

**Commonwealth of Kentucky**  
**OFFICE OF THE ATTORNEY GENERAL**  
**Office of Civil and Environmental Law**  
**Opinions Branch**

**OPEN RECORDS**  
**and**  
**OPEN MEETINGS**

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This outline contains a summary of the laws pertaining to Kentucky's Open Records and Open Meetings Acts and how those laws have been interpreted by the Attorney General and the courts. The Attorney General provides the outline to assist public officials and others in complying with these laws. Although the outline contains references to specific cases and decisions regarding the application of the Open Records and Open Meetings Acts to particular situations, the reader should be aware that requests for public records, and complaints about public meetings, must be evaluated on a case by case basis, and that the authorities cited are not necessarily dispositive of a particular request or complaint. In addition, while the authorities cited are current as of February 2006, the outline does not reflect any subsequent legislative or judicial changes in the law.

The Attorney General also publishes two brochures pertaining to Kentucky's Open Records and Open Meetings Acts. The first brochure, entitled "Your Duty Under the Law," is distributed to public officials pursuant to KRS 15.257 along with "Managing Public Records," a brochure prepared by the Department for Libraries and Archives, to provide basic information about the laws pertaining to open records and open meetings as well as the laws pertaining to records management. The Attorney General also publishes a brochure entitled "Protecting Your Right to Know" to assist members of the public in obtaining access to public records. These brochures are available on the Attorney General's website at [ag.ky.gov](http://ag.ky.gov).

The Office of the Attorney General welcomes suggestions for improvements to this work as well as ideas for future publications. Comments may be sent to the Attorney General's Office, Attn: Amye L. Bensenhaver, Opinions Branch, Capitol Building, Suite 118, 700 Capitol Avenue, Frankfort, Kentucky 40601-3449.

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## Related Sources

The following is a list of related sources designed to assist agencies in properly managing their records and responding to open records requests:

1. Enterprise Architecture Standard 4060, “Record Keeping – Electronic Mail.”

*<http://gotsource.ky.gov/dsweb/Get/Document-20485/Standard+4060+Electronic+Mail.doc>*

2. Enterprise Architecture Standard 2370, “Electronic Commerce – Electronic Signature.”

*[http://.gotsource.ky.gov/dsweb/Get/Document-9357/2370\\_-\\_Electronic\\_Commerce\\_-\\_Electronic\\_Signature.doc](http://.gotsource.ky.gov/dsweb/Get/Document-9357/2370_-_Electronic_Commerce_-_Electronic_Signature.doc)*

3. Enterprise Architecture Standard 4050, “Record Keeping – General”

*<http://gotsource.ky.gov/dsweb/Get/Document-9406/4050+Recordkeeping+-+General.doc>*

4. Guidelines for Managing E-Mail in Kentucky State Government.

*<http://www.gotsource.net/dscgi/ds.py/Get/File-20270/Appendix+G+-+Guidelines+for+Managing+E-Mail+in+Kentucky+State+Government.doc>*

5. “Status of E-Mail as a Public Record.”

*<http://gotsource.ky.gov/dsweb/Get/Document-54215/Status+of+Electronic+Mail+as+a+Public+Record.doc>*

6. “Internet and Electronic Mail Acceptable Use Policy (C10-060)”

*[http://gotsource.ky.gov/dsweb//Get/Document-5282/CIO-060%2B--%2BEmail%2Band%2BInternet%2BAUP%2B-%2Brev%2BNov\\_05.doc](http://gotsource.ky.gov/dsweb//Get/Document-5282/CIO-060%2B--%2BEmail%2Band%2BInternet%2BAUP%2B-%2Brev%2BNov_05.doc)*

7. Technology Analysis and Support Services

*<http://www.kdla.ky.gov/recmanagement/technology.htm>*

8. Guidelines for Responding to Open Records Requests for Public Records in a Database

*<http://www.kdla.ky.gov/recmanagement/DatabasesasPublicRecord.pdf>*

9. Information/Services for Government Records Managers

*<http://www.kdla.ky.gov/recmanagement.htm>*

10. State Records Retention Schedules

*<http://www.kdla.ky.gov/recmanagement/stateschedule.htm>*

11. Local Government Records Retention Schedules

*<http://www.kdla.ky.gov/recmanagement/localschedule.htm>*

12. General Schedule for Electronic and Related Records

*<http://www.kdla.ky.gov/recmanagement/schedules/erecordsgeneral.pdf>*

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# THE KENTUCKY OPEN RECORDS ACT

## **KRS 61.870 - KRS 61.884**

The Open Records Act was originally enacted by the General Assembly in 1976 and became effective on July 15, 1976. The Act was first amended in 1986, and underwent substantial amendment in the 1994 Regular Session of the General Assembly. Those amendments took effect on July 15, 1994 (House Bill 64).

### **I. Purpose of the Open Records Act**

- A.** The Open Records Act contains the following statement of policy at KRS 61.871:

The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

- B.** The 1994 legislation amending the Act contains additional legislative findings at KRS 61.8715:

The General Assembly finds an essential relationship between the intent of this chapter and that of KRS 171.410 to 171.740, dealing with the management of public records, and of KRS 11.501 to 11.517, 45.253, 171.420, 186A.040, 186A.285, and 194A.146, dealing with the coordination of strategic planning for computerized information systems in state government; and that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. The General Assembly further recognizes that while all government agency records are public records for the purpose of their

management, not all these records are required to be open to public access, as defined in this chapter, some being exempt under KRS 61.878.

*See*, 04-ORD-032, 00-ORD-122, 00-ORD-46, 99-ORD-106, 99-ORD-59, 98-ORD-173, 97-ORD-143, 97-ORD-103, 97-ORD-82, 96-ORD-108, 95-ORD-165, 95-ORD-58, 95-ORD-48, 95-ORD-45, 95-ORD-43, 95-ORD-8, 94-ORD-142, 94-ORD-141, 94-ORD-140.

## **II. Mandate of the Open Records Act**

### **A. KRS 61.872(1) provides:**

All public records shall be open for inspection by any person, except as otherwise provided by [the Act] . . . .

### **B. In addition, KRS 61.884 provides:**

Any person shall have access to any public records relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the [exceptions to disclosure of records provided in KRS 61.878].

## **III. Definitions**

### **A. "Public record" is defined in KRS 61.870(2) as:**

All books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. 'Public record' shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of KRS 61.870 that are not related to functions, activities, programs, or operations funded by state or local authority.

*See*, 03-ORD-214, 03-ORD-196, 03-ORD-5, 02-ORD-160, 00-ORD-132 (e-mail as a public record), 00-ORD-206 (Department of Corrections criminal record database), 96-ORD-267, 96-ORD-259, 96-ORD-103, 96-ORD-64, 96-ORD-41, 95-ORD-156, 95-ORD-126, 95-ORD-125, 95-ORD-119, 94-ORD-



108, 94-ORD-6, 93-ORD-105, and *Kentucky Central Life Insurance Co. v. Park Broadcasting of Kentucky, Inc.*, Ky. App., 913 S.W.2d 330 (1996) (holding that records of private insurance company undergoing rehabilitation do not lose their private status simply because the rehabilitator has used, possessed, or had access to them).

**B.** "Software" is defined in KRS 61.870(3)(a) and (b) as:

The program code which makes a computer system function, but does not include that portion of the program code which contains public records exempted from inspection as provided by KRS 61.878 or specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system.

The operating system, application programs, procedures, routines, and subroutines such as translators and utility programs, but . . . not . . . that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency.

**C.** "Public agency" is defined in KRS 61.870(1) as:

**1.** Every state or local government officer;

**a.** *Kentucky Central Life Insurance Co. v. Park Broadcasting*, Ky. App., 913 S.W.2d 330 (1996) (holding that the commissioner, as rehabilitator of private insurance company, occupies a legally separate role from that of his official capacity as regulator of the state insurance department, and therefore falls outside the purview of this provision).

**2.** Every state or local government department, division, bureau, board, commission, and authority;

**a.** 97-ORD-66, 95-ORD-133, 95-ORD-122.

**b.** *But see*, KRS 7.119c - requests for records of the Legislative Research Commission or the General Assembly must be

directed to the director of the Legislative Research Commission and his/her decision is subject to review by the Legislative Research Commission.

3. Every state or local legislative board, commission, committee, and officer;
  - a. *See*, III.C.2.b. of this outline
4. Every county and city governing body, council, school district board, special district board, and municipal corporation;
5. Every state or local court or judicial agency;
  - a. Despite this language, records of the courts and judicial agencies are not subject to the Open Records Act. *Ex Parte Farley, Ky.*, 570 S.W.2d 617 (1978); *York v. Commonwealth, Ky. App.*, 815 S.W.2d 417 (1991). These records are placed under the exclusive jurisdiction of the Court of Justice pursuant to KRS 26A.200 and KRS 26A.220.
  - b. *See*, 04-ORD-037, 02-ORD-235, 02-ORD-24, 99-ORD-24, 98-ORD-86, 98-ORD-6, 97-ORD-138, 96-ORD-173, 96-ORD-84, 96-ORD-82, 95-ORD-89, 93-ORD-122, 93-ORD-47, 92-ORD-1144, OAGs 91-193, 91-45, 85-9, 79-174, 78-262.
6. Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
  - a. 03-ORD-214, 97-ORD-66.
  - b. *See*, III.C.2.b. of this outline.
7. Any body created by state or local authority in any branch of government;
  - a. *See*, III.C.2.b. of this outline.
8. Any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;

- a. *Hardin County, Ky. v. Valentine*, Ky. App., 894 S.W.2d 151 (1995). Hospital patient records are not public records, and therefore not subject to the statutory reproduction cost limitation of KRS 61.874.
  - b. *Citizens for a Better Environment, Inc. v. Ohio County Industrial Foundation, Inc.*, Ky. App., 156 S.W.3d 307 (2004). Private, nonprofit corporation receiving funds obtained through fiscal court's imposition of occupational tax, and expending or paying out funds under contract with fiscal court, is a public agency for open records purposes.
  - c. *See*, 04-ORD-012, 02-ORD-222, 00-ORD-175, 97-ORD-65, 96-ORD-99, 96-ORD-15, 95-ORD-91, 95-ORD-79, 95-ORD-78, 95-ORD-65, 94-ORD-98, 94-ORD-13, 94-ORD-1, 93-ORD-90, OAGs 92-62, 91-184, 90-63, 90-59; *compare*, 97-ORD-114.
9. Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j) or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;
- a. *Kentucky Central Life Insurance Co. v. Park Broadcasting*, Ky. App., 913 S.W.2d 330 (1996). Rehabilitator of private insurance company is not a public agency by virtue of the fact that he is appointed by the court; 97-ORD-66.
10. Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection;
- a. *University of Louisville Foundation v. Cape Publications*, Ky. App., 2002-CA-0-01590-MR (11/21/03) unpublished opinion holding that Foundation was established and created by University of Louisville and is controlled by the University and is therefore a public agency per KRS 61.870(1)(j).
  - b. *See*, 96-ORD-21, 94-ORD-67, 94-ORD-13.
  - c. *See*, III.C.2.b. of this outline.

11. Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection.

a. *Frankfort Publishing Co., Inc. v. Kentucky State University, Ky.*, 834 S.W.2d 681 (1992). Reasoning used by the Court of Appeals in determining the proper scope of the term “public agency,” based on the placement of punctuation, produces a result which is inconsistent with the legislative intent of the Act. The phrase “or agency thereof,” as it appears in the original definition of “public agency,” is an all encompassing one intended to define as a public agency any agency of a governmental unit.

b. *See*, 92-ORD-1245, 92-ORD-1232.

D. “Commercial purpose” is defined in KRS 61.870 (4)(a) and (b) as:

1. The direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee.

a. *See*, 02-ORD-89, 94-ORD-80, 94-ORD-66.

2. “Commercial purpose” does not include:

a. Publication or related use of a public record by a newspaper or periodical (*see*, 02-ORD-19);

b. Use of a public record by a radio or television station in its news or other informational programs; or

c. Use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties.

E. “Media” is defined in KRS 61.870(7) as:

The physical material in or on which records may be stored or represented, and which may include, but is not limited to paper, microform, disks, diskettes, optical disks, magnetic tapes, and cards.

F. "Mechanical processing" is defined in KRS 61.870(8) as:

Any operation or other procedure which is transacted on a machine, and which may include, but is not limited to a copier, computer, recorder or tape processor, or other automated device.

#### **IV. General Requirements for Public Agency**

A. Suitable Facilities - Each public agency must make suitable facilities available for the exercise of the right of inspection of public records. KRS 61.872(1).

*See, 03-ORD-83, 02-ORD-114, 02-ORD-94, 99-ORD-96, 00-ORD-8 (use of agency computer to inspect "original" public records), 93-ORD-46.*

B. Time for Inspection - Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency. KRS 61.872(2).

*See, 03-ORD-86, 98-ORD-69, 96-ORD-164, 93-ORD-48, 92-ORD-1439, OAG 92-13.*

1. A person may inspect the public records;

a. During the regular office hours of the public agency; or

b. By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian

shall mail the copies upon receipt of all fees and the cost of mailing. KRS 61.872(3).

*See, Tri-County Animal Shelter v. Randy Skaggs, Ky.App., 2001-CA-001097-MR and 2001-CA-001197-MR (12/06/02) unpublished opinion holding that KRS 61.872(3)(b) provides the method for copying and distributing records and circuit court order requiring requester to bring his own copy machine and paper to the agency to make copies vacated with directions to agency to comply with statutory requirements of KRS 61.872(3)(b).*

*See, 00-ORD-75, 00-ORD-8, 97-ORD-12, 97-ORD-3, 95-ORD-52; compare, 98-ORD-157 (recognizing that inmate's right to conduct on-site inspection may be restricted).*

C. Official Custodian - Each public agency should appoint an official custodian of the agency's records.

1. "Official Custodian" is defined in KRS 61.870(5) as:

[T]he chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control.

2. "Custodian" is defined in KRS 61.870(6) as:

[T]he official custodian or any authorized person having personal custody and control of public records.

*See, 96-ORD-61, 94-ORD-99, 94-ORD-12, OAGs 92-51, OAG 92-31; compare, 00-ORD-229, 01-ORD-94, 98-ORD-100, 94-ORD-155, (casual possession of record) and 96-ORD-7 (concurrent possession of the same record).*

D. Rules and Regulations - KRS 61.876

1. Each public agency must adopt rules and regulations in conformity with the Open Records Act to:

a. Provide full access to public records;



## V. Procedures

### A. Application to inspect records - KRS 61.872(2)

1. The application should be made to the official custodian of the public agency's records.
2. Written application - The official custodian may require written application describing the records to be inspected.

*See*, 03-ORD-086, 02-ORD-246, 02-ORD-89, 99-ORD-129, 97-ORD-175, 96-ORD-259, 96-ORD-55, 96-ORD-19, 95-ORD-88, 95-ORD-60, 94-ORD-101, OAG 76-588.

