

10-ORD-103

May 20, 2010

In re: David T. Thompson/Midway City Council

Summary: Decision overruling 96-ORD-141 and 00-ORD-140 and holding that the proposed budget submitted to the city's legislative body pursuant to KRS 91A.030(7) is a nonexempt public record and no longer shielded from disclosure by KRS 61.878(1)(i) and (j). Although proposed budget at issue in this appeal had not been submitted to legislative body as a whole, and access was therefore properly denied, city council's position that proposed budget was exempt until adopted by council as an ordinance was erroneous in light of this holding.

Open Records Decision

The question presented in this appeal is whether the Midway City Council properly relied on KRS 61.878(1)(i) and (j), as construed by this office in 96-ORD-141 and 00-ORD-140, in denying *Midway Messenger* reporters Heather Rouse and Al Cross's April 13, 2010, request for a copy of "the proposed city budget for 2010-11 as distributed at the meeting of the Finance and City Property Committee of the Midway City Council currently in session." The requesters expressed the view that they were "entitled to this immediately because it was distributed and discussed at the meeting." Because the record on appeal does not reflect that Mayor Tom Bozarth submitted his proposed budget to the Council pursuant to KRS 91A.030(7) on or before the date of the reporters' request, we affirm the Council's denial as of that date. However, we find that although the Council advanced a good faith argument for nondisclosure of the

proposed budget until it is adopted by the Council as a budget ordinance, based on the cited open records decisions, the legal analysis on which those decisions was premised erroneously equated the terms “preliminary” and “proposed.” This resulted in a sweeping construction of KRS 61.878(1)(i) and (j) that was, and is, at odds with the statutes directing the submission of a proposed budget by the city’s executive authority to the city’s legislative body, and the statement of legislative policy codified at KRS 61.871.¹ Accordingly, we reverse 96-ORD-141 and 00-ORD-140 and hold that the Mayor’s² proposed budget forfeits the protection it enjoys in its preparatory stage under KRS 61.878(1)(i) and (j), and becomes an open record accessible to the public, when it is submitted to the Council pursuant to KRS 91A.030(7).³

In an April 16 response, Mayor Bozarth characterized the proposed budget as “purely preliminary.” He explained that the budget had “not been presented to the Midway City Council and no action by the Council had been taken on it.” Shortly thereafter, David T. Thompson initiated this appeal on behalf of the Kentucky Citizens for Open Government.⁴ Mr. Thompson described the circumstances leading up to the request and appeal:

¹ KRS 61.871 declares:

[T]he basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

² KRS 91A.030(5) addresses the various forms of city governments and provides:

Preparation of the budget proposal shall be the responsibility of the executive authority of the city in cities operating pursuant to KRS Chapter 83, KRS 83A.130 or 83A.140 or the city manager in cities operating pursuant to KRS 83A.150.

³ KRS 91A.030(7) states:

The budget proposal together with a budget message shall be submitted to the legislative body not later than thirty (30) days prior to the beginning of the fiscal year it covers.

⁴ It is unclear why Mr. Thompson brought this appeal instead of the reporters who submitted the request. Kentucky’s courts have addressed “standing” in an open records context in only one case: *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 375 (Ky. 1994). The Court

[A] meeting [of the Midway City Council's Finance and City Property Committee] has been called for noon[, April 13, 2010,] for, among other purposes, a review of the City's proposed budget for the 2010-11 fiscal year, according to the meeting notice and agenda.

...

At the meeting, attended by [Mayor] Bozarth and two of the three committee members, the proposed budget was distributed, but Bozarth (who is not a member of the Committee) said, "We're going to go over that on Monday" at the meeting of the full City Council A copy of the current budget was distributed [for purposes of comparison], and [Mr.] Cross asked for a copy of it and the proposed budget. The current budget was provided, but [Mayor] Bozarth said the proposed budget would not be provided because it was "proposed."

On appeal, Mr. Thompson argues:

commented that in its most recent decision involving standing, *City of Louisville v. Stockyards Bank and Trust Co.*, 843 S.W.2d 327 (1992):

We reiterated the prevailing Kentucky standard for determining standing as "a judicially recognizable interest in the subject matter" which is not "remote and speculative" and held that notwithstanding the statutory provision, the City had standing to challenge the alleged improper conduct of the fund's governing body. The Court reasoned that any other construction would result in the absurdity that the fund trustees were not subject to any oversight even by a party having a duty to indemnify against mismanagement.

