

MEMORANDUM

To: Citizens Review Board Work Group
From: Hollie Hopkins
Legislative Service Director, Jefferson County Attorney's Office
Date: June 1, 2020
Re: Subpoena Power

This memo details the research done to date on the subpoena power generally, and previous delegations of that power to Metro Government, which was discussed briefly at the May 29 work group meeting.

Subpoena power can only be granted to a local government, or to a state or local governmental agency, by state statute. Subpoena powers are tightly drawn by the statutes, and the powers generally are authorized to be used in connection with investigations or proceedings where a body is resolving a dispute (like, for example, deciding a claim filed with the local Human Rights Commission). Sometimes the agency has the power itself to issue a subpoena, and in other instances, it is granted the authority to seek a subpoena from a court.

Subpoenas are enforced through Kentucky courts. If someone refuses to comply with a subpoena, a petition can be filed for the court to order compliance with the request for documents or testimony. In evaluating the request to enforce a subpoena, a court would consider two questions before ordering compliance. First, a court would review whether that the issuing body has subpoena power. Second, a court would consider whether the information requested by the subpoena was necessary for purposes of the specific investigation or proceeding in which the subpoena was issued.

At this time, it's not clear that any existing statutory grant of subpoena power to Metro could be used by a newly created Citizens Review Board (CRB) or Office of Inspector General (OIG). The structure of a review board may offer a mechanism to use an existing power, but that remains to be seen based on the recommendations of the committee and the resulting legislation. The General Assembly has the authority to expressly grant a CRB or OIG subpoena power, and has regularly vested both state and local governmental agencies with that power.

General principles regarding the subpoena power

First, local governmental bodies have only those powers granted to them by the Kentucky General Assembly:

“Under the present Constitution, and as firmly reiterated by the court, counties and cities have only those powers expressly delegated by state legislation.”¹

Second, the mere grant by the General Assembly to a local government of the power to enact local laws does not carry with it automatically the power to issue subpoenas. The subpoena power either must be expressly granted by the legislature, or necessarily inherent in another power that is expressly granted to the local government by the General Assembly. As a result, a local government cannot give itself the power to issue subpoenas. This principle is set forth in a case involving the old City of Louisville Board of Aldermen and Mayor Bill Stansbury.

In 1978, the former Board of Alderman passed a Resolution creating a Select Committee of Inquiry composed of five Board members, and granting that Committee the power to conduct an investigation into the activities of Mayor Stansbury. In this same Resolution, the Board also authorized itself, through its Select Committee, to compel the attendance of witness to “determine the extent, if any, of any illegal, improper, or unethical activities by the Mayor.” Mayor Stansbury vetoed the Resolution, The Board overrode that veto, and also enacted an Ordinance expressly granting the Committee the subpoena power. Both the trial court and the Court of Appeals prevented the Board from exercising any subpoena power based solely on its legislatively authority.²

The Kentucky Supreme Court agreed, and held that that the power to legislate does not automatically carry with it the power to issue subpoenas:

[W]e hold that legislative power of a municipal corporation, of itself, does not embrace by implication the power to compel testimony and administer oaths to witnesses, or to confer similar authority to a committee.³

One reason offered by the court for this holding is the awesome power of the subpoena process:

The authority to subpoena witnesses and compel them to give evidence is too powerful, and too susceptible of abuse, to be implied in the absence of utter necessity. It is a tool of inquisition, short only of the rack and screw.⁴

¹ *Fiscal Court of Jefferson County v. City of Louisville*, 559 S.W.2d 478, 482 (Ky. 1977) (quoting *A Comparison of the Present and the Proposed Kentucky Constitutions*, L.R.C. Info. Bull. # 52 (1966) at p. 61.)

² *Maupin v. Stansbury*, 575 S.W.2d 695, 697 (Ky. App. 1978).

³ *Id.* at 172.

⁴ *Id.* at 171.

While the court found the subpoena power was not implicit in the power to legislate, it stated that the subpoena power was implicit in the express power granted to the Board by the General Assembly to investigate and remove the Mayor:

The express authority conferred by KRS 83.660 upon the Board of Aldermen to sit in judgment of charges against the mayor, and to remove him from office in consequence of those charges, does include as an indispensable concomitant the right to subpoena witnesses and physical evidence and to compel the giving of testimony under oath.⁵

The court stated that if the Board actually brought charges against the Mayor as permitted by KRS 83.660, it could then issue subpoenas in the context of those specific proceedings.