*See also*, *George William Sykes v. James Kemper*, Ky. App., 2000-CA-000714-MR (3/30/01), unpublished decision holding that failure to issue timely response to open records request not excused by requester's failure to identify request as a request made under KRS 61.870 *et seq.*

3. Specificity of request - The applicant must describe the requested records with enough specificity to allow the public agency to identify and locate the records.

*See*, 03-ORD-213, 03-ORD-12, 02-ORD-161, 98-ORD-17, 97-ORD-86, 97-ORD-46, 96-ORD-171, 96-ORD-91, 95-ORD-108, 95-ORD-68, 94-ORD-108, 94-ORD-12, 93-ORD-116, OAGs 92-56, 91-58, 91-7, 90-83, 89-81, 89-8.

- a. *Department of Corrections v. Chestnut*, Ky. App., 2004-CA-001497-MR (04/04/03) unpublished opinion holding that a request is sufficiently specific, and the statute satisfied, "as long as the custodian can identify what documents the applicants wish to see . . . ."

- a. The public agency is not obligated to honor a "standing request" for records. *See*, 99-ORD-110, 97-ORD-18, 95-ORD-43, OAG 91-78.

4. Identity of requester - The identity of the person seeking access to a public record is irrelevant; all persons have the same standing to request access to public records.



*See, 02-ORD-89, OAGs 91-129, 89-86, 82-394, 80-641, 79-582, 79-546.*

**B. Response to application to inspect records**

1. Application to wrong person - If the application is sent to someone who does not have custody or control of the requested public record, the person who receives the application shall notify the applicant of that fact and shall provide the applicant with the name and location of the official custodian of the public record. KRS 61.872(4). This does not authorize a public agency to refuse inspection of documents that are within its custody or control based on the agency's assertion that the records may be obtained more easily or more appropriately from another agency.

*See, 98-ORD-21, 96-ORD-227, 95-ORD-115, 95-ORD-81, 95-ORD-61, 94-ORD-155, 93-ORD-65, OAGs 91-21, 90-71.*

2. Record not available - The official custodian shall notify the applicant if the public record is in active use, in storage, or not otherwise available, and shall designate a place, time, and date for inspection of the public record not to exceed three (3) days from receipt of the application. Inspection may be delayed if a detailed explanation of the cause for the delay is given and the place, time, and earliest date on which the public record will be available for inspection is stated. KRS 61.872(5).

*See, 02-ORD-240, 02-ORD-142, 01-ORD-38, 98-ORD-17, 95-ORD-105, 95-ORD-17, 94-ORD-75, 92-ORD-1567, 92-ORD-1421, OAG 91-200.*

3. Nonexistent records - If requested records do not exist or cannot be located, the public agency should specifically indicate the fact to the person who has requested the records and indicate what steps were taken to locate the record.

*See, 02-ORD-208, 98-ORD-200, 98-ORD-154, 98-ORD-80, 98-ORD-23, 97-ORD-180, 96-ORD-164, 96-ORD-151, 96-ORD-101, OAGs 91-220, 91-101, 90-69, 90-26, 86-38.*

- a. The public agency is not obligated to create records to satisfy a particular open records request. 02-ORD-112, 97-ORD-56, 96-ORD-139, 95-ORD-48.

*See also, 97-ORD-31, 96-ORD-171, 95-ORD-165, 95-ORD-105, 95-ORD-96, (discussing adequacy of agency's search for records).*

4. The public agency must respond to the application:
  - a. In writing;
  - b. To the person making the request;
  - c. Within three (3) days (excepting Saturdays, Sundays, and legal holidays). KRS 61.880(1).

*See, 01-ORD-94, 96-ORD-268, 96-ORD-168, 95-ORD-58, 93-ORD-134, 93-ORD-94, 93-ORD-88, 92-ORD-1422, OAGs 92-64, 91-178, 91-72, 91-30, 90-123.*

*See also, 96-ORD-207 (computation of time).*

5. The response must include:
  - a. The public agency's statement of whether it will comply with the request for inspection;
  - b. The public agency's statement, if inspection of any or all of the requested public records is denied, of the specific exception authorizing the withholding of the record withheld, and a brief explanation of how the exception applies to the record(s) withheld. KRS 61.880(1).

*See, 96-ORD-46, 95-ORD-162, 95-ORD-131, 95-ORD-114, 95-ORD-60, OAGs 91-72, 91-48, 91-44, 91-41, 91-31, 91-30.*

- c. *Edmondson v. Alig*, Ky. App., 926 S.W.2d 856, 858 (1996), "KRS 61.880(1) requires the custodian of records to provide particular and detailed information in response to a request for documents."
- d. In 96-ORD-56, the Attorney General admonished a public agency for "habitually misciting the appropriate exemption." Recognizing that the error was a technical one, and expressing reluctance to declare that an agency violated the Open Records Act on a technicality, the Attorney General

nevertheless warned that the procedural requirements of the Act “are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request.”

6. The response shall be issued by the official custodian or under his authority. KRS 61.880(1).

*See, 94-ORD-15.*

7. The response constitutes final agency action. KRS 61.880(1).
8. As amended, KRS 61.880(2) no longer requires an agency to send a copy of responses denying inspection to the Attorney General.

C. Copies of records - KRS 61.874

1. Original copies - No person shall remove the original copies of the public records from the offices of a public agency without the written permission of the official custodian of the records. KRS 61.872(1).

2. The applicant has the right to make abstracts and memoranda of the public records that are inspected. KRS 61.874(1).

3. The applicant has the right to obtain copies of:

- a. All public records not exempted by the terms of KRS 61.878.

*See, 94-ORD-47; OAGs 89-66; 89-43; 89-27.*

- b. Public records other than written records if such duplication will not damage or alter the records. KRS 61.874(1).

- c. Refusal to provide copy of record, after inspection has been permitted, is inconsistent with KRS 61.874(1).

*See, 02-ORD-210.*

4. KRS 61.874(1) provides that the custodian may require a written request and advance payment of the prescribed fee, including postage where appropriate, when copies are requested. As amended, KRS 61.872(3) provides that the custodian of records can no longer require the applicant to appear in person to inspect the

public records before supplying copies of the records if the applicant's residence or principal place of business is outside of the county in which the public records are located, he precisely describes the records, and the records are readily available within the public agency. The official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

*See, 01-ORD-8, 97-ORD-131, 96-ORD-7, 95-ORD-90, 94-ORD-48.*

**5. Nonexempt public records used for noncommercial purposes - KRS 61.874(2)**

- a.** Nonexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. Agencies are not required to convert hard copy format records to electronic formats. KRS 61.874(2)(a).

*See, 95-ORD-12.*

- b.** The minimum standard format in paper form is defined as not less than 8 ½ inches x 11 inches in at least one (1) color on white paper, or for electronic format, in a flat file electronic American Standard Code for Information Interchange (ASCII) format. If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request. KRS 61.874(2)(b).

*See, 99-ORD-38, 95-ORD-12.*

**6. The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes but may not charge for the right to inspect. KRS 61.874(3).**

*See*, 03-ORD-4, 02-ORD-198, 02-ORD-89, 00-ORD-110, 99-ORD-186 (agency cannot require payment of sales tax for copies), 99-ORD-159, 99-ORD-102, 99-ORD-40, 96-ORD-159, 96-ORD-3, 95-ORD-110, 95-ORD-82, 94-ORD-145, 94-ORD-90.

- a. The fee shall not exceed the actual cost for making the copies including the costs of the media and mechanical processing, and shall not include the cost of staff required to make the copies. As amended, KRS 61.874(1) provides that when copies are requested, this fee may include the cost of postage.

*See*, 01-ORD-136, 98-ORD-95, 97-ORD-58, 96-ORD-273, 96-ORD-271, 94-ORD-43, 93-ORD-44, 92-ORD-1491; *compare*, 98-ORD-109 (\$3.00 copying charge for driving history records established by KRS 186.018(3) *but see*, *Transportation Cabinet v. Schwan's Technology Group*, 2003-CA-001063-MR (08/20/04) unpublished opinion distinguishing requested records from driving history records; OAG 92-79 (copying charge for records appearing on county clerks' fee schedule governed by KRS 64.012); *compare*, 02-ORD-218.

*See also*, *Woodward Hobson & Fulton L.L.P. v. Revenue Cabinet*, Ky.App., 69 S.W.3d 476 (2002) affirming Attorney General's decisions holding that it is improper to charge sales tax on photocopies of records provided under the Open Records Act.

- b. In *Friend v. Rees*, Ky. App., 696 S.W.2d 325 (1985), the court found ten cents a copy to be a reasonable fee for reproducing standard hard copy records.

*See*, OAG 92-79, 91-210, 91-193, 87-80, 84-91, 82-396, 80-421.

- c. Unless a public agency can substantiate that its actual costs exceed ten cents per page, based on the cost of media and mechanical processing, its copying charge will be deemed excessive, and in violation of the Open Records Act.

*See*, 94-ORD-149, 94-ORD-77, 92-ORD-1491, OAGs 92-79; 91-98; 89-9; 88-74; 84-91.

- d. If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may, at its discretion, provide the requested format and recover staff costs as well as any actual costs incurred. KRS 61.874(3).

*See, 99-ORD-136, 98-ORD-151, 96-ORD-251, 96-ORD-133.*

- f. Public agencies cannot charge requester for exercising their right of inspection and their right to make abstracts or records.

*See, 97-ORD-8.*

7. Nonexempt public records used for commercial purposes - KRS 61.874(4)

- a. Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee based on one or both of the following:

- i. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

- ii. Cost to the public agency of the creation, purchase, or other acquisition of the public records. KRS 61.874(4)(a), (b), and (c).

- b. The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee. KRS 61.878(4)(b).

*See, 95-ORD-17, 95-ORD-9.*

8. Online access - KRS 61.874(6)

- a. Online access to public records in electronic form may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements. Fees shall not exceed:
  - i. The cost of physical connection to the system and reasonable cost of computer time access charges; and
  - ii. If the records are requested for a commercial purpose, a reasonable fee based on the factors set forth in KRS 61.874(4).
  - iii. *See, 05-ORD-025.*

9. Unlawful use of public records - KRS 61.874(5)

- a. It is unlawful for a person to obtain a copy of any part of a public record for a:
  - i. Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to KRS 61.874(4)(b); or
  - ii. Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or
  - iii. Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television station shall not be held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for that commercial use.

- b.** A person who violates subsections (2) to (6) of KRS 61.874 shall be liable to the public agency from which the public records were obtained for damages in the amount of:
  - i.** Three (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated;
  - ii.** Costs and reasonable attorney's fees; and
  - iii.** Any other penalty established by law. KRS 61.8745.

## **VI. Exceptions to Right of Inspection**

- A.** The official custodian may refuse to permit inspection of public records, or mail copies thereof, if:
  - 1.** The application places an unreasonable burden in producing public records; or
  - 2.** The custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency. As amended, KRS 61.872(6).
    - a.** Refusal for either of these reasons must be sustained by clear and convincing evidence. KRS 61.872(6).
    - b.** *See*, 03-ORD-211, 00-ORD-71, 99-ORD-179, 99-ORD-69, 99-ORD-14, 99-ORD-4, 97-ORD-153, 97-ORD-129, 97-ORD-88, 97-ORD-26, 97-ORD-6, 96-ORD-201, 96-ORD-51, 96-ORD-42, 96-ORD-9, 95-ORD-139, 95-ORD-121, 95-ORD-2, 94-ORD-99, 93-ORD-72, 92-ORD-1261, 92-ORD-1190, OAGs 91-168, 91-58, 91-42, 90-112, 90-101, 89-85, 89-79, 89-76, 86-52.
    - c.** *See also*, 03-ORD-26, 95-ORD-105 (involving duplicative requests for the same records).
    - d.** KRS 61.872(6) as a "security" exemption.  
  
*See*, 97-ORD-129 and 95-ORD-121, *compare* 02-ORD-211 and 99-ORD-51.



- B. A public agency may refuse to permit inspection of public records if the public records have been placed under a court order of confidentiality; the entry of such a court order removes the public records from the application of the Open Records Act. A public agency may otherwise refuse to permit inspection of public records marked "confidential" only if consistent with one or more of the exceptions codified at KRS 61.878(1)(a) through (l).

*See, 94-ORD-138, 93-ORD-93, OAGs 91-121, 89-22.*

- C. A public agency is not obligated to honor a request for information, as opposed to a request for specifically described records.

*See, 02-ORD-213, 02-ORD-175, 99-ORD-71, 97-ORD-182, 96-ORD-150, 96-ORD-146, 96-ORD-53, 95-ORD-150, 95-ORD-131.*

- D. KRS 61.878 provides that the following public records are excluded from the application of the Open Records Act and are subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.

*See, 00-ORD-97, 99-ORD-145, 99-ORD-126, 99-ORD-125, 99-ORD-64, 98-ORD-87, 98-ORD-39, 98-ORD-15, 97-ORD-163, 97-ORD-41, 96-ORD-263, 95-ORD-18, 94-ORD-19, 94-ORD-19, and Department of Corrections v. Courier-Journal and Louisville Times, Ky. App., 914 S.W.2d 349 (1996) The term "party," which appears in this provision, is not synonymous with the term "person." Since requester was not a proper party to litigation, KRS 61.878(1) was inapplicable and public agency improperly relied upon it in denying access to records relating to litigation.*

*See also, 96-ORD-138, OAG 89-65, OAG 82-169 (although open records provisions should not be used by parties to litigation as a substitute for requests under discovery, there is no indication in the Open Records Act that an agency's obligations under the Act are suspended in the presence of litigation).*

*See also, Kentucky Lottery Corporation v. Stewart, Ky. App., 41 S.W.3d 860 (2001) Public agency is not relieved of its duties under the Open Records Act because of actual or pending litigation; "[T]he gist of [the wording of KRS 61.878(1)] is not to terminate a person's right to use an open records*

request during litigation, but to limit a court on an open records request on *excluded records*, to those records that could be authorized through a court order on a request for discovery under the Rules of Civil Procedure governing pre-trial discovery.”

1. Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. KRS 61.878(1)(a).
  - a. In *Kentucky Board of Examiners v. Courier-Journal*, Ky., 826 S.W.2d 327 (1992), the court established a balancing of interests analysis in which the privacy interest in nondisclosure is balanced against the public’s right to be informed about what government is doing.
  - b. A similar balancing test is used by the federal courts in construing the federal Freedom of Information Act (“FOIA”). *See, e.g., United States Dept. of Justice v. Reporter’s Comm. for Freedom of the Press*, 48 US 749 (1989).
  - c. First determine if an individual has a cognizable privacy interest that KRS 61.878(1)(a) was intended to protect.
    - i. If so, balance that interest against the public’s interest in disclosure.
    - ii. Relevant factors: whether an open records related public purpose will be advanced by the disclosure and the magnitude of the privacy interest implicated.
    - iii. The identity of the requesting party is not a factor in assessing the public interest served by disclosure.
    - iv. *See*, 94-ORD-45, OAGs 91-130, 91-105, 91-62, 86-15, 83-286, 82-204.
  - d. Examples of information that does not, in general, constitute a clearly unwarranted invasion of personal privacy:
    - i. Name, position, work station, and salary of public employees.

