No. 20-CI-004653

JEFFERSON CIRCUIT COURT
DIVISION SEVEN (7)
HON. AUDRA ECKERLE

LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT, for itself and on behalf of its Cabinets, Departments, Officers and Employees — PLAINTIFF

v.

LOUISVILLE METRO COUNCIL, et al., — DEFENDANTS

BRIEF OF *AMICUS CURIAE* KENTUCKY PRESS ASSOCIATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Louisville Metro Council's Government Oversight and Audit Committee ("Committee") is seeking to perform a core government function: oversight of public officials' response to months-long public protests over the death of Breonna Taylor, which have drawn international attention to the City. The Committee has subpoenaed two senior officials—Louisville Metro Police Department ("LMPD") Chief Schroder and Louisville/Jefferson County Metro Government ("Metro Government") Chief of Public Safety Hess—to discuss a wide range of topics related to the City's response to these protests. The subjects of testimony include: vandalism the City's response to it; the use of tear gas and/or pepper balls against protesters and members of the media; the placement of snipers on rooftops during protests; warnings to and communications with protestors; any "stand-down" order(s), directives, guidance given or passed along to government responders relative to protests and vandalism; and how or why law enforcement came to be at a restaurant blocks away from the protests on the night David McAtee was shot by LMPD officers and Kentucky National Guard members.

The Plaintiff in this case—Metro Government—claims that its witnesses can only provide such testimony in a closed hearing conducted out of the public's view. Their argument relies on a statute providing that any testimony "subject to" any of the exceptions in the Open Meetings Act should take place behind closed doors unless the witness chooses to testify publicly. The fundamental problem with this argument is that none of the Open Meetings Act's exemptions would permit the Metro Council to hear this testimony behind closed doors even if it wanted to.

There are three reasons why this is so. *First*, the Open Meetings exception Plaintiff relies upon—the "litigation exception"—is a narrow exemption that only extends "to matters commonly inherent to litigation, such as *preparation, strategy or tactics*." *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 923-924 (Ky. 1997). It does not cover all *facts* that may be disputed in litigation. None of

the subjects on which the Committee seeks testimony would probe the City's planned litigation strategy, and therefore the Metro Council could not have invoked the exception at all.

Second, the litigation exception may only be invoked by public agencies that are parties to a pending or threatened lawsuit. The Attorney General has long held that an agency that goes into closed session to discuss litigation to which it is not a party violates the Act. *See* 93-OMD-119. That is precisely what Plaintiff asks the Metro Council to do: hold a closed session to discuss litigation to which it is not a party. *Metro Council* was not named in the *Scott et al. v. Louisville/Jefferson County Metro Government* lawsuit. And Metro Council and Metro Government plainly are separate entities for purposes of the Open Meetings Act and otherwise—as evidenced by the fact that Metro Government hired its own counsel and *sued* the Metro Council in this litigation.

Third, the only party to the *Scott* litigation—Metro Government—is not subject to the Open Meetings Act at all. Neither the Mayor nor the LMPD is required to open its meetings to the public. Thus, Metro Government cannot avail itself of any of the exemptions under the Act if asked to testify before an agency subject to that law.

In short, Metro Council was not permitted to hold this testimony in closed session. Thus, nothing in KRS 61C.103(14)(b) compels the Committee to do so.

ARGUMENT

Although framed as a dispute about the Metro Council's subpoena power under KRS 67C.103(14), in reality this case is about the routine application of the exemptions set forth in the Open Meetings Act. KRS 67C.103(14)(b)(2) does not create any new exceptions to the Open Meetings law, and it only requires testimony to be taken in closed session where the testimony itself is "subject to KRS 61.810." Thus, if the testimony requested could not be taken in closed session under one of the Open Meetings Act's enumerated exceptions, then a subpoena recipient has no right to insist that the requested testimony be conducted in private. Here, the Open Meetings Act

would not permit closed-door hearing on the subject matters set forth in the subpoena. Plaintiff's claims therefore fail as a matter of law.

Plaintiff relies on the "litigation exception" to the Open Meetings Law. That statute permits closed-door "[*d*]*iscussions of* . . . pending *litigation against* or on behalf of *the public agency*." KRS 61.810(1)(c) (emphasis added). Here, that exception does not apply for at least three reasons. The requested testimony (1) does not call for "discussions of . . . pending litigation"; (2) the *Scott* litigation is not "against" the "the public agency" subject to the Act—the Metro Council; and (3) the entity that is a defendant in the lawsuit is not a "public agency" for purposes of the Act. For each of these reasons, the plaintiff's claims are wholly without merit.

I. The Proposed Testimony Is Not Subject to the Litigation Exception.

The Open Meetings Act's "pending litigation" exemption is a narrow exception to the Act's command that "[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times." KRS 61.810. Like all exceptions to this rule, the litigation exception "must be strictly construed 'so as to avoid improper or unauthorized closed, executive or secret meetings.'" *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012) (quoting *Ratliff*, 955 S.W.2d at 923); *see also* KRS 61.800 ("[T]he exceptions provided for by KRS 61.810 or otherwise provided for by law shall be strictly construed.").

