



KENTUCKY PRESS ASSOCIATION

April 19, 2010

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

Dear Amye:

This is an appeal on behalf of the Kentucky Citizens for Open Government, an affiliate of the Kentucky Press Association, under the Kentucky Open Records Act, KRS 61.870-884.

On the morning of Tuesday, April 13, 2010, Al Cross, an assistant professor in the School of Journalism and Telecommunications at the University of Kentucky, informed Diane Shepard, the assistant clerk of the City of Midway, that he and one of his students would expect to inspect any documents discussed at the meeting of the Midway City Council's Finance and City Property Committee. The meeting had been called for noon that day 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. Cross asked Shepard to inform Mayor Tom Bozarth of his desire, and she said she would. (Students in Cross's classes cover Midway as class assignments and their stories are published in the Midway Messenger, a blog and Web site that Cross publishes, and in The Woodford Sun, the county's weekly newspaper. Cross and his students receive notices of Midway meetings, under the Open Meetings Act.

At the meeting, attended by 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. Sharon Turner, the chair of the committee, agreed, but first said City Clerk Phyllis Hudson, who could not attend, was going to have a copy of the current budget for comparison purposes. A copy of the current budget was distributed, and Cross asked for a copy of it and the proposed budget. The current budget was provided, but Bozarth said the proposed budget would not be provided because it was "proposed." Cross and one of his students, Heather Rous, who covered the meeting as a class assignment, filed a written request, addressed to Bozarth and Turner, asking for inspection and copying of the proposed budget on grounds that it was being discussed by a public agency at a public meeting and was readily available. Cross told Bozarth and the committee that the matter presented an unresolved issue of law. He later reminded Bozarth via e-mail that the city had three days to explain in writing the reasons for the denial.

KRS 61.878 says "preliminary drafts" and "preliminary recommendations" are subject to inspection only on court order, but those are very limited phrases. Recommendations are by nature preliminary, so the adjective in the latter phrase compounds its limiting nature. Likewise, the former phrase does not simply say "draft" or "preliminary document," but uses two limiting words together. 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 that phrase once it is distributed to and discussed by members of a public agency at a public meeting. After all, a budget is the basic policy document for a government, and KRS 61.871 says, "The General Assembly finds and declares that the 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." (Emphasis added.) We do not believe that the unpublished opinion 96-ORD-141, which denied a requester access to a proposed city budget, applies here because that case did not deal with discussions by members of a public agency at a public meeting.



KENTUCKY PRESS ASSOCIATION

Page 2 - Amye Bensenhaver - April 19, 2010

Other parts of the law support disclosure of documents being discussed by members of a public agency at a public meeting. KRS 61.872, which creates the right to inspect and receive copies of public records, indicates that if a record is readily available, it should be provided without delay. Subsection 3(b) of that section says a public agency shall mail records to a requester outside the county "after he precisely describes the public records which are readily available within the public agency." Perhaps more importantly, subsection 5 says, "If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection." (Emphases added.) Taken as a whole, this section indicates that the legislature intended that public records be subject to immediate inspection if readily available. In this case, copies of the proposed budget were inches away from the student reporter and a copy machine was fewer than 10 steps away. The record was readily available and stopped being preliminary once it was distributed. While the advance notice to the mayor may have prompted him to delay discussion of the budget, discussion of its details was not necessary to invoke disclosure, because it was discussed generally and a stated purpose of the meeting was to "review" the budget. Again, the law requires that exceptions be strictly construed.

We request a speedy opinion in this matter because time is of the essence. Bozarth said at the meeting, which Rous recorded, that the budget would be discussed at the next two city council meetings. He did not say that copies of the budget would be provided at those meetings. And regardless of the particular circumstances in Midway, this is budget-adoption time for all local governments in Kentucky, and we have been apprised of similar problems with access to proposed budgets in other jurisdictions.

Thanks.

Cordially,

David T. Thompson
Executive Director
Kentucky Press Association
Kentucky Citizens for Open Government

ENC: Response from The City of Midway, KY