

Ky. Op. Atty. Gen. 04-OMD-230, 2004 WL 2960112 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

04-OMD-230

December 6, 2004

In re: Kenneth Henrickson/Lakeside Park City Council

Open Meetings Decision

The question presented in this appeal is whether the Lakeside Park City Council violated the Open Meetings Act in failing to comply with [KRS 132.027](#), requiring the posting of two legal notices and a public hearing prior to the first reading of an ordinance increasing the ad valorem tax on real property, in enacting Ordinance #06-2004. For the reasons that follow, we find that although the Council's initial response to the open meetings complaint arising from this dispute was deficient, the record is otherwise insufficient to support the claimed violation.

On November 9, 2004, Kenneth Henrickson submitted a written complaint to the Lakeside Park City Council [\[FN1\]](#) in which he alleged that the Council violated “numerous statutes and the intent of the Open Meetings Act” when it enacted Ordinance #06-2004, raising the ad valorem tax on real property, at its September 13, 2004, regular [\[FN2\]](#) meeting. Specifically, Mr. Henrickson complained that the Council violated [KRS 132.027](#) by failing “to publish a legal notice twice in two consecutive weeks and to hold a public hearing to hear comments from the public” As a means of remedying the alleged violation, Mr. Henrickson proposed, *inter alia*, that the Council repeal Ordinance #06-2004, recall all tax bills, and discontinue the collection of any taxes under the cited ordinance.

In a response dated November 20, 2004, Lakeside Park City Attorney Otto Daniel Wolff advised Mr. Henrickson that “[t]he only time a governmental entity, such as a city, is required to respond to a request within three business days is to provide public records,” noting that there was no such request for records in his complaint. Nevertheless, Mr. Wolff issued the Council's response within one day of Mr. Henrickson's request in “an effort to accommodate [his] request” for a response within three days. Continuing, Mr. Wolff observed:

I am reviewing the concerns raised in your letter and I assure you, if a step was missed, the City will do whatever is needed to remedy the situation.

On November 12, Mr. Wolff supplemented the Council's response asserting that the Council “did not see any relief being sought that involves the Open Meetings of Public Agencies statutes.” He reasoned:

If there is a problem with how the tax rate was set (i.e., not having a meeting) that involves the tax, but there is no Open Meetings violation. In fact, because there was an open meeting, you are able to know the facts about which you complain.

Shortly thereafter, Mr. Henrickson initiated this appeal, asserting that the Open Meetings Act “has a scope and

reach that goes beyond [KRS 61.800 to 61.850](#).” In support, he cited *Reed v. City of Richmond*, [FN3] *Ky. App.*, 582 S.W.2d 651 (1979), asserting that the court in that case determined that the city violated the Act “by refusing to grant a request for a public hearing made by an accused prior to dismissal,” notwithstanding the fact that “[t]he laws for dismissal and rights to accused are not found in [KRS 61.805 to 61.850](#).” It was his position that “the Open Meetings Act still applies . . . since the *express purpose* of the . . . Act was violated.”

*2 In supplemental correspondence directed to this office following commencement of Mr. Henrickson's appeal, Mr. Wolff elaborated on the Council's position. He explained:

As confirmed in the attached certified copy of Ordinance 6-2004, this Ordinance was read at two open meetings of the City Council before being voted upon. Proper notice was given for these meetings. At these meetings the public was afforded an opportunity to speak on any matter, including the pros and cons of Ordinance 6-2004.

Neither Ordinance 6-2004 nor any subject matter related to the ordinance was discussed in a closed session of the City Council.

Before there can be an Open Meetings Act issue there needs to be a meeting that is closed to the public, allegedly illegally, but no such meeting was held herein.

The necessity of having an allegedly illegally closed meeting in order to raise an Open Meetings Act issue is illustrated in the two cases cited by Mr. Henrickson in his letter of appeal; neither case is helpful for Mr. Henrickson's contentions. Both cases involve improperly held closed meetings of governmental agencies. *Floyd Co. Bd. of Ed. v. Ratliff*, above, discusses a Board of Education meeting that went into closed session supposedly to discuss potential litigation, but during the closed session, rather than discussing potential litigation, the Board discussed a personnel reorganization plan for Floyd County schools. The Court deemed doing such violated the Open Meetings Act and thus any action taken regarding the true subject of the closed session - a general reorganization of school personnel - was voidable.

Reed v. City of Richmond, above, involved a Police Personnel Board hearing which resulted in appellants' firing. At the personnel hearing appellant's request for an open hearing was denied and the hearing was conducted as a closed meeting, the Court properly deemed the closed proceeding a violation of the Open Meetings Act.

As previously noted, the present situation does not involve a closed session of the Lakeside City Council, and without such there is no merit to Mr. Henrickson's Open Meetings Act contention, therefore the City again denies Mr. Henrickson's Open Meeting Act accusations.

While we do not agree with the Lakeside Park City Council that an open meetings violation can only be premised on an improper closed meeting, we agree with the Council that because no violation of the Open Meetings Act is alleged, “the Act is not the appropriate course to attack what the ordinance does.”

