

104 Administration Building
University of Kentucky
Lexington, Kentucky 40506-0032

June 1, 1999

Professor Roy L. Moore
Chair, University Senate Council
10 Administration Building
University of Kentucky
Lexington, Kentucky 40506-0032

Re: U.K. Board of Trustees Meeting
May 4, 1999 -- Complaint of
Violation of Open Meetings Act.

Dear Professor Moore:

This will respond to your May 24, 1999 complaint received on May 26, 1999, alleging that the University of Kentucky Board of Trustees violated the Kentucky Open Meetings Act at its regular meeting on May 4, 1999.

Your first complaint is that the Board failed to give proper notice pursuant to KRS 164.170(2) of the agenda of the meeting. The Open Meetings Act has no requirement relating to agendas for regular meetings; accordingly, this complaint cannot be a violation of the Open Meetings Act.

Your second complaint alleges that during the closed discussion the Board discussed "the mandatory retirement policy established by the Administrative Regulation." There is no violation of the Open Meetings Act as alleged, inasmuch as any such discussion regarding "mandatory retirement policy" related directly to whether Dr. Wethington should receive a new contract for an additional term of years.

Your third complaint is that the Board violated the Open Meetings Act because it held "discussion . . . to extend the terms [sic] of his employment and contract extensions are not exempted by KRS 61.878(1)(f)." You cite 94-OMD-63 as your authority.

President Wethington's contract as it existed on May 4, 1999 was for a stated period, July 1, 1996 through and ending on June 30, 2001. On May 4th, he had no contract of any kind for any period of time beyond June 30, 2001. The Board went into closed session and discussed whether President Wethington should be appointed or employed, or not, as President for an additional term of years. Closing the meeting for this purpose was proper under the clear wording of KRS 61.810(1)(f): "discussions . . . which might lead to the appointment . . . of an individual employee." Under Kentucky law, the Board of Trustees "may appoint a president." KRS 164.220. When we returned from closed session, the Board authorized me to negotiate and execute a new contract with Dr. Wethington.

I believe that you have misread the holding of 94-OMD-63. That opinion involved a planning and zoning commission meeting in which the commission members went into closed session with an existing employee who wanted to resign. During the closed session, the employee presented the commission a proposal for a short-term employment contract,

discussions were held about the salary, benefits and length of the contract, and a tentative agreement was reached in the closed session. In complaining about the agency's action, the Danville Advocate-Messenger "maintained that the employment contract does not fall within the 'appointment, discipline, or dismissal' exception to the public meetings law" because "it merely continues the person's employment even though the terms and conditions have changed." The Attorney General characterized this as a "contractual matter negotiated during a closed session" where the commission, "in an attempt to secure the continuance of [the employee's] employment," "negotiated with her and agreed upon an arrangement which changed the terms and conditions of her employment." The Attorney General, however, stated that "since the negotiations and discussion with the employee did not involve the possible appointment, discipline, or dismissal of that person, the negotiations and discussions should not have taken place in a closed session." (Emphasis added) Two years after issuing 94-OMD-63, the Attorney General issued 96-OMD-97, which explained the earlier opinion; 94-OMD-63 was described by the Attorney General as a meeting involving a closed session wherein the agency conducted "negotiations with an employee in an attempt to secure the continuation of her employment."

At our May 4, 1999 meeting, our Board did not conduct negotiations with President Wethington in an attempt to secure the continuation of his employment. President Wethington did not accompany the Board into closed session. No negotiations occurred with President Wethington during the meeting. The facts show that in open session, the Board authorized me to negotiate and execute a new contract with the President, for a new term extending beyond his existing employment contract with the University. I explained to the Board the procedure I would use to propose a new salary to Dr. Wethington to be included in his new contract. Because there was a new appointment of Dr. Wethington to an additional term as President after the Board reconvened into open session, it is clear that the earlier discussions held in the closed session "might" have led to the appointment of Dr. Wethington. Thus, 94-OMD-63 is distinguishable from and is not controlling regarding whether the Board properly invoked the exception to the Open Meetings Act on May 4th.

The Kentucky Court of Appeals has held that the word "appointment" in KRS 61.810(f) should not be given a narrow, restrictive reading and can apply to other types of actions relating to individuals. See *Courier-Journal and Louisville Times v. University of Louisville*, 596 S.W.2d 374, 379 (Ky. App. 1979).

The Attorney General Opinion most clearly on point on this issue is 95-OMD-93, where the question was whether the public agency violated KRS 61.815 when it discussed in closed session the "possible renewal of [an agency] employee's contract." The complainant in that case contended that "discussions of the possible renewal of a contract are not exempt under KRS 61.810(1)(f)." The agency stated that the purpose of the closed session was to consider whether to reappoint the employee or to dismiss him. The Attorney General held that "the stated purpose of the closed session was to discuss the matter of whether or not [an employee] would be retained. Such a matter is a proper subject for a closed session under KRS 61.810(1)(f)."

The facts of 95-OMD-93 are four-square with those at our May 4 meeting. The issue before the Board was whether to appoint the President beyond June 30, 2001. The clear weight of the authority from the Attorney General and a literal reading of the statute support that the Board did not violate the letter or the spirit of the Open Meetings law when it discussed whether to offer Dr. Wethington a new appointment, under different terms, for an additional term of years beyond his current appointment.

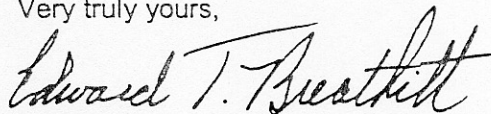
The Board's regulations relating to a search committee were fully complied with during the original appointment of Dr. Wethington as President in 1990. The Governing Regulation clearly contemplates that a search committee's advice need only be obtained on the initial appointment of a president.

You have proposed several remedies for the Board to take pursuant to KRS 61.846(1).

Your first proposal, *i.e.*, "to rescind [my] authority to negotiate a contract with President Wethington and rescind the contract of May 15, 1999 with him" is denied. The Board's discussion of whether to appoint President Wethington to an additional term as President was in substantial compliance with KRS 61.810(1)(f) and was the proper subject of a closed session as determined by the Attorney General in 95-OMD-93. The vote on the matter to appoint Dr. Wethington to an additional term was taken in open, public session, pursuant to the dictates of KRS 61.810(1)(c), and thus was completely proper under the Open Meetings Act. There is thus no reason to rescind the Board's decision as a remedy under the open Meetings Act.

Concerning your second proposal, I do plan to provide notice and an opportunity for discussion of the resolutions submitted by the University Senate at the Board's June 8, 1999 meeting.

Very truly yours,

A handwritten signature in dark ink, reading "Edward T. Breathitt". The signature is fluid and cursive, with the first name "Edward" and last name "Breathitt" clearly legible.

Edward T. Breathitt
Chairman