Courts interpreting this provision have repeatedly held that "[t]he drafters of this legislation clearly envisioned that this exception would apply to matters commonly inherent to litigation, such as *preparation, strategy or tactics*." *Ratliff*, 955 S.W.2d at 923-924 (emphasis added); *see also Carter*, 366 S.W.3d at 419 ("This exception covers discussions of strategy, tactics, possible settlement and other matters pertaining to the case."). The exception does not extend to all factual information that could conceivably relate to a pending or threatened case. On the contrary, the Supreme Court has

repeatedly emphasized that this narrow exception "must not be expanded to include general discussions of 'everything tangential to the topic.'" *Id.* (quoting *Jefferson County Board of Education v. The Courier–Journal*, 551 S.W.2d 25 (1977)).

The Attorney General, too, has repeatedly emphasized that the litigation exception is meant to safeguard litigation strategy and tactics. *See, e.g.*, 15-OMD-044 (public agency may use litigation exception "to 'maintain the confidentiality of its litigation strategy when it is a party to litigation, threatened with litigation, or anticipates initiating litigation on its own behalf.'" (quoting OAG 78-227)); 97-OAG-001 ("KRS 61.810[(1)(c)] . . . is intended to permit a public agency to maintain the confidentiality of its litigation strategy when it is a party to the litigation" (quoting OAG 91-141)). Thus, the Attorney General has affirmed the use of the exception to permit closed sessions to: discussions on strategy, tactics, and the possible settlement of a proceeding against the agency (92-OMD-1728); "briefings by agency counsel on the strengths and weaknesses of a case, actual or threatened" (04-OMD-039); discussions—but not final action—on whether to appeal a decision by the Attorney General (97-OMD-96); updates on the status of pending cases (09-OMD-208); and discussions on whether to bring a potential claim (11-OMD-011).

At the same time, the Attorney General also has held that the exception does not sweep so broadly as to cover discussions of all *facts* related to the subject matter of a lawsuit. Indeed, the AG has repeatedly held that an agency exceeds the permissible scope of the exception when "discussion occurred in the closed session that was tangential to '*heading off* threatened litigation' or *strategy*, *tactics*, etc. pertaining to the anticipated case, if any." 11-OMD-162, p. 10 (emphasis added) (citing 04-OMD-146, p. 8). It likewise found Open Meetings violations where an agency went into closed session to discuss: hearing procedures (03-OMD-178); potential retention of legal counsel (01-OMD-152); and its obligations and possible responses relative to its alleged failure to abide by the

terms of a Memorandum of Understanding entered into by the Commonwealth and the urban county government (95-OMD-57).

In light of this authority interpreting the statute's text, the Committee was correct in insisting the subpoenaed testimony be taken in open session. The Committee subpoenaed Chiefs Hess and Schroeder to testify in connection with its investigation "into the actions and inactions of the consolidated local government surrounding the death of Breonna Taylor, the death of David McAtee, and related protests in Louisville." *See* July 17, 2020 B. Ackerson Letter, Compl., Exh. B. Specifically, the Committee seeks testimony concerning:

- vandalism, and the response to it;
- the use of tear gas and/or pepper balls, and how media came to be targeted or came in contact with the same;
- the placement of snipers on rooftops;
- the placement and use of lighting, and sound equipment;
- the warning to and communications with protestors;
- directives and any confusion relative to use of helmets or other equipment by officers;
- any "stand-down" order(s), directives, guidance given or passed along to government responders relative to protests, vandalism, etc.; and
- how or why law enforcement came to be at Dino's the night David McAtee was shot.

See July 30, 2020 Email from J. Ricketts to S. Amato et al., Compl., Exh. 3. This testimony is not *about* the litigation. None of these subjects bears on "matters commonly inherent to litigation, such as *preparation, strategy or tactics*." *Ratliff*, 955 S.W.2d at 924 (emphasis added). The Committee will not be discussing litigation strategy. Nor will it be considering a settlement offer. It will not be meeting with lawyers to discuss the strengths and weaknesses of any case. Rather, the Committee will be performing its core oversight function—something that *must* be done in public. *See* KRS 61.810(1).

Plaintiff asks this Court to extend the litigation exception to cover all *facts* that might be in dispute in a lawsuit. But that breathtaking expansion would be a radical re-writing of the Open Meetings law the General Assembly passed. Consistent with the Supreme Court's instruction that the litigation exception "must not be expanded to include general discussions of 'everything

tangential to the topic,'" *id.* (citation omitted), this Court should decline Plaintiff's request to expand the exception well beyond its intended scope.