*See*, 01-ORD-245, 99-ORD-173, 98-ORD-184, 98-ORD-171, 94-ORD-26, 93-ORD-45, OAGs 91-48, 87-84, 87-37, 76-717.

- ii. Portions of public employees' resumes reflecting relevant prior work experience, educational qualifications, and information regarding ability to discharge responsibilities of public employment.

*See*, 00-ORD-137, 00-ORD-90, OAGs 92-59, 91-202, 91-198, 91-41.

- iii. Reprimands to employees regarding job-related misconduct.

*See*, 04-ORD-031, 02-ORD-222, 02-ORD-140, 00-ORD-104, 99-ORD-39, 98-ORD-45, 97-ORD-128, 97-ORD-121, 96-ORD-86, 95-ORD-123, 95-ORD-47, 92-ORD-1515, OAGs 92-34, 92-17, 91-20.

*See also*, *Palmer v. Driggers*, Ky.App., 60 S.W.3d 591 (2001).

- iv. Lawsuit settlement documents.

*See*, 00-ORD-207, 00-ORD-5, 98-ORD-24, 97-ORD-29, 94-ORD-72, OAGs 92-34, 92-17, 91-20.

*See also*, *Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co.*, 941 S.W.2d 469 (1997).

- v. Identities of employees who testified in open Personnel Board hearings.

*See*, OAG 91-94.

- vi. Arrest records and incident reports of local police departments.

*See*, 99-ORD-27, 91-12, 82-388.

*But see*, 02-ORD-36 (identifying information in incident reports involving victims of sex crimes).

- vii.** Open records request letter and agency response.  
*See, 92-ORD-1440.*
- viii.** Detention center visitor log; city hall sign-in log.  
*See, 96-ORD-220, 93-ORD-102.*
- ix.** Letters of resignation submitted by public employees.  
*See, 97-ORD-121, 94-ORD-108.*
- x.** 911 dispatch log and tapes.  
*See, 02-ORD-092, 98-ORD-31, 95-ORD-29, 94-ORD-150, 94-ORD-144, 94-ORD-133.*  
  
*But see, Bowling v. Brandenburg, Ky. App., 37 S.W.3d 785 (2000).*
- xi.** Public employee timesheets.  
*See, 96-ORD-239.*
- xii.** Records reflecting improper use of public equipment.  
*See, 98-ORD-112, 98-ORD-92, 98-ORD-31, 96-ORD-238, OAG 86-21.*  
  
*But see, Stewart v. University of Louisville, Ky.App., 2001-CA-000980-MR and 2001-CA-001063-MR (08/02/02) unpublished opinion holding that in the absence of proof that public employee misused public computer, public's interest in disclosure of personal records in that computer is outweighed by employee's privacy interest. Factors considered: agency had no express policy forbidding employees' personal use of public computers and there was no evidence that employee was abusing public time or resources.*
- xiii.** Records revealing tax delinquency.

*See, 97-ORD-22, 97-ORD-9.*

- xiv.** Records relating to application to Governor for executive pardon.

*See, 01-ORD-29.*

- xv.** Records relating to qualification for licensure maintained by licensure board.

*See, 03-ORD-80.*

- xvi.** Voter Assistance Forms.

*See, 03-ORD-34.*

- xvii.** Names of persons who have obtained dog and kennel licenses that appear on records maintained by dog warden. *See, 03-ORD-247.*

- e.** Examples of information that does, in general, constitute a clearly unwarranted invasion of personal privacy:

- i.** Home address, social security number, medical records, and marital status of public employee.

*See, 97-ORD-176, 94-ORD-91, OAGs 91-35, 91-202, 91-185, 91-81, 91-48, 90-60, 87-37, 79-275.*

- ii.** Results of polygraph tests.

*See, 93-ORD-124, OAGs 90-144, 86-39.*

- iii.** Applications and resumes from unsuccessful applicants for state jobs.

*See, OAG 90-113; compare, 03-ORD-84.*

- iv.** Employee evaluations.

*See, 02-ORD-197, 96-ORD-275, 96-ORD-256, 96-ORD-51, 94-ORD-132, 94-ORD-108, 94-ORD-54, 92-ORD-*

1145, OAGs 91-62, 89-90, 86-15, 83-286, 77-394;  
*compare*, 96-ORD-206.

- v. Psychological and psychiatric records.

*See*, OAG 92-10.

- vi. Information contained in an ambulance run report.

*See*, 95-ORD-167, OAG 92-75. These records are specifically protected from disclosure by KRS 311A.190.

- vii. Home address and social security numbers of private citizens in agency files.

*See*, 95-ORD-151.

*See also*, *Zink v. Commonwealth, Dept. of Workers' Claims*, Ky.App., 902 S.W.2d 825 (1994).

- viii. Identity of juvenile victim of crime depending on the nature and circumstances of the crime and the impact on the juvenile of further disclosure.

*See*, 98-ORD-185, 98-ORD-123, 96-ORD-115.

- ix. Individual customer billing records of a public utility.

*See*, 96-ORD-176; *compare*, 96-ORD-237.

- x. Race and gender of public employees.

*See*, 96-ORD-252.

- xi. Records containing graphic details of violent crime if relatives of victims of crime will be traumatized by disclosure.

*See*, 00-ORD-162.

- xii. Names and addresses of members of Kentucky Teachers Retirement System.

See, 02-ORD-183.

**xiii.** Donor records.

See, *University of Louisville Foundation v. Cape Publications*, Ky. App., 2003-CA-002040-MR and 2003-CA-002049-MR (05/04/05) (petition for discretionary review granted 12/14/05) unpublished opinion holding that unless donor specifically waives the right to privacy, donor records should remain protected regardless of whether donor has specifically requested anonymity.

**xiv.** Identities and identifying information relating to rape victims that appears in an incident report.

See, *Cape Publications v. City of Louisville*, Ky. App., 147 S.W.3d 731 (2003) and 02-ORD-36.

**f.** *Kentucky Board of Examiners of Psychologists v. The Courier-Journal and Louisville Times Company*, Ky., 826 S.W.2d 324 (1992). Information contained in the Board's complaint file against a psychologist charged with sexual misconduct is not available to newspaper under the Open Records Act. Such information is subject to the exception relating to information of a personal nature the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

**i.** The act "exhibits a general bias favoring disclosure."  
*Board of Examiners*, at p. 327.

**ii.** "Given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of antagonistic interests."  
*Board of Examiners*, at p. 327.

**iii.** "[T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and

can only be determined within a specific contact.”  
*Board of Examiners*, at p. 328.

- g. *Beckham v. Board of Education, Ky.*, 873 S.W.2d 575 (1994). A person who is affected by a public agency’s decision to release a record may contest the agency’s decision in circuit court if disclosure would constitute a clearly unwarranted invasion of personal privacy.

*See*, 94-ORD-62.

- h. *Zink v. Commonwealth, Ky. App.*, 902 S.W.2d 825 (1994). Disclosure of information on workers compensation S.F.1 form, including claimant’s social security and telephone number, address, etc., constitutes a clearly unwarranted invasion of personal privacy. At page 829, the court recognized, “At its most basic level, the purpose of disclosure focuses on the citizens’ right to be informed as to what their government is doing. That purpose is not fostered however by disclosure of information about private citizens that reveals little or nothing about an agency’s own conduct.”

- i. *Lexington Fayette Urban County Government v. Lexington Herald-Leader Co., Ky.*, 941 S.W.2d 469 (1997). Confidentiality clause in document settling litigation between private citizen and governmental entity does not make the document exempt under the Open Records Act. At page 473 the Court reasoned, “In balancing the sacrosanct right of an individual to privacy against legitimate public concerns and the right of the public to inquiry into the working of government, we find that a settlement of litigation between private citizens and a governmental entity is a matter of legitimate public concern which the public is entitled to scrutinize.”

- j. *Mindy Hines v. Department of Treasury, Ky. App.*, 41 S.W.3d 872 (2001). Disclosure of information in unclaimed property database regarding value of individual units of unclaimed property constitutes a clearly unwarranted invasion of personal privacy. Treasury discharges its duty under the Open Records Act by releasing names and addresses of owners of unclaimed property, and the total values of the property it holds and disburses each year.



k. *Palmer v. Driggers*, Ky.App., 60 S.W.3d 591 (2001). Public has a legitimate interest in complaint filed against police officer, alleging that he neglected his duty by engaging in an improper relationship with another officer while on duty, that outweighed officer's privacy interest.

1. *See also, Kallstrom v. City of Columbus*, 136 F.3d 1055 (6<sup>th</sup> Cir. 1998); *Bloch v. Ribar*, 156 F.3d 673 (6<sup>th</sup> Cir. 1998); and *Déja Vu of Nashville Inc., et al. v. The Metropolitan Government of Nashville & Davidson County TN, et al.*, 274 F3d 377 (6<sup>th</sup> Cir. 2001) Recognizing a constitutional right to nondisclosure of certain types of private information that implicate a fundamental liberty interest. *But see, Henderson v. City of Chattanooga*, Tenn. Ct. App., 133 S.W.3d 192 (2003) Release of photographs of police officers did not violate officer's right of privacy.

2. Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute. KRS 61.878(1)(b).

3. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records. KRS 61.878(1)(c)1.

*See, Marina Management, Inc. v. Commonwealth of Kentucky*, Ky., 906 S.W.2d 318 (1995) Records containing confidential audited financial reports of privately owned corporation which were submitted to a public agency pursuant to a license agreement with the state are exempt from disclosure because disclosure would give an unfair advantage to competitors, and reports were disclosed confidentially.

*See*, 03-ORD-129, 01-ORD-222, 01-ORD-143, 01-ORD-87, 00-ORD-188, 99-ORD-201, 99-ORD-81, 96-ORD-221.

4. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally

recognized as confidential or proprietary, which are compiled and maintained:

- a. In conjunction with an application for or the administration of a loan or grant;

*See, 97-ORD-132.*

- b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;

*See, Hoy v. Kentucky Industrial Revitalization Authority, Ky., 907 S.W.2d 766 (1995)* Documents submitted to KIRA by corporation in application for investment tax credits are excluded from Open Records Act by this provision.

- c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or

- d. For the grant or review of a license to do business. As amended, KRS 61.878(1)(c)2.a, b, c, d.

- i. These exemptions do not apply to records whose disclosure is directed by another statute. KRS 61.878(1)(c)3.

- ii. *See, 99-ORD-88, 96-ORD-135, 95-ORD-107, 93-ORD-86, 93-ORD-43, 92-ORD-1238, OAGs 92-66, 91-105, 91-72, 91-70, 91-44, 89-75, 88-1, 86-1, 83-256.*

- e. The exemptions set out in KRS 61.878(1)(c)1. and (1)(a)2.a., b., c., and d. shall not apply to records the disclosure or publication of which is directed by another statute.

*See, Strong v. Chandler, Ky., 70 S.W.3d 405 (2002)* KRS 15.060(2) is a statute directing disclosure of otherwise exempt records to Attorney General that are relevant to the recovery of treasury funds.

5. Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption does not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in KRS 61.878(1)(c). KRS 61.878(1)(d).
6. Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods. KRS 61.878(1)(e).
7. The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property, until such time as all of the property has been acquired. KRS 61.878(1)(f).

- a. This provision does not affect the law of eminent domain.

- b. When the necessary acquisitions for a project are within a relatively compact area and the limits of the project are reasonably drawn, it is the legislative intent that the appraisals on the property need not be made available for inspection until such time as all of the parcels of land owned by various owners have been acquired.

*See, 01-ORD-81, 99-ORD-215, 98-ORD-175, 97-ORD-191, 97-ORD-171, 95-ORD-98, 94-ORD-137, 94-ORD-85, 94-ORD-74, 92-ORD-1374, OAGs 91-159, 91-117, 91-83, 90-15, 89-42, 85-79.*

8. Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination before the exam is given or if it is to be given again. KRS 61.878(1)(g).

*See, Triplett v. Livingston County Board of Education, Ky. App., 967 S.W.2d (1997). See also, 02-ORD-168, OAG 92-80.*

9. Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administration adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 62.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884. KRS 61.878(1)(h).
- a. *Skaggs v. Redford, Ky.*, 844 S.W.2d 389 (1993). Prospect of *habeas corpus* action qualifies as "prospective law enforcement action," within meaning of KRS 61.878(1)(h)." [T]he exemptions in the Open Records Act should be construed in a manner sufficiently broad to protect a legitimate state interest, and . . . the state's interest in prosecuting the appellant is not terminated until his sentence has been carried out." *Skaggs*, at p. 390.
- b. *Bowling v. Lexington-Fayette Urban County Government, Ky.*, 172 S.W.3d 333 (2005) Affirming *Skaggs v. Redford*.
- c. *See*, 03-ORD-15, 02-ORD-215, 02-ORD-211, 02-ORD-194, 02-ORD-179, 02-ORD-112, 02-ORD-20, 01-ORD-217, 01-ORD-67, 01-ORD-15, 02-ORD-215, 02-ORD-211, 02-ORD-194, 02-ORD-179, 02-ORD-112, 02-ORD-20, 01-ORD-217, 01-ORD-67, 00-ORD-116, 99-ORD-170, 99-ORD-162, 99-ORD-11, 97-ORD-107, 96-ORD-137, 96-ORD-106, 96-ORD-73, 96-ORD-56, 95-ORD-154, 95-ORD-111, 95-ORD-95, 95-ORD-69, 94-ORD-81, 93-ORD-137, 93-ORD-117, 93-ORD-98, 92-ORD-1364, OAGs 92-46, 91-214, 91-132, 91-92, 91-57, 91-50, 91-35, 91-8, 90-116, 90-97, 90-67, 90-64, 88-27, 87-15.

- d. If a criminal case is on appeal, records pertaining to the case are exempt from disclosure under this provision.

*See, OAGs 91-91, 86-47, 82-356.*

- e. Concurrent jurisdiction - where there is concurrent jurisdiction between two agencies, and where they both have an interest in the investigation, the records of one agency may be withheld if the other agency is actively involved in an investigation.

*See, 02-ORD-215, 94-ORD-56, 94-ORD-7, OAGs 90-67, 83-39.*

- f. *Courier-Journal and Louisville Times Co. v. Kent Downey and John Doe, Ky. App., 1999-CA-002466-MR (3/30/01)* unpublished opinion holding that investigatory files of Attorney General do not enjoy permanent protection from public disclosure under language in KRS 61.878(1)(h) relating to permanent protection for investigatory files of Commonwealth's and county attorneys.

- 10. Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency. KRS 61.878(1)(i).

