

**City of Midway**

P.O. Box 4275  
Midway, Kentucky 40347-4275

Tom Bozarth, Mayor

email address:  
pmoloney@sturgilltumor.com

April 27, 2010

~~Ms. Amye S. Bensenhaver  
Office of the Attorney General  
700 Capital Avenue, Suite 118  
Frankfort, KY 40601~~

Re: *City of Midway*  
*Complaining party: David T. Thompson/Kentucky Press Association*

Dear Ms. Bensenhaver:

The open records appeal filed by David T. Thompson, Executive Director of the Kentucky Press Association, on April 19, 2010 and received by the City of Midway on April 23, 2010, should be denied for the following reasons:

1. David T. Thompson did not submit or make a request for the City of Midway's proposed budget for the 2010 – 2011 fiscal year. Said request was made and signed by Heather Rous. Inasmuch as David T. Thompson requested no records of the City of Midway he has nothing about which to complain.
2. The proposed preliminary draft budget of the City of Midway for 2010 – 2011 is exempt from disclosure pursuant to KRS 61.878(1)(i) and (j). As a proposed preliminary draft document that is specifically exempted under the Kentucky Open Records Act, it does not lose its exempt status between its creation and finality, whether it is or is not discussed at an open meeting. Such proposed preliminary draft documents that are specifically exempted under the Act are not subject to availability until final action is taken by a public agency or government.
3. In the instant case, and as the April 19, 2010 letter of Mr. Thompson indicates, the subject proposed preliminary draft budget was distributed to two (2) of three (3) members of the City Finance Committee but was not discussed at the open meeting on April 13, 2010. As indicated above, 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.

**Council Members**

Sandra M. Cooke, Doris J. Leigh, Aaron Hamilton, Diana Queen, Sharon Turner, Charlann Wombles  
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4. KRS 61.878(1)(i) & (j) relating to preliminary county and city budgets has been squarely addressed by the Attorney General's Office on several previous occasions. All of those decisions support the City of Midway's denial of the request made by Ms. Rous for a copy of the proposed preliminary draft budget. For example, In re: *The Kentucky Post*/Campbell County Fiscal Court (00-ORD-140), the Office of the Attorney General found that the Campbell County Fiscal Court properly relied on KRS 61.878(1)(j) in denying a *Kentucky Post* reporter's request for "an advance copy of the (Draft) Campbell County Fiscal Year 2000-2001 Budget."

Specifically, the Attorney General noted that in giving "consideration to *The Kentucky Post*'s arguments, we do not find them sufficiently persuasive to overcome in excess of twenty years of open records decisions, none of which were successfully challenged. In decisions dating back to 1976, the year in which the Open Records Act was enacted, this office has distinguished between budgets in the process of being formulated and current working budgets on the basis of which expenditures are contemporaneously being made".

In explaining again its reasoning that proposed and preliminary draft budgets fall within the statutory exception, the Attorney General opinion referenced an earlier decision affirming the Jackson County Fiscal Court's denial of a request for a draft of the county fiscal budget "explaining that the draft budget:

is exempt from mandatory public inspection by KRS 61.878(1) [(i) (j)] which exempts preliminary drafts, notes, preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended. To be more explicit, preliminary drafts of a budget are not required to be available for public inspection. They are of the nature of intraoffice memoranda, preliminary tentative and merely expressions of recommendations which may or may not be incorporated into the final document".

OAG 83-166.

In the matter of In re: Jo Coffman/City of Shepherdsville, the Attorney General also addressed the Open Records Act relating to a request made for a copy of the fiscal budget of the City of Shepherdsville after the city held a meeting to receive the mayor's budget message. In that unpublished opinion, the Attorney General found that the city did not violate the Open Records Act in declining to make available for public inspection the "mayor's proposals for the city's 1996-1997 fiscal year budget as such a document is preliminary in nature and it may or may not be incorporated into the city's final budget document for the fiscal year in question". 96-ORD-141. The City of Midway's budget process is not distinguishable from any of the above

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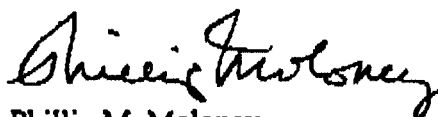
governmental bodies and is no less or more exempt under the specific provisions of KRS 61.878(1)(i) & (j).

If a proposed preliminary draft budget loses its exempt status under KRS 61.878(1)(i) and (j) between the time of its initial creation and the version that receives final approval upon passage by a governmental body, then, the aforementioned statute becomes unclear and blurred and subject to a host of interpretations other than its plain meaning and will require deciding what exceptions will be made to the exemption. Surely this was not the legislative intent of the statute when the exemption was created.

5. The City of Midway is a 5<sup>th</sup> Class City with limited resources. Its two City Hall employees are trained to be consistent and compliant with law in regard to incoming Open Record requests. The City tries to handle all requests and to treat all requestors equally and not to prefer one requestor over another simply because of a requestor's status, profession or resources. Record custodians need and should have a reliable set of guidelines upon which to consult so as to be consistent in responding to open records requests. In that regard, cities, counties and public agencies trust that they can rely upon the plain meaning of the Open Records Act and interpretations made and decisions rendered by the Attorney General's Office and Kentucky's appellate courts.

The City of Midway tries to conduct its business in an open and transparent fashion in compliance with the Open Meetings Act. Likewise, it attempts to fully comply with the provisions of the Open Records Act. In reliance upon KRS 61.878(1)(i) and (j), 00-ORD-140 and 96-ORD-141, the City of Midway believes it was rightly justified in denying the subject request and had proper basis upon which to do so. While neither Ms. Rous nor her professor appealed the denial of request, both were advised that the City will provide them with a copy of the budget once the Midway City Council takes final action on it. They did request and were provided with a copy of the 2009-2010 budget that the Midway City Council passed last year. The City of Midway will likewise be pleased to furnish David T. Thompson with a copy of the 2010-20 final budget, once approved.

Sincerely,



Phillip M. Moloney,  
Attorney for City of Midway

PMM/slh

cc: David T. Thompson ✓