

OAG 94-25

April 4, 1994

John C. Darsie
General Counsel
University of Kentucky
2 Administration Building
Lexington, Kentucky 40506-0032

Re: Open Meetings Inquiry

Dear Mr. Darsie:

This letter responds to your inquiry regarding the application of the open meetings law to meetings of the University Senate, faculties of colleges, and faculties of departments. We apologize for the delay in answering your letter.

In order to provide guidance on what we perceive to be an important and difficult question in the application of the open meetings law, we have determined that your inquiries should be addressed in an official opinion of this office. This opinion is not an open meetings decision and consequently does not carry the force of law. Nor does this opinion necessarily represent the direction that subsequent open meetings decisions will take. While we generally decline to provide advisory opinions on open meetings questions, the lack of prior rulings on this subject, coupled with the need of university counsel to provide responsible advice regarding a broad spectrum of open meetings situations, compels us to depart from our usual policy.

Our consideration of your question has been made easier by your inclusion of helpful documents, including an excerpt from the university's governing regulations and legal opinions from other attorneys. We have considered all the points raised in those documents, and while this response does not explicitly discuss every argument advanced in favor of a finding that the meetings may be closed to the public, we have given each argument due deliberation.

Scope of open meetings law

We begin by noting that your specific questions are whether the three named bodies are public agencies within the meaning of the open meetings act. As pointed out in the material that you provided to us, the Kentucky Supreme Court, in *Lexington Herald-Leader Company v. University of Kentucky Presidential Search Committee*, Ky., 732 S.W.2d 884 (1987), has held that any committee or subcommittee established by a public agency that is created by statute is itself a public agency. The court also said in that opinion that "the right of the public to be informed transcends any loss of efficiency"- which we take to mean that expense or inconvenience is not a relevant consideration in determining whether an entity is a public agency.

However, your questions cannot be answered by a simple reference to *Lexington Herald-Leader Company v. University of Kentucky Presidential Search Committee*. 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.

Of even greater significance is the fact that neither *Lexington Herald-Leader Company v. University of Kentucky Presidential Search Committee* nor any other Kentucky case of which we are aware has dealt with 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. In examining this question we have drawn some guidance from courts in states where an open meetings law similar to ours is in effect. For example, in *Bennett v. Warden*, Fla.App., 333 So.2d 97, 99 (1976), in holding that the open meetings law does not apply to meetings between an executive officer and his advisors, the court said:

Any other conclusion, carried to its logical extension, would in our view unduly hamper the efficient operation of modern government the administration of which is more and more being placed in the hands of professional administrators. It would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with everyone from whom they would seek counsel . . .

be a public meeting within the disciplines of the Sunshine Law. Neither the letter nor the spirit of the law require it.

Similarly, in *Tribune Publishing Company v. Curators of University of Missouri*, 661 S.W.2d 575, 585 (Mo.App. 1983), the court said,

Securing government accountability at the decisional level is one thing. Adversely affecting administrative efficiency at the non-decisional level is quite another thing. It is inconceivable that the salutary goal of letting the "sunshine" in on meetings of "public governmental bodies" envisioned elimination of all intermediate layers of ozone to the extent of crippling or impeding the day-to-day efficiency of purely administrative functions.

Believing that the approach taken in those cases is sound, we proceed on the premise that our open meetings law is intended to provide public access to meetings of decision-making bodies, and it is not intended to provide public access to the day-to-day administrative work of a public agency. This approach "avoids the crippling consequences of placing unjustifiable impediments on achieving day-to-day administrative efficiency." *Tribune Publishing Company v. Curators of University of Missouri*, above.

Between those two extremes lies a broad middle ground over which we tread with little direct guidance from the statutes. In KRS 61.805(2)(g), "public agency" is defined to include any "board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency" of a public agency. This recursive definition is not particularly helpful in determining the point at which a group of public officials ceases to be a public agency. A governing board creates a committee, and the committee creates a subcommittee; because a committee is a public agency, the subcommittee becomes a committee of a public agency and thus is itself a public agency. And so on. Strictly applied, the statutory definition creates an endless loop from which there is no exit for the performance of delegated administrative duties.