- a. *University of Kentucky v. Courier-Journal and Louisville Times Co., Ky., 830 S.W.2d 373 (1992).* Entire response submitted to the NCAA by the University constitutes the final result of an extensive investigation and is subject to full disclosure. Investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.

- b. *Courier-Journal and Louisville Times Co. v. Brereton C. Jones, Ky. App., 895 S.W.2d 6 (1995).* Governor's appointment calendar is not an accurate log of what actually occurred, and is subject to many changes. It is therefore a work paper or preliminary draft within the scope of KRS 61.878(1)(i).

- c. *See, 02-ORD-245, 02-ORD-97, 02-ORD-86, 01-ORD-104, 00-ORD-197, 00-ORD-168, 00-ORD-98, 99-ORD-220, 99-ORD-206, 98-ORD-140, 98-ORD-7, 97-ORD-191, 97-ORD-183, 97-ORD-73, 97-ORD-14, 96-ORD-155, 96-ORD-86, 96-ORD-32,*

95-ORD-123, OAGs 92-44, 91-229, 91-160, 91-130, 91-99, 91-21, 90-7, 84-98, 83-405.

11. Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended. KRS 61.878(1)(j).
  - a. *City of Louisville v. The Courier-Journal and Louisville Times Co.*, Ky. App., 637 S.W.2d 658 (1982):
    - i. Police department Internal Affairs investigative files are exempt from inspection because they are preliminary to the Police Chief's final decision. If the Chief adopts the recommendations or notes from Internal Affairs as apart of his final action, the preliminary characterization of the Internal Affairs reports is lost to that extent.
    - ii. The complaints that led to or "initially spawned" the Internal Affairs investigation are not exempt from inspection once final action is taken. "Inasmuch as whatever final actions are taken necessarily stem from them, they must be deemed incorporated as part of those final determinations." *City of Louisville*, at 659-60.
  - b. *Kentucky State Board of Medical Licensure v. The Courier-Journal and Louisville Times Co.*, Ky. App., 663 S.W.2d 953 (1983):
    - i. Once final action is taken by the Board, the complaints that "initially spawned" the investigations are subject to public scrutiny.
    - ii. If internal preliminary investigative materials are adopted by the Board as part of its action, the preliminary characterization of the materials is lost, as is the exempt status of the materials.
  - c. *Palmer v. Driggers*, Ky.App., 60 S.W.3d 591 (2001). Public employee's resignation prior to possible termination was final action, and complaint giving rise to disciplinary proceedings was deemed incorporated into final action and forfeited its preliminary character.

d. *See*, 04-ORD-030, 02-ORD-245, 02-ORD-52, 01-ORD-83, 00-ORD-197, 00-ORD-195, 00-ORD-168, 00-ORD-139, 99-ORD-206, 99-ORD-13, 98-ORD-160, 97-ORD-183, 97-ORD-168, 97-ORD-147, 97-ORD-97, 96-ORD-155, 96-ORD-141, 96-ORD-86, 95-ORD-121, 95-ORD-113, 94-ORD-102, 94-ORD-89, 94-ORD-27, 94-ORD-21, 93-ORD-125, 93-ORD-109, 93-ORD-82, 92-ORD-1791, OAGs 92-5, 91-161, 91-160, 91-154, 91-117, 91-100, 91-90, 91-78, 91-23, 91-21, 90-97, 89-36, 80-596.

12. All public records or information the disclosure of which is prohibited by federal law or regulation. KRS 61.878(1)(k).

*See*, 97-ORD-178 (records acquired under records exchange provision found in 27 U.S.C. § 534 (b)), 97-ORD-2 (drug test results acquired under Omnibus Employee Drug Testing Act, 49 U.S.C. § 31306), 99-ORD-150, 98-ORD-1 and 18 U.S.C. § 2721 (records protected by the Drivers' Privacy Protection Act), OAG 90-90 (FBI documents); 03-ORD-201, 03-ORD-120, 00-ORD-215, 00-ORD-148, 00-ORD-119, 99-ORD-73, 98-ORD-162; 95-ORD-55, 94-ORD-17, 92-ORD-1640, OAGs 92-177, 90-52 and 20 S.W. § 1232g (education records protected by the Family Educational Rights and Privacy Act of 1974 - FERPA); *but compare*, 96-ORD-233. *Compare also*, 97-ORD-170, 96-ORD-244, OAG 91-56 (Freedom of Information Act does not apply to state agencies).

*See, Hardin County Schools v. J. Kyle Foster*, Ky. 40 S.W.3d 865 (2001) (statistical compilation of disciplinary actions within a school system is not an 'educational record' within the meaning of FERPA).

*See also, Medley v. Board of Education of Shelby County*, Ky. App., 168 S.W.3d 398 (2004) Videotapes of classroom are "education records" for purposes of FERPA and members of public, generally, would be denied access to such tapes; because requester is a teacher and tapes are of her classroom, she is entitled to a hearing on the question of whether she has a legitimate educational interest and is therefore entitled to review tapes under exception to FERPA for teachers with a legitimate educational interest.

13. Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly. KRS 61.878(1)(l).

*See*, KRS 17.150(2), 00-ORD-206, and OAG 92-46 (Criminal History Records Act); KRS 447.154 and OAG 91-53, 98-ORD-154, 98-ORD-179 (regarding attorney work product); 98-ORD-68, OAGs 92-53, 92-54, 92-ORD-1502, 94-ORD-76, 95-ORD-53, 96-ORD-43, 03-ORD-070, and KRS 620.050(4) (information gathered by Cabinet for Human Resources in cases of dependency, neglect, and abuse); 97-ORD-134, 96-ORD-243, 95-ORD-121, OAG 91-136, 92-25, 92-26, 94-ORD-18, 95-ORD-116, 95-ORD-62, and KRS 197.025 (records regarding inmates); *Hahn v. University of Louisville*, Ky.App., 80 S.W.3d 771 (2001); 04-ORD-030, 03-ORD-171, 01-ORD-246, 00-ORD-111, 00-ORD-10, 98-ORD-15, 97-ORD-127, OAGs 91-185, 91-109, 91-108, 92-ORD-1024, 93-ORD-58, 93-ORD-117, 94-ORD-88, 95-ORD-18, 95-ORD-116, 95-ORD-62, and KRE 503/KRS 422A.0503 (regarding attorney-client privilege); 98-ORD-97, 95-ORD-70, OAG 91-230 and KRS 209.140 (information gathered by CHR in adult abuse investigations); 95-ORD-87, OAG 92-24 and KRE 507/KRS 422A.0507 (psychiatrist-patient privilege); 93-ORD-42, 95-ORD-7, 95-ORD-22, and KRS 610.320(3) (juvenile law enforcement records); 93-ORD-44 and KRS 154A.040(c) (lottery records); 97-ORD-67, 93-ORD-60, 93-ORD-84, and KRS 199.570 (adoption records); 93-ORD-67 and KRS 304.2 - 150(3)(b)1 (records of Department of Insurance); 04-ORD-038, 98-ORD-78, 98-ORD-120, 96-ORD-60, 93-ORD-130, 94-ORD-64, and KRS 131.190(1) (records of the Revenue Cabinet); 93-ORD-133 and KRS 189A.100 (sobriety tests); 93-ORD-142 and KRS 7.510(3) (legislative databases); 96-ORD-235, 95-ORD-148, 94-ORD-27, and KRS 197.510(7) (private provider records); 95-ORD-144, 94-ORD-71 and KRS 532.050(4) (presentence investigation reports); 94-ORD-97 and KRS 365.880 (Uniform Trade Secrets Act); 95-ORD-56 and KRS 337.345 (CHR investigation of wage and hour violations); 99-ORD-197, 99-ORD-61, 96-ORD-14 and KRS 194B.060(1) (records of CHR which reveal the identity of a client or patient); 97-ORD-167 and KRS 210.235 (mental health records of CHR relating to individuals hospitalized); 02-ORD-44, 97-ORD-70 and KRS 11A.080(2) (records of Executive Branch Ethics Commission until final determination is made); 98-ORD-149 and KRS 7.410(3) (records relating to Office of Education Accountability); 99-ORD-102, 98-ORD-150 and KRS 197.025(2) (restricting inmate access to records containing a specific reference to the inmate); 98-ORD-151 and KRS 213.131 (vital records); 99-ORD 244, 99-ORD-20, and KRS 344.250(6) (restricting disclosure of information obtained by the Human Rights Commission); 99-ORD-209 and KRS 61.661 (confidentiality of data in Kentucky Retirement System member's account); 99-



ORD-217 and KRS 160.700 (protecting student education records); 00-ORD-118 and KRS 15.400(3), 03-ORD-43; (police recruit applicant file); KRS 311A.190 (data and records regarding emergency medical care); 01-ORD-139 and KRS 323.120(1) (private reprimands issue to architects); 03-ORD-188, 02-ORD-19 and KRS 189.635 (accident reports); 02-ORD-183 and KRS 161.585(1) (confidentiality of data in Kentucky Teachers Retirement System member's account); 03-ORD-90 and KRS 205.175 (information transmitted to the Cabinet for Families and Children in child support cases); 03-ORD-39 and KRS 197.440 (communications made in sex offender treatment program); 03-ORD-126 and KRS 17.175(4) (records produced from DNA samples); 03-ORD-222 and KRS 237.110(8) (automated list of concealed carry weapons permit); 03-ORD-227 and KRS 218A.202(6)(f) (KASPER data).

14. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to:
  - a. Criticality lists resulting from consequence assessments;
  - b. Vulnerability assessments;
  - c. Antiterrorism protective measures and plans;
  - d. Counterterrorism measures and plans;
  - e. Security and response needs assessments;
  - f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
  - g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security

systems of any building or facility owned, occupied, leased, or maintained by a public agency; and

- h.** Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact physical location of hazardous chemical, radiological, or biological materials. (KRS 61.878(1)(m)1.)

Pursuant to KRS 61.878(1)(m)2.a., b., and c., the term “terrorist act” is defined as “a criminal act” intended to:

Intimidate or coerce a public agency or all or part of the civilian population;

Disrupt a system identified in subparagraph 1.f. of this paragraph; or

Cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency.

If a public agency denies an open records request on the basis of KRS 61.878(1)(m), the agency must, on the same day, send a copy of the written denial to the executive director of the Office of Security Coordination and the Attorney General (KRS 61.878(1)(m)3.).

If a member of the Kentucky General Assembly requests a public record that qualifies for exclusion under this exemption, the exemption is inapplicable to the record (KRS 61.878(1)(m)5.).

*See, Associated Press v. Governor Ernie Fletcher, Kentucky State Police, No. 05-CI-00959, Franklin Circuit Court, Division I, (December 5, 2005).* Homeland Security exemption is inapplicable to records disclosing the number of state troopers assigned to protect Vice President Dick Cheney on his visit to Kentucky. Noting that the key words in the exemption are “reasonable likelihood,” the court concluded that “[t]here is little ‘reasonable likelihood’ that the numbers of Kentucky State Police assigned in this situation . . . will expose a vulnerability in the security measures taken . . . . The raw number of officers assigned to the security detail will not provide any would be terrorists with a tactical advantage in possible future attacks. This information will not reveal where the officers were stationed, the specific routes they followed, the specific duties they performed or any other information that would provide a detailed

account of the Kentucky Department of State Police's security plan for visiting dignitaries." *See also*, 05-ORD-175; 05-ORD-250; 05-ORD-255.

15. Public or private records, including books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, having historic, literary, artistic, or commemorative value accepted by the archivist of a public university, museum, or government depository from a donor or depositor other than a public agency. This exemption shall apply to the extent that nondisclosure is requested in writing by the donor or depositor of such records, but shall not apply to records the disclosure or publication of which is mandated by another statute or by federal law. (KRS 61.878(1)(n)).

E. Limitations to the exemptions in KRS 61.878

1. Statistical information - No exemption shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person. KRS 61.878(2).

*See, Hardin County Schools v. J. Kyle Foster, Ky., 40 S.W.3d 865 (2001).* Statistical information relating to student discipline that is not personally identifiable is not an education record protected from disclosure by Family Educational Rights and Privacy Act, 20 S.W. § 1232g, and its state counterpart, and must therefore be released. "personally identifiable information would include information that makes the identity of the student easily traceable, such as a name, address or personal characteristics."

2. No exemption in this section shall be construed to deny, abridge or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him. The records shall include, but not be limited to, work plans, job performance, demotions, evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores and preliminary and other supporting documentation. A public agency employee, including university employees, applicant or eligible shall not have the right to inspect or to copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency. KRS 61.878(3).

*See, Hahn v. University of Louisville, Ky.App.*, 80 S.W.3d 771 (2001) KRS 61.878(1) overrides KRS 61.878(3) and operates to prevent disclosure of records protected by attorney-client privilege to public agency employee even though the records relate to her; 03-ORD-30, 03-ORD-68, 02-ORD-168, 00-ORD-159, 98-ORD-124, 98-ORD-81, 98-ORD-39, 98-ORD-34, 97-ORD-133, 97-ORD-87 (former employee), 96-ORD-27, 96-ORD-16, 96-ORD-8, 95-ORD-97, 95-ORD-84, 95-ORD-37, 94-ORD-24, 94-ORD-9, 93-ORD-74, 93-ORD-50.

*See also*, 96-ORD-59, 96-ORD-39 (public employee cannot be compelled to forfeit his rights under this provision).

3. Sharing between public agencies - The exemptions in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function. KRS 61.878(5).
  - a. Such exchange or sharing of public records does not bar a public agency from claiming applicable exemptions in response to a citizen's request for those records.
  - b. *Strong v. Chandler, Ky.*, 70 S.W.3d 405 (2002) "The language of KRS 61.878(5) is clear and unambiguous. It states that the exchange of information between public agencies is not prohibited or limited if such an exchange is necessary in the performance of a legitimate government function."
  - c. *See*, 03-ORD-134, 97-ORD-62, 96-ORD-177, 96-ORD-164, OAGs 91-129, 91-108, 91-86, 91-22, 85-94, 79-608, 79-475, 77-666.
4. Use is not mandatory - The exemptions "are a shield and not a shackle." State agencies cannot be penalized for releasing exempted documents.

*See*, 02-ORD-194, 95-ORD-100, 94-ORD-91, OAGs 91-81, 79-275.

*But see, Kallstrom v. City of Columbus*, 136 F.3d 1055 (6<sup>th</sup> Cir. 1998); *Bloch v. Ribar*, 156 F.3d 673 (6<sup>th</sup> Cir. 1998); *Déja Vu of Nashville Inc., et al. v. The Metropolitan Government of Nashville & Davidson County TN, et al.*, 274 F.3d 377 (6<sup>th</sup> Cir. 2001) (recognizing that liability

might exist under 42 S.W. Section 1983 for disclosure of public records containing certain types of private information).

5. Estoppel - An agency is not estopped from denying inspection of a document released in error.

*See*, OAGs 91-136, 90-117, 90-107, 83-140.