Beckham at 579. "Having found standing in the face of a statute which failed to confer it expressly" in the *Stockyards Bank* case, the Court recognized that individuals affected by agency disclosure of public records to a requester under the Open Records Act "were entitled to be heard on their exclusion claims," pursuant to KRS 61.882(1). The Court recognized that "it would be wholly inconsistent [with the holding in the *Stockyards Bank* case] to deny standing when [KRS 61.882(1)] affirmatively declares it." *Id.* The Court has not had occasion to address a non-requester's standing to contest agency denial of a request submitted by someone other than him or herself.

A proposed budget is a document that by nature usually goes through a lengthy process of drafting, consideration, and adoption. A proposed budget being circulated among employees of a public agency might be considered a "preliminary draft," but our position is that it ceases to fit the phrase once it is distributed to and discussed by members of a public agency at a public meeting.

Additionally, Mr. Thompson argues, the Open Records Act evinces a legislative intent "that public records be subject to immediate inspection if readily available." Because the proposed budget "was inches away from the [reporters] and a copy machine was fewer than 10 steps away," it was "readily available and should have been provided without delay."

In supplemental correspondence, the Midway City Council reaffirmed its reliance on KRS 61.878(1)(i) and (j), reasoning:

As a proposed preliminary draft document that is specifically exempted under the Kentucky Open Records Act, [the proposed preliminary draft budget] does not lose its exempt status between its creation and finality, whether it is or is not discussed at an open meeting. [It is] . . . not subject to availability until final action is taken by a public agency or government.

Acknowledging that the "proposed preliminary draft budget" was distributed to two of the three member City Finance Committee at its April 13 meeting, the Council asserted that it was not discussed at that meeting, and maintained that "even if it were discussed, and when as a proposed preliminary draft budget it is in the coming weeks discussed by the City Council at work or regular council sessions, it does not lose its exempt status until final action is taken." To hold otherwise, the Council concluded, renders the application of KRS 61.878(1)(i) and (j) to the budget "unclear and blurred and subject to a host of interpretations . . ." and confounds records custodians in their efforts to utilize "a reliable set of guidelines" and insure "consisten[cy] in responding to open records requests."

We are not wholly persuaded by the arguments advanced by either party to this appeal. While we concur with Mr. Thompson in the view that the Mayor's proposed budget is no longer preliminary when it is submitted to the

Council pursuant to KRS 91A.030(7), we do not agree that public discussion of an otherwise exempt record abrogates the exemption *in all cases*.⁵ Conversely, and notwithstanding past open records decisions erroneously equating the terms “preliminary” and “proposed,” we do not agree with the City Council that the Mayor’s proposed budget is shielded from disclosure as a preliminary draft until it is adopted by the Council as an ordinance, but concur with the Council in the view that to insure consistency in interpretation and application of KRS 61.878(1)(i) and (j) to the proposed budget there must be an event that triggers forfeiture of its preliminary status *other than discussion at a public meeting*. That trigger is the submission of the proposed budget by the Mayor to the City Council pursuant to KRS 91A.030(7). As of the date of this event, the Mayor’s proposed budget is a nonexempt public record that must be disclosed to the public. To the extent that they are inconsistent with this decision, 96-ORD-141 and 00-ORD-140 are overruled. Because OAG 83-166 does not address “proposed budgets,” focusing exclusively on “preliminary drafts of a budget,” it is not inconsistent with the decision we reach today, and is not overruled.

As noted, KRS 91A.030(5) assigns the duty of preparing the budget proposal to the executive authority of the city in cities operating under the mayor-council, mayor-alderman, and commission forms of government and to the city manager in cities operating under a manager form of government.⁶ While records exchanged by city employees in the formulation of the proposed budget, and consisting of notes, drafts, recommendations, and memoranda in which opinions are expressed, fall within the parameters of KRS 61.878(1)(i) and (j), the proposed budget that results from that intra- or inter-agency exchange of opinions and ideas, reflected in those preliminary documents, represents final action of the Mayor, who is himself a public agency pursuant to KRS

⁵ In 00-ORD-140, we recognized that the Open Records Act and the Open Meetings Act “occasionally work at cross-purposes and cannot be harmonized.” An example of this dissonance would be the presence of an exception in the Open Records Act for “test questions, scoring keys, and other examination data . . .,” and the absence of a corresponding Open Meetings Act exception for discussions of possible test questions. Under these circumstances, an agency would be required to discuss in an open meeting a record that would qualify for protection from public inspection. Given this dichotomy, we cannot impose a rule of general application, but must examine each record and meeting on an individual basis.

