

RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-00592-MR

ROBERT E. TAYLOR III

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 09-CI-00720

BOWLING GREEN MUNICIPAL UTILITIES

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, VANMETER, AND CAPERTON, JUDGES.

CAPERTON, JUDGE: Robert E. Taylor, III appeals from a decision of the Warren Circuit Court affirming an opinion by the Office of the Attorney General of Kentucky in a Kentucky Open Meetings Act and Kentucky Open Records Act case. The question presented for review is whether Bowling Green Municipal Utilities (BGMU) violated the Open Meetings Act, Kentucky Revised Statutes

(KRS) 61.800, *et seq.*, or the Open Records Act, KRS 61.870, *et seq.*, by failing to observe the required formalities. Upon a thorough review of the record, we find that it did not, and affirm the Warren Circuit Court.

BGMU is a non-profit municipal utility that provides water, electric, and fiber optic services to the City of Bowling Green. In the fall of 2008, BGMU sent out a “Request for Proposals” (RFP) for an insurance agency or agent to represent BGMU and provide insurance coverage. This official request for proposals required that any responses be submitted to the purchasing agent in an envelope marked “Sealed Proposal, Insurance Agency/Agent Selection” by September 25, 2008. The Appellee herein, Robert E. Taylor, III, was the incumbent insurance provider. He submitted his proposal on September 25, 2008, along with an official copy of the RFP in the hopes of retaining BGMU as a client.

After it received all of the responses to its RFP, the BGMU general manager Mark Iverson reviewed the bids and asked two other BGMU employees to independently review the bids. Once all three individuals had separately reviewed the bids, they met to combine their tabulations. These combined tabulations were the basis for General Manager Iverson’s non-binding recommendation to the BGMU Board of Directors.

Ultimately, BGMU selected a provider other than Taylor. This selection was made at a regularly scheduled board meeting which was open to the public on October 13, 2008. Taylor was present at the meeting wherein the Board

of Directors deliberated with regard to the insurance agents and agencies in question and made its selection.

After the contract was awarded to another entity, Taylor made several open records requests of BGMU and received the RFP and a draft RFP, among other documents. Taylor contended, based upon information received, that one of the RFPs referred to an “Insurance Committee,” and that the three individuals who tabulated the bids composed a “committee” whose purpose was to act in an advisory capacity to the Board. Taylor further alleged that all three of the committee members were present during the October 13, 2008, Board meeting and made a recommendation to the Board, which the Board accepted without modification.

BGMU refuted these assertions and maintained that the term “Insurance Committee” was only mentioned in a draft RFP which was never disseminated, and further, that the Board never approved the formation of any committee with respect to the selection of insurance.

On March 16, 2009, Taylor requested an opinion from the Office of the Kentucky Attorney General (OAG) concerning whether BGMU committed a violation of Open Meetings Act or Open Records Act with respect to the three-employee “committee.” The OAG issued an opinion on March 31, 2009, finding that no Open Meetings Act or Open Records Act violation had occurred because the BGMU employees were not a “committee” and were not a “public agency” for the purposes of the Acts. Thereafter, Taylor appealed the decision to the Warren

Circuit Court. The Warren Circuit Court affirmed the OAG opinion on the same grounds, holding that the Open Meetings Act does not allow for public access to the daily administrative goings-on of a public agency.

Taylor now appeals to this Court.

On appeal, Taylor makes essentially the same argument presented to the trial court: that the bids and proposals sent in response to the RFP were reviewed by an established committee created by BGMU and, thus, the committee was subject to KRS Chapter 61 for the purposes of the Open Records Act and the Open Meetings Act.

Open Records Act and Open Meetings Act determinations are reviewed by this Court *de novo*. *Kentucky Bd. Of Examiners of Psychologists and Div. of Occupations and Professions, Dept. for Admin. v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992); *Eplion v. Burchett*, 354 S.W.3d 598, 601 (Ky.App. 2011). Hence, we owe no deference to the trial court on review.

The policy behind the Open Records Act is that the “free and open examination of public records is in the public interest.” KRS 61.871. It is undisputed that BGMU is a “public agency” falling under the purview of the Chapter. However, Taylor argues that the three employees who reviewed the bids were a committee and, thus, the Open Records Act and Open Meetings Act applied to their actions as well.