- F. Separating excepted and non-excepted material - If a public record contains material that is excepted from disclosure under 61.878, the public agency shall separate the excepted material and allow inspection of the non-excepted material. KRS 61.878(4).

- a. *See*, 04-ORD-038, 98-ORD-33, 95-ORD-113, 95-ORD-82, OAGs 91-48, 91-35.

## **VII. Role of the Attorney General - KRS 61.880; 40 KAR 1:030**

- A. Review of denial of inspection - If a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection. If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request. The Attorney General shall review the request and denial of inspection. As amended, KRS 61.880(2); 40 KAR 1:030 Section 1.

*See*, 94-ORD-108, 94-ORD-99, 94-ORD-19, 94-ORD-8, 94-ORD-4, 93-ORD-112, 93-ORD-99, 92-ORD-1449.

1. The Attorney General may request additional documentation from the agency. KRS 61.880(2)(c); 40 KAR 1:030, Section 3.

*See*, 04-ORD-031, 96-ORD-206.

2. The Attorney General may request a copy of the requested records, but shall not disclose the records. KRS 61.880(2)(c); 40 KAR 1:030, Section 3.

3. The Attorney General shall issue a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884.

- a. On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question.
  - b. The opinion shall be issued within twenty (20) days (excepting Saturdays, Sundays, and legal holidays).
  - c. In unusual circumstances, the Attorney General may extend the twenty (20) day time limit by sending written notice to the complaining party and a copy to the denying agency, setting forth the reasons for the extension, and the day on which a decision is expected to be issued, which shall not exceed an additional thirty (30) work days, excepting Saturdays, Sundays, and legal holidays. KRS 61.880(2)(b). "Unusual circumstances" means:
    - 1. The need to obtain additional documentation from the agency or a copy of the records involved;
    - 2. The need to conduct extensive research on issues of first impression;
    - 3. An unmanageable increase in the number of appeals received by the Attorney General.
  - d. The burden of proof rests with the public agency that denied inspection of the public record. KRS 61.880(2)(c).  
  
*See, 96-ORD-135, 96-ORD-56, 95-ORD-167, 95-ORD-137, 95-ORD-61, 95-ORD-29, 95-ORD-27, 95-ORD-3, 94-ORD-154, 94-ORD-108, 94-ORD-35, 92-ORD-1020; compare, 96-ORD-125 (agency's technical error).*
  - e. The Attorney General has a precise and limited role in adjudicating open records appeals.  
  
*See, 96-ORD-171, 96-ORD-148, 96-ORD-142, 96-ORD-120.*
4. The Attorney General shall not reconsider a decision rendered under the Open Records Law. 40 KAR 1:030, Section 4.

5. If the requested documents are released to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision. 40 KAR 1:030, Section 6.

*See, Department of Corrections v. Bobby Chestnut, Ky. App., 2004-CA-001497-MR (04/04/05) unpublished opinion holding that an appeal is not "mooted" where request is only partially honored.*

6. It is not the Attorney General's duty to investigate to determine whether documents actually exist when the requesting party maintains that they exist and the public agency maintains that they do not exist.

*See, OAGs 91-112, 91-101, 86-35.*

7. A party shall have thirty (30) days from the day that the Attorney General renders his decision to appeal the decision. An appeal within the thirty (30) day time limit shall be treated as if it were an action brought under the section pertaining to court enforcement. KRS 61.882.

8. If an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained. KRS 61.880(5)(a) and (b).

- a. *Tri-County Animal Shelter v. Randy Skaggs, Ky.App., 2001-CA-001097-MR and 2001-CA-001197-MA unpublished opinion holding that the filing of subsequent open records request with agency during the 30 day period for appealing Attorney General's earlier decision did not toll the time for agency appeal of earlier decision.*

- b. *Hunter v. Kentucky Lottery Corporation, Ky.App., 2002-CA-000333-MR (2003) unpublished opinion holding that the "Attorney General's opinions in [open records appeals] are binding on the parties and enforceable in court . . . [u]nless appealed, the opinion is the same as a lower court decision. The statute does not make such opinions binding on the courts. Although the opinion, if not appealed, binds the*

agency to the particular case addressed, the opinion is not binding judicial precedent”.

- c. *George William Sykes v. Jones Kemper*, Ky. App., 2000-CA-01066 (3/30/01) unpublished opinion recognizing that “when any state agency is notified of a statutory violation by enforcement officials exercising their jurisdictional duties, the deficiency must be promptly remedied”; *Department of Public Advocacy v. Parramore Sanborn*, Ky. App., 1999-CA-001506-MR (3/2/01) unpublished opinion dismissing DPA’s appeal from Attorney General’s decision for failure to timely appeal.

B. Review of complaint - The Attorney General shall review any written complaint that the intent of the Open Records Act is being subverted by an agency short of denial of inspection. KRS 61.880(4).

- 1. Examples of this type of complaint:
  - a. Imposition of excessive fees:
  - b. Misdirection of the applicant.
- 2. These complaints shall be subject to the same process as if the request for inspection had been denied.

## VIII. Court Enforcement

A. The Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained shall have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person. KRS 61.882(1).

- 1. A person alleging a violation of the provisions does not have to exhaust his remedies under KRS 61.880 by asking the Attorney General to review the matter before filing suit in a Circuit Court. KRS 61.882(2).
  - a. *But see Partin v. Kentucky State Police*, Ky.App., 2001-CA-001502 (04/04/03) unpublished opinion holding that an inmate in a penal institution must first seek relief from the



Attorney General regarding denial of a records request per KRS 197.025(3); accord, *White v. Franks*, Ky. App., 2001-CA-001018-MR (11/7/03) unpublished opinion.

- B.** Notifying the Attorney General - A public agency must notify the Attorney General of any action filed against the agency in Circuit Court regarding the enforcement of the Open Records Act. The Attorney General shall not, however, be named as a party in any Circuit Court actions regarding the enforcement of the Open Records Act, nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings. KRS 61.880(3); 40 KAR 1:030 Section 5.

*See*, 95-ORD-59.

**C.** Court Proceedings

1. Except as otherwise provided by law or rule of court, proceedings arising under the Open Records Act take precedence over all other causes and shall be assigned for hearing and trial at the earliest practicable date. KRS 61.882(4).
2. In an appeal of the Attorney General's decision where the appeal is properly filed, the court shall determine the matter *de novo*. KRS 61.882(3).
3. The burden of proof is on the public agency to sustain its action. KRS 61.882(3).
4. The court may view the records in controversy *in camera* before reaching a decision. KRS 61.882(3).

**D.** Remedies

1. The court may issue an injunction or other appropriate order. KRS 61.882(1).
2. Costs, attorney fees, and monetary awards - If the court finds that the records were wilfully withheld in violation of the Open Records Act, it may, within its discretion, award the person who prevailed against the agency:
  - a. All costs, including reasonable attorney fees, incurred in connection with the legal action;

- (1) *Lang v. Sapp*, Ky.App., 71 S.W.3d 133 (2002) Prevailing party is not automatically entitled to award of his costs (overruling *Blair v. Hendricks*, Ky.App., 30 S.W.3d 802 (2002)). Circuit court must first find that agency willfully withheld records, and if it makes such a finding, court still has discretion to award or deny costs.
- (2) *Hunter v. Kentucky Lottery Corporation*, Ky.App., 2002-CA-000333-MR (2003) unpublished opinion holding that “mere wrongful conduct by the agency is not sufficient to award costs and attorney’s fees. ‘Willful’ requires some knowledge of the wrongfulness of the denial”; see also, *Kentucky Lottery Corporation v. Stewart*, Ky.App., 41 S.W.3d 860 (2001).
- (3) *Martin v. Kentucky Board of Medical Licensure*, Ky.App., 2002-CA-000487-MR (08/15/03) unpublished opinion holding that although appellant was successful in appeal to Attorney General, he did not prevail “in an action in the courts” and is not entitled to costs.

b. An amount not to exceed twenty-five dollars (\$25.00) for each day that the person was denied the right to inspect or copy the public records. KRS 61.882(5).

3. Attorneys fees, costs, and awards shall be paid by the agency that the court determines is responsible for the violation. KRS 61.882(5).

#### E. Penalties

1. Class A misdemeanor - Any official of a public agency who wilfully conceals or destroys any record with the intent to violate the Open Records Act shall be guilty of a Class A misdemeanor for each separate violation. KRS 61.991(2)(a).
2. Contempt - Any official of a public agency who fails to produce any record after entry of final judgment directing that such records shall be produced shall be guilty of contempt. KRS 61.991(2)(b); KRS 61.882(3).

# THE KENTUCKY OPEN MEETINGS ACT

## KRS 61.805 - KRS 61.850

The Open Meetings Act was originally enacted by the General Assembly in 1974 and became effective on June 21, 1974. The Act was substantially amended by the 1992 regular session of the General Assembly and those amendments took effect on July 14, 1992 (House Bill No. 16). The Act underwent minor revision in the 1994 legislative session.

### I. Purpose of the Open Meetings Act

- A. As stated in OAG 78-571 (modified on other grounds by OAG 89-25):

The purpose of the Open Meetings Law is to prevent the public's business from being conducted in private. This fact should be kept in mind by public officials at all times.

- B. The 1992 legislation amending the Open Meetings Act contains the following provision:

The General Assembly finds and declares that the basic policy of KRS 61.805 to 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for by Section 3 of this Act [KRS 61.810] or otherwise provided for by law shall be strictly construed.

### II. Mandate of the Open Meetings Act

- A. KRS 61.810 as amended provides in part:

All 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 [except as otherwise provided in the Act].

*See, Bourbon County Board of Adjustment v. Currans, Ky. App., 873 S.W.2d 836 (1994); Stuart G. Yeoman v. Commonwealth of Kentucky Health Policy Board, Ky., 875 S.W.2d 873 (1994), 00-OMD-147, 00-OMD-114.*

1. "Meeting" is defined in KRS 61.805(1) as:

all gatherings of every kind, including video teleconferences, regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting.

*See*, 03-OMD-22 (one-sided discussion); 01-OMD-30 (informational session), 00-OMD-200, 95-OMD-64, 94-OMD-50.

a. *Howard v. City of Independence*, Ky. App., \_\_\_S.W.3d\_\_\_ (2005) acts of an individual authority, here the mayor, fall within the coverage of the definition of a meeting and are subject to the Open Meetings Act. Because appellant did not follow procedures set forth at KRS 61.846 and .848, he was not entitled to relief.

b. A meeting of a group of public officials, officers, and employees from various governmental entities where none of those entities is represented by a quorum and where the group does not exist pursuant to statute, ordinance, order, resolution, or any act of any public agency does not constitute a meeting of a public agency.

*See*, 96-OMD-174. *See also*, *Stuart G. Yeoman v. Kentucky Health Policy Board*, Ky., 875 S.W.2d 873 (1994).

c. The county did not violate the Open Meetings Act as it was conducting a statutorily required public hearing pertaining to the expenditure of public funds for various projects, not requiring the presence of a quorum of the fiscal court, rather than holding a public meeting of the fiscal court. *See*, 96-OMD-157.

d. The public agency did not violate the Open Meetings Act on the day in question as no meeting was held on that date. *See*, 96-OMD-35.

- e. The attendance by a quorum of the members of the city council at a convention or conference organized by someone other than the council does not in and of itself constitute a meeting of the council. See, 95-OMD-136.

2. "Public agency" is defined in KRS 61.805(2), as amended, as:

- (a) Every state or local government board, commission, and authority;
- (b) Every state or local legislative board, commission, and committee;
- (c) Every county and city governing body, council, school district board, special district board, and municipal corporation;
- (d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
- (e) Any body created by or pursuant to state or local statute, executive, order, ordinance, resolution, or other legislative act in the legislative or executive branch of government;

*See, 03-OMD-187.*

- (f) Any entity when the majority of its governing body is appointed by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a "public agency," a state or local officer, or any combination thereof;

*See, 98-OMD-96.*

- (g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and

controlled by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection; and

*See*, 99-OMD-178, 99-OMD-77, 97-OMD-139, 95-OMD-124, 95-OMD-120, 94-OMD-63; compare 00-OMD-141.

- (h) Any interagency body of two (2) or more public agencies where each "public agency" is defined in paragraph (a), (b), (c), (d), (e), (f), or (g) of this subsection;

*See*, 98-OMD-94.

- a. *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, Ky., 732 S.W.2d 884 (1987):

- i. This statute means that "a public agency is any agency which is created by statute, executive order, local ordinance or resolution or other legislative act, or any committee, ad hoc committee, subagency or advisory body of said public agency." *Id.* at 886.

- ii. The Board of Trustees of the University of Kentucky is created by statute. Its Presidential Search Committee was created by formal action of the Board of Trustees and, therefore, is a public agency subject to the provisions of the Open Meetings Act.

- b. *See*, 94-OMD-148 and OAGs 91-54 (committee or advisory body created by a fiscal court or a county judge/ executive is a public agency); 89-25 (advisory committee appointed by school superintendent is a public agency).

- c. A nonprofit corporation providing mental health services to the community is not a public agency pursuant to KRS 61.805(2). *See*, 96-OMD-180. Other examples of nonpublic agencies are set forth in 95-OMD-71, OAG 81-266, OAG 79-560, OAG 78-395, and OAG 75-402.

3. "Action taken" is defined in KRS 61.805(3) as a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body.
4. The Act, as amended in 1992, adds to the definitions set forth in KRS 61.805 the definition of the term "member" which means:

a member of the governing body of the public agency and does not include employees or licensees of the agency.

*See, 94-OMD-127.*
5. "Video teleconference" is defined in KRS 61.805(5) as one (1) meeting, occurring in two (2) or more locations, where individuals can see and hear each other by means of video and audio equipment.

### III. General Requirements for Public Agency

#### A. Time and Place of Meetings - KRS 61.820

1. All meetings shall be held at specified times and places which are convenient to the public.
  - a. *Knox County v. Hammons, Ky., 129 S.W.3d 839 (2004)* "Kentucky's Open Meetings Act does not impose upon government agencies the requirement to conduct business only in the *most* convenient locations at the *most* convenient times. The intent of the open meetings statutes is to ensure that government business is not conducted in secret, that the public is adequately notified of the time and nature of government proceedings, and that interested citizens be afforded the opportunity to participate in such proceedings."
  - b. While it is apparent that meetings of the school board held during school hours are not convenient to the complaining party, it cannot be concluded on the basis of the available evidence that meetings of the board held during school

hours are inconvenient for the residents of the county. *See*, 95-OMD-106.

- c. Three members of the board of education violated the Open Meetings Act when the notice, motion, and vote relative to a closed session were given, made and taken at a site which did not constitute the forum for the public meeting. *See*, 95-OMD-92.
- d. There is no statutory authority for a public agency to conduct a meeting, which is required to be open, by telephone. 02-OMD-206, 02-OMD-153, 94-OMD-87, 93-OMD-20, 92-OMD-1728, OAG 92-151.
- e. Retreat conducted by city commission outside of the jurisdictional limits of the governmental unit it served violated KRS 61.820. 02-OMD-78.