In short, a local jurisdiction cannot grant itself the subpoena power just because it has the power to enact local laws. That power to issue subpoenas must come from an act of the General Assembly. Local governments can acquire that power in two ways. First, the state statute can expressly provide that the local government has the power to issue subpoenas in specific circumstances. Second, the state statute can vest a local government with some other express power that cannot be effectively exercised absent the authority to issue a subpoena.

Statutory grants of subpoena power

The General Assembly regularly has delegated the power to issue subpoenas to state and local government entities. A few examples of delegations to state agencies include KRS 7.320 (Legislative Research Commission); KRS 61.670 (Kentucky Registry of Election Finance); KRS 278.230 and 320 (Public Service Commission). Each of these statutes spells out the specific purposes for which the agency is authorized to issue a subpoena.

Some Louisville Metro agencies have subpoena power through statutes that apply more broadly to specific boards or agencies regardless of their location in the Commonwealth. For example, KRS 100.231 grants subpoena power to all boards of zoning adjustment in connection with questions before those boards. KRS 100.407 grants subpoena authority to all planning commissions that have the power to enforce binding elements.

KRS 344.320 presents a slightly different situation. That statute authorizes a local government to permit a local human rights commission to seek subpoenas through a circuit court. This is not a direct grant of subpoena power, but a direct grant to local governments to authorize the use of subpoenas if they choose to do so. Metro has

⁵ *Id.* at 172.

exercised this legislatively granted power to permit our local Human Rights Commission to seek subpoenas in Jefferson Circuit Court. See LMCO 92.08(B).

Express delegations of subpoena power in KRS Chapter 67C

The General Assembly has made four express grants of subpoena power to Louisville Metro in KRS Chapter 67C, and one express grant of the authority to Metro to delegate subpoena power to another Metro agency.

KRS 67C.103

In 2017, the statute was amended to provide Metro Council with investigative and audit powers for specific purposes outlined by the General Assembly. KRS 67C.103(13(f)). The statute required Metro Council to establish a Government Oversight and Audit Committee (GOAC) to facilitate the investigations. In connection with those investigations, the GOAC was granted the power to issue subpoenas for testimony or documents to a limited group of entities and individuals to obtain information “pertinent to the investigation.” KRS 67C.14(b)(2).

The legislature allowed Metro Council to make a very limited delegation of the subpoena power that the statute granted to the GOAC. Metro Council is permitted to (and has) delegated subpoena power to the Louisville/Jefferson County Ethics Commission to gather documents and testimony “relevant to possible violations of the code of ethics.” KRS 65.003(7); KRS 67C.103(14)(e). The General Assembly clearly prohibited any further delegation by Council of GOAC’s subpoena power to any other body not part of Metro Council:

Except as provided in KRS 65.003(7), the legislative council of the consolidated local government shall not delegate those powers [to issue subpoenas and administer oaths] to any other entity or entities not a part of the legislative council of the consolidated local government.

KRS 67C.103(14)(e).

KRS 67C.119

This statute outlines the requirements for the affirmative action system in Louisville Metro, including a system for complaints and hearings for violations of the affirmative action plan, and appeals of those decisions. In the event of an appeal from a decision on an affirmative action complaint, the board established to hear those appeals may issue subpoenas for materials requested by either party or that board itself believes are required to properly resolve the case.

KRS 67C.325 and KRS 67C.326

The other two delegations of subpoena power by the General Assembly to Louisville Metro both relate to the LMPD. KRS 67C.301-.327 provides for the creation and operation Metro's Police Force Merit System. The Merit Review Board is responsible for personnel matters for the LMPD officers, including classification, qualifications, hiring, promotion, demotion, suspension or other discipline. KRS 67C.303(1).

KRS 67C.325 provides for procedural due process for those officers subject to departmental disciplinary action, giving them the right to be heard and to confront their accusers in connection with these hearings. The statute grants the Merit Review Board, through its chair, the power to issue subpoenas to gather documents or testimony it feels is necessary for deciding the case. The chair may also, "upon a showing or proper need", issue subpoenas for other testimony or documents that either the officer or the police chief requests for purposes of the Merit Board proceedings.

KRS 67C.326 provides for similar procedural due process rights for an officer in connection with an individual citizen's complaint against an officer. In any hearing on a citizen complaint, the body conducting the hearing "shall" subpoena any testimony or documentary evidence requested by either the charging party or the accused officer. If a witness fails to comply with the subpoena, the body conducting the hearing has the option to report the failure to the circuit court, which can compel the party to comply through contempt of court proceedings.