⁶ Similarly, KRS 68.240(1) assigns the duty of preparing a proposed budget to the county judge/executive for submission to the fiscal court by May 1 of each year.

61.870(1)(a).⁷ The proposed budget must be made accessible to the public when it is submitted to the City Council pursuant to KRS 91A.030(7) because it constitutes statutorily required final action of a public agency, in this case, the Mayor of the City of Midway. At this juncture, the budget forfeits the preliminary character it enjoyed while it was in preparation and is no longer a draft. The “need for governmental confidentiality” accorded the proposed budget prior to submission to the Council must yield to the public’s right to know. *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 578 (Ky. 1994).

It is unclear why Mayor Bozarth disseminated a copy of the proposed budget to the City’s Finance *Committee* in advance of the scheduled date of submission to the Council as a whole. His proposed budget first appears as an item on the regular meeting agenda for the *Council’s* April 19 meeting, under New Business, as “2010-11 Budget and Appropriations Work Session.” We assume that the earlier disclosure was an aberration from standard practice insofar as KRS 91A.030(7) envisions the submission of the proposed budget to the legislative body as a whole. To avoid confusion in the application of KRS 61.878(1)(i) and (j) to proposed budgets, we adhere to the view that the event that triggered forfeiture of the budget’s preliminary character was the Mayor’s submission of the budget to the Midway City Council on April 19. This position should not, however, be construed to authorize dissemination and discussion of the proposed budget at the committee level prior to KRS 91A.030(7) submission to the legislative body as a whole to improperly avoid disclosure of the budget to the public. Nor should it be construed to permit any other device that facilitates discussion of the proposed budget by council members prior to submission under KRS 91A.030(7) and corresponding public disclosure.

We address, briefly, Mr. Thompson’s argument that the reporters should have been afforded immediate access to, and a copy of, the proposed budget. In an early open records opinion, the Attorney General recognized that “it is contrary to the letter and spirit of the open records law for an agency to make it more difficult to inspect a public record than it was before the open records law was enacted.” OAG 76-588, p. 3. There, we observed:

⁷ KRS 61.870(1)(a) defines the term “public agency” as “[e]very state or local government officer.”

Records which are easily described and readily available, such as tax assessment records, should not be temporarily withheld from inspection by red tape under the pretence of complying with the open records law. Even before the open records law such records as deeds, mortgages and tax records were open to the public. Their availability should be no more restricted than is necessary to safeguard the records.

Id. Several years later, we suggested that, "Public agencies should accommodate requesters whenever they can within the bounds of the efficient operation of their office." OAG 83-204, p. 3. The Midway City Council, and *all* public agencies, would do well to bear these observations in mind. Nevertheless, no provision of the Open Records Act mandates immediate disclosure of a nonexempt public record upon request, and we are not at liberty to read such a requirement into the statute. Although the accommodation which these reporters sought was an entirely reasonable one, we cannot declare that the Committee's refusal to immediately provide them with a copy constituted a violation of the Open Records Act. This is particularly true in light of the fact that the proposed budget had not, insofar as we can ascertain, been submitted by Mayor Bozarth to the Council as a whole pursuant to KRS 91A.030(7).

Although this decision represents a departure from past open records decisions, it does not represent a departure from standard practice in many cities and counties throughout the Commonwealth. Recognizing the importance of an informed electorate, these public agencies have chosen to disclose proposed budgets to members of the public attending meetings at which the proposed budgets are discussed, notwithstanding the existence of legal authority supporting nondisclosure. Their application of KRS 61.878(1)(i) and (j) to proposed budgets fully comports with the decision we reach today. Kentucky's highest court has determined that this office is "permitted to reexamine - and even reject - its former interpretation of the law" rather than "perpetuate . . . an erroneous interpretation of the law." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 663 (Ky. 2008). In rejecting our former interpretation of the law relating to disclosure of proposed budgets, we have attempted to "explicitly and rationally justify [our] change in position." *Chestnut* at 663, citing *In re Hughes and Coleman*, 60 S.W.3d 540, 544 (Ky. 2001). That change is postulated on a strict construction of the exemptions previously cited to support nondisclosure of proposed

budgets, a closer review of the statutes directing the submission of a proposed budget by the executive authority to the legislative body, and a continuing commitment to the statement of legislative policy declaring that “free and open examination of public records is in the public interest.” KRS 61.871.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), 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 proceeding.

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Distributed to:

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