The statutes are clear that any “committee...established, created, and controlled” by a public agency is also deemed to itself be a “public agency” for the purposes of the Acts. KRS 61.870(1)(j); KRS 61.805(2)(g). KRS 61.820 requires that:

All meetings of all public agencies of this state, and any committees or subcommittees thereof, shall be held at specified times and places which are convenient to the public, and all public agencies shall provide for a schedule of regular meetings by ordinance, order, resolution, bylaws, or by whatever other means may be required for the conduct of business of that public agency. The schedule of regular meetings shall be made available to the public.

In addition, any special meetings held by a public agency or committee or subcommittee thereof must comply with statutory notice requirements governing special meetings. KRS 61.823. The minutes of such meetings must be recorded and made available for public inspection upon request. KRS 61.835.

In the present case, the three-employee panel that considered the proposals did not comply with KRS 61.820 or KRS 61.823. However, BGMU argued that those statutory subsections were inapplicable because the three-employee panel was not a “committee” under the statute. The Attorney General agreed and held that the three employees did not constitute a “committee... established, created, and controlled” by BGMU. The trial court affirmed the OAG opinion upon this same reasoning.

We are inclined to agree with the OAG and the trial court that the three employees were merely acting within the scope of their employment and were not a “committee” under the Chapter. As we have previously stated, this

Court may give weight to the reasoning and views expressed by the OAG in its opinions. *Woodward, Hobson & Fulton, LLP v. Revenue Cabinet*, 69 S.W.3d 476, 480 (Ky.App. 2002).

We find that BGMU did not establish, create, or control a committee to act on its behalf with respect to the insurance agent/agency proposals, nor did it delegate any of its decision-making authority. To begin, the Board did not ask the employees to review the bids. Instead, General Manager Iverson requested two employees assist him in reviewing the bids. Although Taylor points to the use of the phrase “Insurance Committee” on some of the documents he received through open records requests from BGMU, the record is devoid of any evidence that the employees had any authority to bind the Board or that the Board delegated any of its decision-making authority to them. It is not the name which a group is given that is determinative, but its function. Open Meetings Decision (OMD) 95-71.¹

Taylor urges that *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884 (Ky. 1987), is dispositive because it held that even advisory bodies with no delegated power may be subject to the Open Meetings Act. However, the OAG addressed the *Lexington Herald-Leader* case in a later opinion, noting that “the statute that the court construed, KRS 61.805(2), has undergone substantial revision and the applicability of the court’s analysis to the current statutory language is open to question.” OAG

¹ As we have previously stated, this Court may give great weight to the reasoning and views expressed by the OAG in its opinions. *Woodward, Hobson & Fulton, LLP v. Revenue Cabinet*, 69 S.W.3d 476, 480 (Ky.App. 2002).

94-25. The OAG further noted that neither *Lexington Herald-Leader* nor any other Kentucky case at that time had delved into the “extent to which the open meetings law reaches down through layers of administrative organization to affect the day-to-day administrative work of public employees.” Upon researching the same, this Court has not found any case that does so.

More importantly, however, is the fact that *Lexington Herald-Leader* is distinguishable from the present case. *Lexington Herald-Leader* involved a group of individuals appointed by a formal action of the Board as an advisory committee. In the present case, the evidence of record indicated that the Board had no involvement in requesting employees to help tabulate the bids but that a general manager picked two employees to help sort through the submitted proposals. An informal group of individual employees is not akin to a committee created by a formal action of a Board.

We reiterate the position previously espoused by the OAG that “the administrative functions of the employees of a public agency are not subject” to the Open Records Act or the Open Meetings Act. OMD 4-148; OMD 95-71. In the present case, the employees in question were merely asked to review bids by a member of management and there is no indication the Board either requested this action or approved it, or that the Board delegated any authority to the employees who performed this task. Rather, the task appears to have been purely administrative. This does not fall within the parameters of KRS 61.805(2)(g) or KRS 61.870(1)(j). Therefore, there is no public right to access. The purpose of the

Open Records Act and the Open Meetings Act is not to provide the public with
“access to the day-to-day administrative work of a public agency.” OAG 94-025.

Accordingly, we affirm the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew J. Baker
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Timothy Edelen
Bowling Green, Kentucky