Open Records Act in not providing an agenda for its regularly scheduled dinner meeting of the Board.

KRS 61.835 provides that "the minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded." UK argues that it is not required to create minutes of the dinner meeting because no action was taken. However, "the requirement that the agency record minutes of its meetings is triggered regardless of whether action is taken at the meeting." 05-OMD-117. Accordingly, in not creating minutes of the dinner meeting, UK violated the Open Meetings Act.

UK maintains that the discussion is attorney-client privileged. However, the discussion was presented at a regularly scheduled open meeting. KRE 503(b) provides that a client has a privilege "to refuse to disclose and to prevent any other person from disclosing a confidential communication." KRE 503(a)(5) provides that "a communication is 'confidential' if not intended to be disclosed to third persons." *See generally The St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 776 (Ky. 2005). However, "where there is no expectation that communications between a client and his attorney remain confidential, the privilege is absent." *U.S. ex rel. Burns v. A.D. Roe Co.*, 904 F. Supp. 592, 594 (W.D. Ky. 1995). Here, there is no expectation that the communications would remain confidential; they were presented at a regularly scheduled meeting in open session, where there is a reasonable expectation that members of the public may attend. Accordingly, the attorney-client privilege does not attach. As UK is required to produce minutes of the meeting, the minutes must reflect the substance of the presentation.³

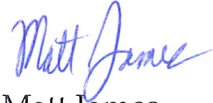
A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a). The Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

³ KRS 61.810(1)(c) provides an exception to the Open Meetings Act for "discussions of proposed or pending litigation against or on behalf of the public agency." "There is no exception authorizing a closed session discussion in which the agency's attorney renders legal advice. . . . 'The attorney-client privilege is not a viable exemption to the Open Meetings Act *except* as attorney-client discussions involve 'proposed or pending litigation against or on behalf of a public agency.'" 15-OMD-096. UK invokes the attorney-client privilege for the presentation, but states that the discussion was for the purposes of legal advice, not pending litigation. If UK had entered into a closed session, it would have been improper; however, it did not actually go into closed session.

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