The consequences of Plaintiff's position are plain enough in this case: the public will not have the right to see how its elected leaders are holding City officials accountable for their actions in response to the protests surrounding Breonna Taylor's death at the hands of the LMPD. As this Court recently recognized in another Open Meetings Case, "[h]ow [the Metro Council] holds the Mayor accountable or not is undoubtedly the public's business." Order Granting Temporary Injunction, p. 4, *Courier-Journal, Inc. v. Louisville Metro Council*, No. 20-CI-4152 (Jefferson Cir. Ct. July 30, 2020). Thus, "[a]ll such discussions most certainly should be made public." *Id.*

But the natural consequences of accepting Plaintiff's argument are even more troubling when considered in light of the typical Open Meetings disputes that arise across the Commonwealth every day. The litigation exception applies when the risk of litigation is "more than 'remote.'" 11-OMD-162. Any number of public policies or subject matters *could* give rise to litigation. And, if the litigation extended to the *facts* underlying a public agency's actions, then an agency could hold all discussions of proposed policy alternatives, or all oversight hearings, behind closed doors on the theory they might get sued. That would run directly counter to the General Assembly's command "that the formation of public policy is public business and shall not be conducted in secret." KRS 61.800.

Moreover, accepting Plaintiff's position would transform the Open Meetings Law into a way to shield information that even the attorney-client privilege does not protect. In Kentucky, the privilege only protects communications between a lawyer and a client, *see* KRE 503—not underlying *facts* about which a client might communicate with an attorney or other party. It is black letter law that "[t]he privilege 'protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege,' and 'is triggered only by a client's request for legal, as

contrasted with business, advice.'" *Lexington Pub. Library v. Clark*, 90 S.W.3d 53, 60 (Ky. 2002) (citations omitted). Here, the Committee has not sought any testimony about communications between the Plaintiff and its attorneys; it simply seeks to understand what is happening on the streets of the city in a time of great unrest. There is no basis to extend an Open Meetings exception meant to protect that attorney-client relationship well beyond the bounds of what that underlying privilege would protect.

Simply put, the testimony the Committee seeks is not protected by the litigation exception. This Court may resolve the case on that basis alone. But even if the litigation exception were arguably relevant, it still would not apply for the reasons articulated below.

II. The Metro Council is Not a Party to the *Scott* Lawsuit.

The Committee could not have invoked KRS 61.810(1)(c) for an entirely separate reason: it is not a party to the *Scott et al. v. Louisville/Jefferson County Metro Government* lawsuit that, in Plaintiff's view, requires the closed session testimony.

The Attorney General resolved a virtually identical appeal in 93-OMD-119. There, the Louisville Firefighter's Pension Fund invoked the litigation exception to go into closed session to discuss a lawsuit to which it was not a party: litigation involving the Louisville *Policemen's* Pension Fund. The Attorney General held that was improper:

> This office cannot condone the invoking of KRS 61.810(1)(c) when the agency in closed session does nothing more than monitor cases which have not been filed against or on behalf of the public agency attempting to utilize the exception. To do so would be an improper and unauthorized expansion of the exception. Generally, the discussion of cases in which the public agency is not a party plaintiff or defendant must be conducted in open and public sessions.

93-OMD-119; *see also* 97-OAG-001 ("KRS 61.810[(1)(c)] . . . is intended to permit a public agency to maintain the confidentiality of *its* litigation strategy *when it is a party to the litigation*" (quoting OAG 91-141)). The Attorney General emphasized that "[i]f the agency goes into closed session solely to

discuss litigation to which the agency is not a party, then the agency is in violation of the Open Meetings Law, *even if the agency has been sued or threatened with litigation*." 93-OMD-119 (emphasis added).

That is precisely the case here. Louisville Metro Council is not a party to the *Scott* litigation. Rather, that suit was filed against the same party that is suing the Metro Council here: Louisville Metro Government. Louisville Metro Government cannot sue itself, illustrating that the Metro Council and Metro Government are indeed separate parties.

Perhaps most telling of all, the Plaintiff in this case is (upon information and belief) represented by the very same law firm that has been engaged to work with the County Attorney to defend the *Scott* action. Plainly, those attorneys could not be suing Metro Council in this action if they simultaneously represented the Metro Council in the *Scott* case. *See, e.g.*, Ky. SCR 3.130(1.7) (entitled "Conflict of interest: current clients").

III. The Metro Council is Not a Party to the *Scott* Lawsuit.

The litigation exception does not apply for a final, related reason. The party that *is* a defendant in the *Scott* litigation—Metro Government—is not subject to the Open Meetings Law. That Act defines "public agency" to include, as relevant here "[e]very county and city *governing body*, *council*, school district board, special district board, and municipal corporation." KRS 61.805(2)(c) (emphasis added). That definition includes the Metro Council, but *not* Metro Government *per se*. Indeed, neither the Mayor nor the LMPD are bound to hold open meetings; only Metro Council is.

Therefore, the only party who is a defendant in litigation is not subject to the Open Meetings Act at all. Consequently, the testimony from City officials is not "subject to" any portion of the Act, including KRS 61.810. KRS 67C.103(14)(b) simply does not apply.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion for a Preliminary Injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was served via electronic mail and U.S. Mail this 19th day of August 2020, upon the following:

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