In 00-OMD-65, this office was asked to determine if the Frankfort Streetscape Committee violated the Open Meetings Act by failing to provide adequate notice of a special meeting held for the purpose of entertaining public comment on a Renaissance Kentucky project. The Committee responded that public notice of the public hearing was published in the local newspaper some five days before the hearing, but acknowledged that it did not give legal notice under KRS Chapter 424 as it had previously done on a voluntary basis. The Committee maintained that “the public notice that was published met the twenty-four (24) hour notice requirement for [special] meetings imposed by [KRS 61.823](#),” and that therefore “neither the open meetings provisions of KRS Chapter 61 nor the legal notice provisions of KRS Chapter 424 [were] violated.”

*3 At page 3 of 00-OMD-65, we observed:

[T]he Attorney General is not charged with the duty to interpret and enforce the requirements for legal notices codified in KRS Chapter 424, and in particular [KRS 424.130](#), in an open meetings appeal. Where, however, a quorum of the members of a public agency meet to discuss public business or to take action, and a complaint is made concerning the conduct of that meetings, [KRS 61.846\(2\)](#) mandates that “the Attorney General shall review the complaint [and the agency's response thereto] and issue within ten (10) days, excepting Saturdays, Sundays, and legal holidays, a written decision which states whether the agency violated the provisions of [KRS 61.805 to 61.850](#).” *When these laws intersect, our analysis is confined to issues relating to the propriety of the agency's actions under the Open Meetings Act.*

(Emphasis added.) Because the contested meeting in 00-OMD-65 was a *special* meeting, and because the Streetscape Committee failed to comply with notice requirements for *special* meetings codified at [KRS 61.823](#), we concluded that the Committee violated the Open Meetings Act. [FN4]

Extending the reasoning of 00-OMD-65 to the instant appeal, we find that the Attorney General is not charged with the duty to interpret and enforce the requirements for legal notices codified in Chapter 132 of the Kentucky Revised Statutes, and in particular [KRS 132.027](#), in an open meetings appeal. Contrary to Mr. Henrickson's belief, and his interpretation of *Reed v. City of Richmond*, the Open Meetings Act does not “appl[y] to all law, including KRS 132.” In *Reed*, the Kentucky Court of Appeals concluded that the City of Richmond violated [KRS 61.810\(6\)](#), now [KRS 61.810\(1\)\(f\)](#), of the Open Meetings Act by refusing the requests for public hearings of employees of a police department who were facing disciplinary action. That provision of the *Open Meetings Act*, authorizes public agencies to conduct, in closed session, discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student “without restricting that employee's, members, or student's right to a public hearing if requested” The court concluded that “the refusal of the hearing board to grant the appellants' requests for public hearings clearly violate[d] [KRS 61.810](#).” *Reed* at 654. (Emphasis added). The court *did not* reach beyond [KRS 61.800 to 61.850](#) to find a violation of the Open Meetings Act. We are similarly foreclosed from finding a violation of the Act in the Lakeside Park City Council's alleged failure to observe the requirements found at [KRS 132.027](#).

It is the decision of this office that Mr. Henrickson presents insufficient evidence to support a claim that a violation of the Open Meetings Act occurred at the September 13, 2004, regular meeting of the Lakeside Park City Council. He does not allege that the Council failed to give adequate notice of a special meeting, as required by [KRS 61.823\(2\), \(3\), and \(4\)\(a\) and \(b\)](#), and could not successfully do so inasmuch as that meeting was a regular meeting. He does not allege that the Council conducted an improper closed session in contravention of [KRS 61.815](#), that persons were excluded from, or unable to observe, the meeting in contravention of [KRS 61.840](#), or that minutes were not recorded, in contravention of [KRS 61.835](#). Simply put, Mr. Henrickson does not state a cognizable claim of violation under the Open Meetings Act.

*4 Nevertheless, we find that the Council's original response to Mr. Henrickson's complaint was deficient insofar as it failed to acknowledge a statutory duty to respond to such complaint within three business days, and to “include a statement of the specific statute or statutes supporting the public agency's denial [of the complaint]” and a brief explanation of how the statute or statutes apply, per [KRS 61.846\(1\)](#). Although these deficiencies were corrected in the Council's supplemental response, we remind the Council “that the procedural requirements of the Open Meetings Act ‘are not mere formalities, but are an essential part of the prompt and orderly processing’ of a meetings complaint.” 00-OMD-65, p. 6. We urge the Lakeside Park City Council to review the cited provision to insure that future responses conform to the Open Meetings 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 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.

Gregory D. Stumbo
Attorney General

Amye L. Bensenhaver
Assistant Attorney General

[FN1]. Pursuant to [KRS 61.846\(1\)](#), Mr. Henrickson's complaint should have been directed “to *the presiding officer* of the public agency suspected of the violation of [KRS 61.805](#) to [61.850](#).” (Emphasis added.)

[FN2]. Mr. Henrickson does not allege that the September 13 Council meeting was a special meeting for which inadequate notice was given per [KRS 61.823](#).

[FN3]. Mr. Henrickson also cited *Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921 (1997)*, for the general proposition that the “[e]xpress purpose of the [Act] is to maximize notice of public meetings and actions,” and that the “failure to comply with the strict letter of the law in conducting meetings of public agencies violates the public good.”

[FN4]. Those violations consisted of failing to post notice of the special meeting per [KRS 61.823\(4\)\(b\)](#) and of attempting to bootstrap an incomplete special meeting notice onto the notice of the City Commission's regular meeting held on the same day.

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