

**OLDHAM CIRCUIT COURT
ACTION NO: 08-CI-00968
DIVISION I**

SCOTT DAVIS

PLAINTIFF

VS

ORDER

OLDHAM COUNTY FISCAL COURT, et. al.

DEFENDANT

This matter is before the Court on Petitioner Scott Davis' petition filed under open records act and open meetings act with regard to two recent denials by the Oldham County Fiscal Court for records/meetings.

OPEN RECORDS ACT

This particular aspect of the Petition requests records pertaining to an anonymous donation in the amount of \$100,000.00 to the Oldham Fiscal Court. While the donor has since voluntarily made his name public, nevertheless, the Petitioner requests damages in the form of a monetary per diem figure as well as costs and attorney's fees.

There can be little doubt under the recent Supreme Court case Cape Publications, Inc. d/b/a The Courier Journal v. University of Louisville Foundation, Inc. #2005-SC-000454-DG rendered August 21, 2008 that the donors' privacy interest gives way to the public's right to know. The case clearly states that with regard to anonymous donors, it would protect the identity of anonymous donors who had the expectation at the time their gift was made that the entity which was the recipient, constituted a "private entity" as opposed to a public entity such as the Oldham County Fiscal Court. As stated by the Supreme Court in Cape, the anonymous donors' expectations of privacy were heightened and the disclosure of their identities constituted a clearly unwarranted invasion of personal privacy. At the time the donations were made the status of the University of Louisville Foundation was uncertain and was only determined after a ruling by the Court of Appeals in 2003.

There is no such uncertainty as to the status of the Oldham County Fiscal Court. It is a public agency. Regardless of any requests for anonymity, donations to a public institution are subject to disclosure according to the Cape case.

Cape discusses a 1986 opinion of U.S. Attorney General, OAG86-76, which concluded that anonymous donations to a public institution (University of Kentucky) fall within the privacy exception set forth in KRS 621.878. Attorney General opinions however are not the law of the State. They are meant merely as guidance from the Attorney General.

Set forth in Fiscal Court's response to Mr. Davis' action, are numerous Attorney General opinions which have similarly held such donations to be non-discloseable. The Supreme Court in Cape made absolutely clear that the Attorney General opinions were of no effect and conflicted with the Supreme Court's view of the situation.

Had the Fiscal Court refused to produce the name of the donor with only the Attorney General opinions as a guideline, the Court would unequivocally state that their actions were not willful. However, at the time the open records request was made by letter of September 24, 2008, the Cape case was final. The Court can find no legal basis for Fiscal Court's refusal to provide the records pertaining to the donation at that point.

As such, the Court awards a reasonable attorney's fee and cost. A reasonable attorney's fee by this Court is determined to be \$2500.00. The Court does not award any damages or per diem amounts.

OPEN MEETINGS VIOLATION

The Plaintiff and Defendants argue whether the closed session violated the Open Meetings Act contained in KRS 61.805 et seq. Both parties have filed sealed memorandum, response, and reply on this matter.

The controlling case appears to be Floyd County Board of Education v. Ratliff, 955 S.W.2d 921 (Ky 1997).

A review of the undisputed facts in this case reveals that the agenda listed by the Fiscal Court and published to the public on September 16, 2008 indicates that the closed session was pursuant to KRS 61.810(f) Personnel. There were no

other reasons listed for the closed meeting exception. The applicable statute is KRS 61.815 which states that prior to going in to an executive session the public body must state the specific exception contained in the statute which is relied upon in order to permit a secret session. There must be specific and complete notification in the open meeting of any and all topics which are to be discussed in the closed meeting. This is the law according to Floyd County Board of Education at page 924. That case further goes on to state "The General Assembly has clearly stated its legislative intent in regard to closed executive or secret meetings. It is set forth in KRS 61.800: The General Assembly finds and declares that the basic policy of KRS 61.805 to 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for in KRS 61.810 or otherwise provided for by law shall be strictly construed. Consequently, the Courts of the Commonwealth must narrowly construe and apply the exceptions so as to avoid improper or unauthorized closed, executive, or secret meetings." *ibid* at 923.

In its response, the Fiscal Court argues that there were other reasons for the closing which are substantial enough to merit a secret session. Those include business negotiations as well as the fact that the session was informational. Neither of these reasons was listed on the agenda and thus may not be now argued by Fiscal Court pursuant to the Floyd County case. That case indicates that the open Meetings Act requires that the specific reason given by the public body for the closed session must be the only topic of discussion while the Court is convened in secret session.

In the Floyd County case, the Court noted that the Board of Education of Floyd County listed the reason for the secret session as "personnel" when in fact the discussion concerned a general reorganization and restructuring of the school district central administrative office involving multiple employees. The Court in Floyd County Board of Education further noted that a later exception argued by the school board as justification for the executive session was not referred to or listed.

The Court has no choice but to find that the subject matter went far and beyond the discussion of any personnel issues and in fact pertained to general

personnel issues rather than any specific individual. As such, even if personnel were the only issue discussed in the secret meeting, it violated the Open Meetings Act. The fact is that much more was discussed than just personnel issues and these additional discussions also violate the Open Meetings Act.

The Court therefore holds that first, the September 16, 2008 secret meeting was an illegal meeting, and Defendants are ordered to publish a clear and adequate record of the ~~secret~~ discussions that took place, which publication shall be within twenty days of date of this Court's Order.

The Defendant shall pay Plaintiff his cost for bringing the action and attorney's fees in the amount of \$2500.00 as well as a \$100.00 fine.

The Court will schedule a hearing upon the request that it set aside the passage of any motions, ordinances, tax increases, or votes taken by the Oldham County Fiscal Court since September 16, 2008 on the issue of the rate increase, the Oldham County Sewer District, the privatization of these matters to Veolia Water Company and any other matter that relates to anything discussed in the illegal closed session September 16, 2008.

As stated in the Floyd County case, all such actions taken by Fiscal Court based upon items discussed in their illegal closed session are "voidable" pursuant to KRS 61.84(5).

Voidable is not the same as void. Fiscal Court is entitled to an opportunity *to argue* that actions should not be voided by this Court.

Counsel are instructed to place conference call to Jodi Johnson at 222-1692 in order to obtain hearing date upon voidability of actions taken pursuant to discussions held in the closed meeting of September 16, 2008.

The Clerk is order to "unsent" all pleadings at the expiration of 10 days following entry of this Order. ~~the~~
DATE: February 6, 2009.

Karen Conrad
KAREN A. CONRAD
CIRCUIT COURT JUDGE, DIVISION I

ENTERED

FEB 12 2009

OLDHAM CIRCUIT/DISTRICT CL.
BY *[Signature]*