- 2. 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 those public agencies.

*See*, 99-OMD-166, 94-OMD-50, 92-OMD-1677, 92-OMD-1473.

- a. The schedule of regular meetings shall be made available to the public.
- b. 02-OMD-127, 93-OMD-123 - continuation of regular meeting at a later date.

**B. Minutes of Meetings - KRS 61.835**

- 1. The minutes of action taken at every meeting of a public agency shall be promptly recorded.
- 2. The minutes shall set forth an accurate record of votes and actions taken at every meeting of a public agency.

*See*, 03-OMD-116.



3. The minutes shall be open to public inspection at reasonable times no later than immediately following the next meeting of the public agency.

*See, 03-OMD-6, 00-OMD-96, 99-OMD-166, 98-ORD-130, 98-ORD-36, 95-OMD-64, 94-OMD-110.*

*See, 03-ORD-173 (tapes of public meetings immediately accessible).*

C. Public Attendance of Meetings - KRS 61.840

1. Meetings room conditions shall insofar as is feasible allow effective public observation of public meetings.

*See, 01-OMD-110, 00-OMD-63, 99-OMD-196, 99-OMD-117, 98-OMD-169, 98-OMD-44, 97-OMD-84, 97-OMD-28, 94-OMD-87.*

3. No person may be required to identify himself/herself in order to attend a meeting.

*See, 03-OMD-116.*

3. No condition other than those required for the maintenance of order shall apply to the attendance of the public at any meeting.

*See, 01-OMD-23, 00-OMD-169, 98-OMD-44.*

4. While members of the public have the statutory right to attend all public meetings and to observe and listen to what transpires at those meetings, the Open Meetings Act does not grant those persons the right to participate in the meeting and address the members of the public agency during the meeting. *See, 02-OMD-181, 95-OMD-99.*

5. News Media Coverage - All public agencies shall permit news media coverage, including but not limited to recording and broadcasting. KRS 61.840.

6. A person should be permitted to tape record a meeting so long as that person and his or her taping equipment do not interfere with the orderly conduct of the public meeting. To the extent that OAG 85-74 conflicts with this decision the earlier opinion is modified. *See, 01-OMD-166, 96-OMD-143.*

7. General Assembly has not set forth procedural rules relative to conduct of meetings and citizen participation. Each public agency must adopt its own rules of procedure. OAG 78-522.

#### IV. Exceptions to Open Meetings - KRS 61.810(1).

All 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, except for the following. *See*, 03-OMD-178.

- A. Deliberations for decisions of the Kentucky Parole Board. KRS 61.810(1)(a).
- B. Deliberations on the future acquisition or sale of real property by a public agency, but only when publicity would be likely to affect the value of a specific piece of property to be acquired for public use or sold by a public agency. KRS 61.810(1)(b).

*See*, 03-OMD-47, 02-OMD-166, 00-OMD-146, 00-OMD-64, 95-OMD-57, 94-OMD-22, 93-OMD-56.

- C. Discussions of proposed or pending litigation against or on behalf of the public agency. KRS 61.810(1)(c).

*See*, 01-OMD-152, 01-OMD-130, 00-OMD-219, 99-OMD-146, 99-OMD-6, 98-OMD-147, 98-OMD-105, 95-OMD-57, 94-OMD-110, 93-OMD-119, 92-OMD-1728. *See also*, *Floyd County Board of Education v. Ratliff*, Ky., 955 S.W.2d 921 (1997).

- D. Grand and petit jury sessions. KRS 61.810(1)(d).
- E. Collective bargaining negotiations between public employers and their employes or their representatives. KRS 61.810(1)(e).
- F. Discussions or hearings which might lead to the appointment, discipline or dismissal of an individual employe, member or student without restricting that employe's, member's or student's right to a public hearing if requested. This exception shall not be interpreted to permit discussion of general personnel matters in secret. KRS 61.810(1)(f).

1. *See*, 03-OMD-148, 03-OMD-089, 00-OMD-113, 00-OMD-86, 99-OMD-221, 99-OMD-133, 99-OMD-94, 97-OMD-124, 97-OMD-110, 97-OMD-80, OAG 90-125, 96-OMD-97, 95-OMD-93, 94-OMD-122, 94-OMD-103, 94-OMD-63, 93-OMD-49, 92-OMD-1735.
  2. Right to a public hearing - *See*, *Reed v. City of Richmond*, Ky. App., 582 S.W.2d 651 (1979).
  3. *Palmer v. Driggers*, Ky. App., 60 S.W.3d 591 (2001) Open meetings exception authorizing closure of meetings for discussion of appointment, discipline, or dismissal of individual public employees did not preclude disclosure of disciplinary complaint against public employee.
- G.** Discussions between a public agency and a representative of a business entity and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business. KRS 61.810(1)(g).
- See*, 01-OMD-227, 99-OMD-104, 94-OMD-119, 94-OMD-106, 92-OMD-1735.
- H.** State and local cabinet meetings and executive cabinet meetings. KRS 61.810(1)(h).
- I.** Committees of the General Assembly other than standing committees. KRS 61.810(1)(i).
- See*, 96-OMD-28, 94-OMD-23, 93-OMD-64, 93-OMD-63.
- J.** Deliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments, at which neither the person involved, his representatives, nor any other individual not a member of the agency's governing body or staff is present, but not including any meetings of planning commissions, zoning commissions, or boards of adjustment. KRS 61.810(1)(j).
- K.** Meetings which federal or state law specifically require to be conducted in privacy. KRS 61.810(1)(k).
- L.** Meetings which the Constitution provides shall be held in secret. KRS 61.810(1)(l).

- M. That portion of a meeting devoted to a discussion of a specific public record exempted from disclosure by KRS 61.878(1)(m). KRS 61.810(1)(m).
  - 1. Such meetings shall not be closed to members of the General Assembly.

**V. Meetings of Less Than A Quorum - Exception - KRS 61.810(2)**

The 1992 legislation added the following provision:

Any series of less than quorum meetings, where the members attending one or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section [KRS 61.810(1)], shall be subject to the requirements of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussion is to educate the members on specific issues.

*See*, 02-OMD-153, 02-OMD-107, 01-OMD-110, 00-OMD-63, 96-OMD-261, 94-OMD-106, OAG 92-146.

*See also*, *Yeoman v. Commonwealth of Kentucky Health Policy Board*, Ky., 875 S.W.2d 873 (1994). "For a meeting to take place within the meaning of the act, public business must be discussed or action must be taken by the agency. Public business is not simply any discussion between two officials of the agency. Public business is the discussion of the various alternatives to a given issue about which the [agency] has the option to take action. Taking action is defined by the Act as 'a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the government body.' KRS §61.805(3). The Act prohibits a quorum from discussing public business in private or meeting in number less than a quorum for the express purpose of avoiding the open meeting requirement of the Act. KRS 61.810(2)."

**VI. Requirements for Conducting Closed Sessions - KRS 61.815**

- A. Notice - Notice shall be given in regular open meeting of the general nature of the business to be discussed in closed session, the reason for the closed session, and the specific provision of KRS 61.810(1) authorizing the closed session. KRS 61.815(1)(a).

*See*, 02-OMD-200, 00-OMD-114, 95-OMD-93, 94-OMD-122, 94-OMD-22.

B. Motion - A closed session may be held only after a motion is made and carried by a majority vote in open, public session. KRS 61.815(1)(b).

C. Final Action - No final action may be taken at a closed session. KRS 61.815(1)(c).

*See, 94-OMD-110.*

D. Matters Discussed - No matters may be discussed at a closed session other than those publicly announced prior to convening the closed session. KRS 61.815(1)(d).

*See, 03-OMD-170*

E. Public agencies and activities of public agencies identified in paragraphs (a), (c), (d), (e), (f) but only so far as (f) relates to students, (g), (h), (i), (j), (k), (l), and (m) of KRS 61.810(1) shall be excluded from the requirements of KRS 61.815(1). KRS 61.815(2).

*See, 97-OMD-96, 94-OMD-78.*

F. *See, e.g., Stinson v. State Board of Accountancy, Ky. App., 625 S.W.2d 589 (1981); Jefferson County Board of Education v. The Courier-Journal, Ky. App., 551 S.W.2d 25 (1977); Chandler v. Bullitt County Joint Planning Commission, Ky. App., 125 S.W.3d 851 (2002).*

## **VII. Requirements for Holding Special Meetings**

The 1992 legislation (House Bill No. 16) repeals KRS 61.825 and creates a new section of KRS 61.805 to KRS 61.850 relative to the holding of special meetings. *See, KRS 61.823.*

A. Who may call a special meeting - The presiding officer or a majority of the members of the public agency may call a special meeting.

B. Notice Requirements and Contents - The public agency shall provide written notice of the special meeting. The notice shall consist of the date, time, and place of the special meeting and the agenda. Discussions and action at the meeting shall be limited to items listed on the agenda in the notice.

*See, Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921 (1997); 02-OMD-121, 01-OMD-175, 01-OMD-135, 00-OMD-227, 00-OMD-154, 00-OMD-142, 00-OMD-65, 99-OMD-213, 99-OMD-203, 99-OMD-184, 99-OMD-166, 99-OMD-153, 98-OMD-74, 97-OMD-43, 96-OMD-216, 95-OMD-149, 94-OMD-119, 94-OMD-78.*

**C. Notice Requirements - Delivery and Posting -**

**1. To Whom and How Delivered - When -**

As soon as possible, written notice shall be delivered personally, transmitted by facsimile machine, or mailed to every member of the public agency as well as each media organization which has filed a written request, including a mailing address, to receive notice of special meetings. The notice shall be calculated so that it shall be received at least twenty-four (24) hours before the special meeting. The public agency may periodically, but no more often than once in a calendar year, inform media organizations that they will have to submit a new written request or no longer receive written notice of special meetings until a new written request is filed.

*See, 98-OMD-125, 97-OMD-90, 97-OMD-49, 96-OMD-216, 94-OMD-122, 94-OMD-111, 94-OMD-50, 92-OMD-1203.*

**2. Posting of the Notice - When -**

As soon as possible, written notice shall also be posted in a conspicuous place in the building where the special meeting will take place and in a conspicuous place in the building which houses the headquarters of the agency. The notice shall be calculated so that it shall be posted at least twenty-four (24) hours before the special meeting.

*See, 04-OMD-029, 95-OMD-64, 94-OMD-111.*

**D. Emergency Situation - Exception to Notice Requirements -**

In the case of an emergency which prevents compliance with the notice requirements this subsection shall govern a public agency's conduct of a special meeting. The special meeting shall be called by the presiding officer or a majority of the members of the public agency. The public agency shall make a reasonable effort, under emergency circumstances, to notify the members of the agency, media organizations which have filed a

written request to be notified, and the public of the emergency meeting. At the beginning of the emergency meeting, the person chairing the meeting shall briefly describe for the record the emergency circumstances preventing compliance with the notice provisions. These comments shall appear in the minutes. Discussions and action at the emergency meeting shall be limited to the emergency for which the meeting is called.

*See, 02-OMD-91, 00-OMD-80.*

### **VIII. Video Teleconferencing of Meetings**

The 1994 legislation amending the Open Meetings Act permits an agency to conduct any meeting, other than a closed session, by video teleconference. KRS 61.826(1).

- A. Notice requirements for video teleconferences - Notice of a video teleconference must comply with the requirements of KRS 61.820 or 61.823 as appropriate. In addition, the notice must:
  - 1. Clearly state that the meeting will be a video teleconference, and
  - 2. Precisely identify the video teleconference locations, and which, if any, is the primary location. KRS 61.826(2).
- B. Procedures for video teleconferences - The same procedures with regard to participating, distribution of materials, and other matters shall apply in all video teleconference locations. KRS 61.826(3).
- C. Interruptions - Any interruption in the video or audio broadcast of a video teleconference at any location shall result in the suspension of the video teleconference until the broadcast is restored. KRS 61.826(4).
- D. *Compare, 02-OMD-206.*

### **IX. Enforcement - Administrative Procedures - KRS 61.846**

- A. Complaining Party - Public Agency - Duties and Responsibilities
  - 1. If a person enforces the Open Meetings Act pursuant to this section, he shall begin enforcement under this subsection.
  - 2. Complaint -

The person shall submit a written complaint to the presiding officer of the public agency suspected of violating the Act. The complaint shall state the circumstances which constitute an alleged violation of the Act and shall state what the public agency should do to remedy the alleged violation. KRS 61.846(1).

*See, 96-OMD-153.*

**3. Public Agency Response - Time to Respond**

The public agency shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of the complaint whether to remedy the alleged violation pursuant to the complaint and shall notify in writing the person making the complaint, within the three (3) day period, of its decision. KRS 61.846(1).

*See, 04-OMD-029, 96-OMD-154, 94-OMD-96, 94-OMD-83, 94-OMD-60, 94-OMD-36, 93-OMD-77, 93-OMD-61.*

**4. If the public agency makes efforts to remedy the alleged violation pursuant to the complaint, efforts to remedy the alleged violation shall not be admissible as evidence of wrongdoing in an administrative or judicial proceeding.**

**5. Public Agency Response - Contents -**

An agency's response denying, in whole or in part, the complaint's requirements for remedying the alleged violation shall include a statement of the specific statute or statutes supporting the public agency's denial and a brief explanation of how the statute or statutes apply. The response shall be issued by the presiding officer, or under his authority, and shall constitute final agency action. KRS 61.846(1).

*See, 04-OMD-029, 93-OMD-111, 93-OMD-49, 92-OMD-1840.*

**B. Role of Attorney General**

**1. Appeal to Attorney General - Contents of Appeal - Time in which to appeal - KRS 61.846(2).**



If a complaining party wishes the Attorney General to review a public agency's denial, the complaining party shall forward to the Attorney General a copy of the written complaint and a copy of the written denial within sixty (60) days from the receipt by that party of the written denial. If the public agency refuses to provide a written denial, a complaining party shall provide a copy of the written complaint within sixty (60) days from the date the written complaint was submitted to the presiding officer of the public agency.

*See, 03-OMD-53; 99-OMD-183, 96-OMD-11.*

**2. Opinion of the Attorney General - KRS 61.846(2).**

The Attorney General shall review the complaint and denial and issue within ten (10) days, excepting Saturdays, Sundays, and legal holidays, a written decision which states whether the agency violated the provisions of the Open Meetings Act. In arriving at the decision, the Attorney General may request additional documentation from the agency. On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who filed the complaint.

*See, 93-OMD-81, 93-OMD-49.*

**3. Failure of Agency to Remedy Violation as Agreed to - Complaint to Attorney General - KRS 61.846(3).**

If a public agency agrees to remedy an alleged violation, and the person who submitted the written complaint believes the agency's efforts are inadequate, the person may complain to the Attorney General. The person shall provide to the Attorney General the complaint submitted to the public agency, the public agency's response, and a written statement of how the public agency has failed to remedy the alleged violation. The procedure relative to public agency denials applies.