Logic and common sense demand that a certain level of subdelegation be reached at which the work being done is too remote from the decision-making process to invoke the public interest secured by the open meetings law. We believe that this equilibrium can best be achieved by applying a single practical definition for the string of terms enumerated in KRS 61.805(2)(g). We have examined several definitions from various sources, and find that the phrase "board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency" refers to any body that possesses the following four characteristics:

- its members act as a unit;
- authority has been officially delegated to it;
- its responsibility is to consider, investigate, take action on, or report to a higher authority; and
- specific matters are entrusted to it.
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These characteristics may be combined into the following definition: "a group of persons acting as a unit, to whom there has been officially delegated the responsibility to consider, investigate, take action on, or report on specific matters entrusted to it." For convenience, we will use the term "committee" to refer to any body that satisfies that definition.

We will now examine each of the three groups about which you inquire, using the information contained in the governing regulations.

The University Senate

The University Senate comprises 103 elected faculty members, 18 elected student members, and 13 or 14 ex officio voting members. It performs its functions directly and through delegation to committees and faculties. Among its functions are the following:

- determining the broad academic policies of the university;
- adopting regulations to implement those policies;
- approving all new academic programs, curricula, and courses;
- approving the annual university calendar; and

- determining the conditions for admission and for degrees;
- making recommendations to the president of the university regarding candidates for degrees, the composition of educational units within the university, and criteria for appointment, promotion, and tenure.

Those functions indicate that the University Senate is a formally established body to which has been delegated responsibility for acting on the matters set out in the regulation. It meets the definition of a committee as set out above and is therefore subject to the open meetings law. Its duties in fact represent the quintessence of public business conducted by a public agency. The actions of the University Senate-which include deciding what is taught, when, and to whom-are among the most important decisions that the university makes. We do not believe that the open meetings law may be interpreted in a manner that would allow such decisionmaking to be conducted in private.

Faculties of colleges

The faculty of a college comprises the dean, assistant and associate deans, and full-time faculty having the rank of assistant professor, associate professor, or professor. The faculty meets in regular sessions. Its function include:

- determining the educational policies of the college; and
- making recommendations to the University Senate on matters to be decided by the University Senate.

Because a college faculty is a formally established body to which has been delegated responsibility for acting on the specific matters entrusted to it, it is a committee and is subject to the open meetings law.

Faculties of departments

The faculty of a department comprises the chairman and members of the department who are members of the corresponding faculty of the school or college. Its functions include:

- setting the department's educational policies;
- developing policies on academic requirements, courses of study, class schedules, graduate and research programs, and service functions; and
- establishing procedures regarding appointment of new members, promotions, and tenure.

Like a college faculty, a department faculty is a formally established body that has been given authority to make decisions and recommendations regarding matters that are entrusted to it. It is therefore a committee and is subject to the open meetings law.

Types of meetings subject to open meetings law

Your letter and the accompanying letter from the general counsel of the University of Louisville indicate a concern that if the open meetings law is construed to cover the bodies described above, it will stifle the flexibility that is an essential feature of meetings of small groups. We do not anticipate such a result. While we have identified the three bodies in question as committees that are subject to the open meetings law, it does not follow that every congregation of employees who are members of those bodies must be an open meeting. The law applies only to meetings at which public business is discussed or action is taken. KRS 61.810(1). If a meeting is contemplated or scheduled at which neither action will be taken nor public business discussed, the meeting need not be open to the public.

While KRS 61.805 defines "action taken," the open meetings law does not contain a definition of "public business." Open meetings decisions have not yet dealt with the precise meaning of that term, but we anticipate that discussion of the following subjects would be considered public business:

- the expenditure of public funds;
- the scope or type of services offered by a public agency;
- regulations, policies, and procedures that affect the manner in which the public agency provides services to the public or complies with its statutory duties;

- personnel matters affecting the compensation, benefits, or duties of public employees.

Conversely, the following subjects are probably not public business:

- matters related to a specific situation involving a particular student, employee, faculty or senate member, or member of the public;
- casual conversations among faculty or senate members;
- matters that are purely internal to the faculty or senate itself, except matters involving the time or place of meetings.

It is of course possible that a meeting of any of the bodies discussed in this opinion would proceed without any action being taken and without any public business being discussed. Those meetings could be closed to the public. We repeat that the information provided here is advisory only and does not necessarily indicate the direction that future decisions will take. Nevertheless, we hope that this information is helpful to you.

Sincerely,
Chris Gorman
Attorney General
Ross T. Carter
Assistant Attorney General