**4. Appeal of Attorney General's Decision - KRS 61.846(4) and (5).**

A party shall have thirty (30) days from the day the Attorney General renders his decision to appeal the decision. A public agency shall notify the Attorney General of any actions filed against

that agency in circuit court regarding enforcement of the Open Meetings Act.

5. Failure to Appeal Attorney General's Decision - KRS 61.846(4)(b).

If an appeal is not filed within thirty (30) days, the Attorney General's decision, as to whether the agency violated the Open Meetings Act, shall have the force and effect of law and shall be enforceable in the circuit court of the county where the public agency has its principal place of business or where the alleged violation occurred.

**X. Court Enforcement - KRS 61.848**

**A. Appeal to Circuit Court - Which Circuit -**

The circuit court of the county where the public agency has its principal place of business or where the alleged violation occurred shall have jurisdiction to enforce the provisions of the Open Meetings Act by injunction or other appropriate order on application of any person.

**B. Exhaustion of Remedies**

A person alleging a violation of the provisions of the Open Meetings Act does not have to appeal to the Attorney General before filing suit in a circuit court. However, he shall file suit within sixty (60) days from his receipt of the written denial from the public agency or, if the public agency refuses to provide a written denial, within sixty (60) days from the date the written complaint was submitted to the presiding officer of the public agency.

**C. De Novo Proceeding**

In an appeal of an Attorney General's decision where the matter is properly filed, the court shall determine the matter de novo.

**D. Except as otherwise provided, proceedings arising under the Open Meetings Act take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.**

**E. Any rule, resolution, regulation, ordinance, or other formal action of a public agency without substantial compliance with the requirements of KRS 61.810, KRS 61.815, KRS 61.820, and Section 6 of House Bill No. 16**

[provisions relative to special meetings] shall be voidable by a court of competent jurisdiction. This provision was formerly codified as KRS 61.830 and now appears as KRS 61.848(5).

**F. Penalties**

1. Any person who prevails against any agency in the courts regarding a violation of the Open Meetings Act, where the violation is found to be wilful, may be awarded costs, including reasonable attorneys' fees, incurred in connection with the legal action. In addition, it shall be within the discretion of the court to award the person an amount not to exceed one hundred dollars (\$100) for each instance in which the court finds a violation. Attorneys' fees, costs, and awards under this subsection shall be paid by the agency responsible for the violation. KRS 61.848(6).

*See, Floyd County Board of Education v. Ratliff, Ky. App., 2002-CA-001971 MR, 2002-CA-001968 MR (10/15/04) unpublished opinion holding that because Board's violations of Open Meetings Act were willful, appellees were entitled to award of attorney's fees.*

2. Fine - Any member of a public agency who knowingly attends a meeting that is covered by the Open Meetings Act but that is not held in accordance with the provisions of that Act shall be punished by a fine of not more than \$100. KRS 61.991(1).

This provision would have to be applied by the District Court and prosecuted by the County Attorney. OAG 76-4. It should be treated in the same manner as a violation. KRS 431.060(3).

**AN INTRODUCTION TO  
KENTUCKY'S OPEN MEETINGS ACT AND OPEN RECORDS ACT**

M. Todd Osterloh  
May 1, 2013

Americans distrust government. We always have. One of the reasons English colonists in America revolted against their government related to the colonists' distrust of their monarchy. This distrust, however, has led to significant progress. A decade after the American Revolution, drafters of our Constitution created a government with checks and balances and protected individual rights in the Bill of Rights because the drafters were skeptical about governmental power.

Two centuries after the American Revolution, state and federal governments began enacting laws to increase the transparency of governmental action. Amidst Vietnam War protests and the Watergate scandal, the Kentucky General Assembly enacted the Open Meetings Act and the Open Records Act.

**Open Meetings Act**

The Open Meetings Act ("OMA") is codified in KRS 61.800-61.850. In order to understand the mandates of the OMA, we must first look into several elements of the Act including what a public agency is, what constitutes a quorum and what exactly a meeting is.

A "public agency" for the purposes of the OMA is considered to be the following entities:

- (a) Every state or local government board, commission, and authority;
- (b) Every state or local legislative board, commission, and committee;
- (c) Every county and city governing body, council, school district board, special district board, and municipal corporation;
- (d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
- (e) Any body created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act in the legislative or executive branch of government;
- (f) Any entity when the majority of its governing body is appointed by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a "public agency," a state or local officer, or any combination thereof;
- (g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees,

- established, created, and controlled by a “public agency” as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection; and
- (h) Any interagency body of two (2) or more public agencies where each “public agency” is defined in paragraph (a), (b), (c), (d), (e), (f), or (g) of this subsection.<sup>1</sup>

Accordingly, a public agency under the OMA includes not just the agency or the entity itself, but also subcommittees and other committees that might be formed out of that larger entity. For example, if a city council has a committee set up to discuss public works, that subcommittee would be required to comply with the OMA.

The OMA applies to meetings when there is a quorum of the agency. The definition of a “quorum” may be defined by statute, ordinance, bylaw, or other governing document, but it is often defined as more than half. Under such a definition, the quorum of a public agency that has an odd number of members is the rounded number up from half of the number of board members. For example, two members would constitute a quorum of a three-member agency; four members would be considered a quorum for a seven member agency. For public agencies that have an even number of members, the quorum is one more than half. For example, a public agency with a total of six members would have a quorum with four members.

A “meeting” under the OMA means “all gatherings of any kind . . . regardless of where the meeting is held and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting.”<sup>2</sup> To summarize, it does not matter where the meeting is held, what kind of meeting it is or whether it is held in conjunction with a previously scheduled meeting. Any grouping of a quorum of members discussing public business would constitute a meeting.

The broad definition of “meeting” under the OMA lends itself to a finding that a meeting includes “gatherings” by telephone. The Attorney General has so found in several opinions.<sup>3</sup> At the same time, the courts and Attorney General have recognized that a member of an agency cannot vote on an issue telephonically or be considered a part of a meeting’s quorum if appearing telephonically.<sup>4</sup> Although these two findings seemingly present a logical inconsistency, the Attorney General has explained the reasoning for the distinction as follows:

This is consistent with the judicial recognition that the Open Meetings Act “is designed to require government agencies to conduct the public’s business in such a way that the deliberations and decisions are accomplished in an atmosphere wherein the public and the media may be present,” *Jefferson County Board of Education v. Courier-Journal and Louisville Times Co.*, Ky. App., 551 S.W.2d 25, 26 (1977), and the

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<sup>1</sup> KRS 61.805(2). It is important to note that the definition of public agency under the Open Meetings Act is different from that of the Open Records Act.

<sup>2</sup> KRS 61.805(1).

<sup>3</sup> See, e.g., 09-OMD-093; 05-OMD-026; 02-OMD-153.

<sup>4</sup> See *Fiscal Court of Jefferson County v. Courier-Journal and Louisville Times Co.* 554 S.W.2d 72, 73 (Ky. 1977); 03-OMD-092; 02-OMD-153; 94-OMD-87; 93-OMD-20; 92-OMD-1728; OAG 92-151.

legislative recognition that “the formation of public policy is public business and shall not be conducted in secret . . . .” KRS 61.800.

Members of a public agency must also be particularly cautious about violating this Act through what is called a serial meeting. A serial meeting is a series of meetings with less than a quorum of members attending each meeting but, nevertheless, discussing the same public business topic.<sup>5</sup> For example, let’s assume that there is a city council of five members. If council member Alpha and council member Bravo randomly meet at a grocery store and discuss an issue on which the city council has an option of taking action, the meeting between Alpha and Bravo would not constitute a quorum because there are only two of the five council members present. If, later, Bravo runs into council member Charlie at the gas station, where they talk about that same issue that was discussed by Alpha and Bravo at the grocery store, a meeting of a public agency occurred. If the city council did not comply with the OMA (and it is a safe presumption that it did not for that serial meeting), there would be a violation of the Act.

There is a vital exception to the rule against serial meetings. Although serial meetings are generally improper under the OMA, members may certainly become informed on specific issues that the agency will take action on without violating the Act so long as the discussion is limited to the education of those public members.<sup>6</sup>

The Attorney General has also suggested that the commonality of members of the agency is not necessary for a violation of the OMA based on a serial meeting. In other words, the same public agency member need not be present at each of the non-quorum meetings in order to violate the Act. For example, if mayor asks the city clerk to contact each of the city council members to determine how they will vote on a certain issue, even though the city clerk is not a member of the agency, the agency may have violated the Act because the city clerk met with or discussed the issue with more than a quorum of the public agency.<sup>7</sup>

There is another important aspect to the prohibition against serial meetings. Technically, a serial meeting in violation of the Act only occurs when the members of the public agency held multiple gatherings lacking a quorum “for the purpose of avoiding the requirements of” the OMA.<sup>8</sup> Needless to say, there are significant complications in determining the subjective intent of members of a public agency.<sup>9</sup> As such, the Attorney General often forgoes any specific findings as to the intent of the members and merely rules on the first two elements: whether there was a quorum and whether public business was discussed or action taken.<sup>10</sup>

The OMA only applies when there are discussions of public business or action taken. “Public business” has been defined by the Attorney General as the discussion of alternatives to an issue on which an agency has the option to take action.<sup>11</sup> For example, if council members

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<sup>5</sup> KRS 61.810(2).

<sup>6</sup> KRS 61.810(2).

<sup>7</sup> 10-OMD-015 (Jan. 25, 2010).

<sup>8</sup> KRS 61.810(2).

<sup>9</sup> It may be particularly difficult to make such a finding in the example above, in which agency members coincidentally and unintentionally met at random public places.

<sup>10</sup> See, e.g., 09-OMD-093 (June 16, 2009).

<sup>11</sup> *Yeoman v. Commonwealth*, 983 S.W.2d 459, 474 (Ky. 1998).

are discussing the budget of their public agency, that is clearly the discussion of an issue that the agency has the option to take action on and would constitute public business. If, on the other hand, council members or members of the agency were discussing the likelihood of certain college basketball teams having success in the national championship game, that would not constitute public business because the agency has no option to take action on that specific topic. Despite how popular college basketball is in this state, discussion thereon would not constitute public business unless, of course, the agency is university board that is a public agency under the OMA.<sup>12</sup>

KRS 61.820 requires all public agencies to hold regular meetings at times and places that are convenient to the public. “Regular meetings” does not necessarily require monthly meetings or even bi-monthly meetings, but could include annual meetings. In addition, it does not require strict adherence to specific times for meetings. For example, a city council may choose to meet twice a month on the first and third Thursday of the month, but on the first Thursday it holds the meeting at 9:00 a.m. and the third Thursday of the month it holds the meeting at 7:00 p.m. Such an “irregular” schedule does not violate this statutory provision mandating regular meetings.

When the statute refers to a time and place that is convenient to the public, the Attorney General has actually interpreted this to mean the meeting cannot be inconvenient. For example, it is permissible to hold a meeting during regular business hours even though some citizens working a regular “9-5” job would have to request leave from their employer in order to attend the meeting of the public agency. This schedule of regular meetings should be established by the public agency by an “ordinance, order, resolution, by-laws, or any other means that may be required for the conduct of business for that public agency.”<sup>13</sup>

Regardless of whether a meeting is in conjunction with a regular meeting or a special meeting, public agencies must allow members of the public to attend every meeting. The agency cannot place any conditions on attendance of the public during open session. The agency cannot require an individual to identify himself or herself in order to attend the meeting. In addition, agencies must provide sufficient facilities for the meeting to take place in the view of the public. For example, if a water district board typically meets at its district office which is relatively small and can only hold ten or twelve people in the room and the board is going to be discussing a controversial topic that it knows will have many members of the public attend the meeting, the water district should find a suitable location—maybe city hall, a courtroom or a public library conference center—that might be large enough to handle such a large crowd for that meeting. The public agency must also allow any individual or member of the media to record and/or broadcast the meeting.<sup>14</sup> It is important to note, however, the public agency is not required to allow public participation in the meeting, although it may be prudent to do so in limited fashion. A public agency can exclude members of the public that are disruptive to the meeting.

There may be times when a public agency must meet at a time other than what the regularly scheduled meeting would be. These non-regular meetings are considered special

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<sup>12</sup> See, e.g., 11-OMD-167 (“While post-adjournment discussions of cars and basketball amongst a quorum of the fiscal court members are certainly permissible, discussions of the budget are not.”)

<sup>13</sup> KRS 61.820.

<sup>14</sup> KRS 61.840.

meetings. Special meetings may be called by either the presiding officer or a majority of members.<sup>15</sup> When a public agency calls a special meeting, that agency must provide written notice of the special meeting to the members of the agency as well as any individual that has filed a request to receive such notice of a special meeting. The notice must consist of the date, time and place of the special meeting along with an agenda or description of items that will be discussed at the meeting. Unlike a regular meeting in which the public agency can discuss any issue it chooses, during a special meeting the public agency can only discuss and take action on items that were listed on the agenda in the notice of the special meeting.<sup>16</sup> This notice must be sent out either by mail, facsimile, or personal delivery in order that it is received 24 hours before the special meeting.<sup>17</sup> Alternatively, the public agency can satisfy the requirement of a written notice by sending out electronic mail to members of the agency along with individuals that have requested to receive notice of special meetings when those individuals have filed a written request with the public agency that indicates their preference to receive email notification as opposed to other delivery. Of course, that written request must include the email address or addresses of the individual requesting email service of the notice. In addition to sending out a written notice of the special meeting, the agency must also post notice of this special meeting in the building or location at which the special meeting will be held as well as the headquarters of the agency. As with the receipt of notice by the public agency members, this posting of the public notice should be made at least 24 hours before the special meeting.

On rare occasions, the public agency may require an emergency meeting that does not provide 24 hour notice in advance of the meeting. In those circumstances, the public agency must make reasonable efforts to notify all the members of the agency as well as the individuals that have requested to be notified about special meetings as far in advance of the meeting as is practical. At the beginning of that emergency meeting, the person presiding over the meeting must describe why the emergency meeting was being called and that description should be included in the minutes of the emergency meeting. Similar to the requirements of a special meeting, discussions within the emergency meeting should be limited to only items which would be classified as emergency issues.

These emergency meetings should only be held when absolutely necessary. There are virtually no scenarios in which the Attorney General has determined that an emergency meeting was justified.<sup>18</sup> The primary reason for this is because in most true emergency situations no one would challenge the public agency's calling of an emergency meeting, which would trigger a complaint and eventually an appeal to the Attorney General. But in the handful of decisions that the Attorney General had discussed this question, the Attorney General determined the circumstances of that particular situation did not meet the emergency need requirement of the statute. The lesson to be learned in this is that any public agency seeking to call an emergency meeting should make absolutely sure that the special meeting requirements of 24 hour notice cannot be met.

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<sup>15</sup> KRS 61.823(2).

<sup>16</sup> KRS 61.823(3).

<sup>17</sup> KRS 61.823(4)(a).

<sup>18</sup> Office of the Attorney General, "Your Duty under the Law" 16 (September 2012), *available at* [http://ag.ky.gov/civil/orom/documents/yourdutyunderthelaw\\_708\\_.pdf](http://ag.ky.gov/civil/orom/documents/yourdutyunderthelaw_708_.pdf)



There will undoubtedly be times during a regular or special meeting in which the public agency must discuss certain things or issues that should not be discussed in the public view. The OMA allows these closed session meetings or executive session meetings under certain, limited circumstances. Subsection 1 of KRS 61.810 describes thirteen different categories of topics that a public agency can discuss in closed session.

- (a) Deliberations for decisions of the Kentucky Parole Board;
- (b) Deliberations on the future acquisition or sale of real property by a public agency, but only when publicity would be likely to affect the value of a specific piece of property to be acquired for public use or sold by a public agency;
- (c) Discussions of proposed or pending litigation against or on behalf of the public agency;
- (d) Grand and petit jury sessions;
- (e) Collective bargaining negotiations between public employers and their employees or their representatives;
- (f) Discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student without restricting that employee's, member's, or student's right to a public hearing if requested. This exception shall not be interpreted to permit discussion of general personnel matters in secret;
- (g) Discussions between a public agency and a representative of a business entity and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business;
- (h) State and local cabinet meetings and executive cabinet meetings;
- (i) Committees of the General Assembly other than standing committees;
- (j) Deliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments, at which neither the person involved, his representatives, nor any other individual not a member of the agency's governing body or staff is present, but not including any meetings of planning commissions, zoning commissions, or boards of adjustment;
- (k) Meetings which federal or state law specifically require to be conducted in privacy;
- (l) Meetings which the Constitution provides shall be held in secret; and
- (m) That portion of a meeting devoted to a discussion of a specific public record exempted from disclosure under KRS 61.878(1)(m). However, that portion of any public agency meeting shall not be closed to a member of the Kentucky General Assembly.

For most attorneys in the Commonwealth that are dealing with public agencies such as cities, school boards or water districts, there are only a few exceptions that will be routinely seen in that setting that will justify that public agency going into closed session. Those would

include: discussions of proposed or pending litigation against or on behalf of the public agency; discussions that might lead to the appointment, discipline or appointment of an employee; discussions of the acquisition or sale of real property; and issues related to homeland security.

In a recent decision by the Attorney General, he concluded that discussions of a public agency (specifically, a city) relating to a contract with another entity should not be discussed in closed session simply because it may have pertained to attorney-client discussions.<sup>19</sup> In that case, the city argued that the discussion was allowed to be held in closed session because it would be protected by meetings which federal or state law specifically required to be conducted in privacy. Kentucky law allows an attorney-client privilege for communications between an attorney and a client in which legal opinion is being rendered, but the Attorney General said that such discussion related to specific provisions of the contract which the contracting entity wanted amended would not sufficiently fall in this exception. The Attorney General also noted that this subsection of the OMA differs from that of the Open Records Act which would allow non-disclosure of attorney-client privileged records.

There are certain procedures that must be dealt with when going into closed session. First and foremost, while the agency is in open session, a member of the public agency must make a motion to go into closed session and specifically identify the reason for that closed session. For example, if a city wanted to go into closed session to discuss the dismissal of an employee, a motion should be made by one of the city council members to go into closed session specifically for the purpose of discussing the dismissal of the employee. Ideally, the minutes should reflect that that is allowed based on KRS 61.810(1)(f). If the motion passes, the public agency goes into closed session (either by going into a separate room where no one else is present or by asking the members of the public to step outside for a minute, depending on the layout of the building in which they are meeting). While in closed session no official minutes should be taken, and the only final action taken in closed session should be a motion to go back into open session. Once back in open session, the agency can then make a formal motion and take action on the issue it was discussing in closed session. Alternatively, there could be no action taken by the agency and the best practice would be to indicate in the minutes of the meeting that no action was taken after the closed session. Similar to a special meeting, discussions, closed sessions discussions must be limited to those topics that were identified in the specific motion to go into closed session. If the motion is made to go into closed session to discuss the dismissal of an employee, the public agency should not talk about the dismissal of the employee and then segue into a discussion of who would be hired for that position. If the public agency knows that it wants to talk about both those issues, the member should so state in his or her motion to go into closed session.

KRS 61.846 discusses how members of the public should approach a potential violation of the OMA if someone believes that a public agency has violated the Act. An individual must draft a complaint in writing that is directed to the agency's presiding officer. That complaint must specify the circumstances constituting the alleged violation, and the individual must propose a remedial action. Often individuals will suggest—as a remedial action—the public agency rescind any action taken as a part of the meeting that violated the Act. An individual may even ask that no action ever be taken again on that specific action. But, even if the agency

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<sup>19</sup> 13-OMD-026 (Feb. 21, 2013).

agrees that a violation of the OMA occurred, there is nothing preventing it from proceeding forward with a new discussion and action taken that replicates the former action. Upon receipt of a complaint, the presiding officer or designee of that presiding officer must respond within three business days. In that response, the presiding officer must admit a violation, or deny the violation, and if admitting a violation, must accept the proposed remedy or reject the proposed remedy and state the reasons why these decisions were made.

If the complaint is not resolved at the public agency level, the individual filing the complaint can file an appeal with the Attorney General within 60 days of the written denial from the agency or within 63 days from the filing of the written complaint if no agency response is ever received. Thereafter, the Attorney General will issue a written decision within 10 days. That written opinion by the Attorney General is final unless either party appeals the Attorney General's decision.<sup>20</sup> If either the individual or the public agency decides to appeal the decision of the Attorney General, that appeal is made to the circuit court where the agency has its principal place of business or where the violation occurred. That appeal must be filed with the circuit court within 30 days of the Attorney General's opinion.

KRS 61.848 provides for penalties for violating the OMA. If a court finds a willful violation of the OMA, the court can issue a fine of \$100 per violation and may award costs including attorneys' fees. That \$100 per violation would be assessed against the public agency. There can also be criminal fines of \$100 against the individual member of the public agency for each time that member of the public agency attends a meeting knowing it is in violation of the OMA. Although these fines are seemingly relatively small, they can quickly add up, particularly in the scenario of a serial meeting violation that may occur on several different issues.

### **Open Records Act**

Much like the OMA, the Open Records Act ("ORA") supports transparency in governmental action. It is codified at KRS 61.870-61-884. In order to understand the ORA, one must first begin with defining "public agency" under the ORA. KRS 61.870 defines "public agency" as

- (a) Every state or local government officer;
- (b) Every state or local government department, division, bureau, board, commission, and authority;
- (c) Every state or local legislative board, commission, committee, and officer;
- (d) Every county and city governing body, council, school district board, special district board, and municipal corporation;
- (e) Every state or local court or judicial agency;
- (f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
- (g) Any body created by state or local authority in any branch of government;

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<sup>20</sup> KRS 61.846.

- (h) Any body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, any funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a public agency under this subsection;
- (i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;
- (j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and
- (k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection.

A recent amendment to subsection (h) is worthy of attention. It now defines a public agency as an entity that has 25 percent of its expenditures derived from state or local funds excluding public procurement contracts. The exclusion for contracts that were awarded pursuant to the public procurement process was enacted during the 2012 General Assembly. The amendment stemmed from ORA requests directed to engineering firms that conducted significant business with public agencies. For example, an engineering company that would exclusively design water plans for public agencies and that comprised most of its business would have previously been subject to the ORA because it would be an entity that derived at least 25 percent of its funds expended in the state from state or local authority funds. In 2012, the General Assembly changed that provision to include the exception so these types of engineering firms and other similarly situated entities that would fall under this exception would be exempt from the ORA. The documents received by the public agency from their engineering company, however, would be subject to the ORA because those would be records in the public agency's possession.<sup>21</sup>

One of the provisions that many public agencies may not be aware of is KRS 61.876. This statute requires public agencies to adopt rules and regulations that provide for how the ORA will be complied with at that public agency. These rules and regulations are designed to provide full access to public records, to protect public records from damage and disorganization, to prevent excessive disruption of the public agency's essential functions, to provide assistance and information upon request and to insure efficient and timely action in response to an application for inspection. In these rules and regulations, a public agency must include the principal office

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<sup>21</sup> Similarly, the public entity cannot simply demand that the engineering firm or other third party retain possession of the records in order to circumvent the disclosure requirements of the ORA. 04-ORD-123 ("In the end, it is the nature and purpose of the document, not the place where it is kept, that determines its status as a public record.").

and its regular office hours, the name of the official custodian of the records for that public agency, the fees charged for copies and the procedures to be followed in requesting public records.<sup>22</sup> These rules and regulations are beneficial not just to the public, but also to the public agency employees who may have to reference them in order to handle certain requests.

The definition of “public record” in the ORA is all encompassing. It includes “all books, papers, maps, photographs, cards, tapes, disks, diskettes, recordings, software or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency.”<sup>23</sup> With developments in technology, a public agency must remember that a public record includes newly developed technological recordings. For example, twenty years ago no one would have imagined that cellphones would have metadata that would be considered a record under the Act.

The public agency can distinguish between records and information, however. Public agencies are not required under the ORA to create records that do not exist or to respond to requests for information. For example, if an individual asked a public agency for the salaries of all its employees, the agency would not be required under the ORA from that specific request to provide the information requested. On the other hand, if the individual asked for payroll records of all the agency’s public employees, the public agency would be required to produce those records subject to any exemptions that may be provided for in the ORA.

KRS 61.872 requires that all public records be open to inspection unless there is an otherwise specifically provided for exception. Anyone can request a public record regardless of who that person is. Similarly, the reason why someone wants to review or copy a public record is irrelevant and the agency has the same legal obligation to provide inspection or a copy of a document regardless of the identity of the individual or the reason.

Some public agencies in their rules and regulations drafted pursuant to the ORA have required individuals to fill out a form in order to receive or inspect public records. The form for the Louisville and Jefferson County Metropolitan Sewer District currently asks the applicant to explain the purpose for which the individual is requesting those documents. Even though the agency is not prohibited from asking for the purpose of the individual requesting the records, the agency cannot require that individual to disclose his or her purpose without producing the documents for inspection or copying.

KRS 61.872 requires the agency to provide certain facilities with respect to the ORA. First, it requires that the agency provide suitable facilities for inspection. Even though most public agencies receive requests for copies of documents, the agency must nevertheless be able to provide a location for an individual to come in to their business operations and review records that have been pulled for that purpose. The agency must allow inspection during regular business hours, but is not required to extend those hours past its usual operating times. Although allowing or requiring having facilities to permit inspection may seem burdensome, it may help the public agency in the long run. For a person who lives in the county in which the agency conducts its business, the public agency can require that person to review the records at its

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<sup>22</sup> KRS 61.876(1)(a)-(d).

<sup>23</sup> KRS 61.870(2).

business before it makes copies and mails them. This requirement, however, only applies to individuals who live or conduct business in the same county as the public agency.<sup>24</sup>

An individual requesting inspection or copies of documents of public records must submit that request in writing directed to the official custodian and it must specify the records requested. The description of the records requested must be specific enough to allow the public agency to know what is being requested. The request must be signed by the requester and his or her name must be printed legibly on the request. As mentioned before, these are the only requirements for submitting a request under the ORA. There is no allowance or requirement that the individual specify her or her purpose for seeking the documents or what he or she is going to do with them after the fact.

Upon receipt of a request to inspect or copy documents, the official custodian of records for the agency must respond in writing within three business days. This response may indicate that the documents are not yet available based on the voluminous nature of the request, the location of the documents, or other justifiable reason. For example, certain documents may be in off-site storage for the public agency and may not be available within a three day period. To the extent that the request for inspection or copying of public records is denied, the public agency must reference what records will not be produced and the specific exception under the ORA that allows the agency to withhold disclosure of those records.<sup>25</sup>

A public agency can charge a fee that is equal to the actual expense it incurs in producing those documents, but there are some exceptions to that. The public agency cannot include staff time and costs in producing those documents or copying those documents. This is because, as the Attorney General has stated, the public agency must be equipped to comply with the ORA. To date, the Attorney General has acknowledged that 10 cents per regular sized page is an appropriate amount to charge. To the extent that an agency seeks to charge more than 10 cents, it must be prepared to prove its actual expenses for copying. These costs may include, for example, reasonable fees for the copy machine, toner, and pieces of paper. There is an exception to the exception, however, in that an agency may charge more than ten cents, including staff time and costs, if the request is for a commercial purpose. This increased cost allowance, however, creates other problems in that the statute suggests that the agency can inquire as to whether or not the document is being requested for a commercial purpose. Once again, the purpose is irrelevant in whether or not the agency must produce the public record it would only be for the cost in providing documents of those documents. In 2012, the General Assembly enacted a law that permits county clerks to charge up to 50 cents per page. That statute only applies to county clerks.<sup>26</sup>

KRS 61.878 provides for 14 categories of documents that are exempted from the disclosure requirements of the ORA.

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<sup>24</sup> KRS 61.872(3)(b).

<sup>25</sup> KRS 61.872(5).

<sup>26</sup> See HB 545, Section 12 (2012).

- (a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;
- (b) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute;
- (c)
  1. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;
  2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:
    - a. In conjunction with an application for or the administration of a loan or grant;
    - b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;
    - c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or
    - d. For the grant or review of a license to do business.
  3. The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;
- (d) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;
- (e) Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;
- (f) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to

acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;

- (g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;
- (h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884;
- (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;
- (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;
- (k) All public records or information the disclosure of which is prohibited by federal law or regulation;
- (l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly;
- (m) 1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to:
  - a. Criticality lists resulting from consequence assessments;
  - b. Vulnerability assessments;
  - c. Antiterrorism protective measures and plans;
  - d. Counterterrorism measures and plans;
  - e. Security and response needs assessments;



f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;

g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and

h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact physical location of hazardous chemical, radiological, or biological materials.

2. As used in this paragraph, “terrorist act” means a criminal act intended to:

a. Intimidate or coerce a public agency or all or part of the civilian population;

b. Disrupt a system identified in subparagraph 1.f. of this paragraph; or

c. Cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency.

3. On the same day that a public agency denies a request to inspect a public record for a reason identified in this paragraph, that public agency shall forward a copy of the written denial of the request, referred to in KRS 61.880(1), to the executive director of the Office for Security Coordination and the Attorney General.

4. Nothing in this paragraph shall affect the obligations of a public agency with respect to disclosure and availability of public records under state environmental, health, and safety programs.

5. The exemption established in this paragraph shall not apply when a member of the Kentucky General Assembly seeks to inspect a public record identified in this paragraph under the Open Records Law; and

(n) Public or private records, including books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, having historic, literary, artistic, or commemorative value accepted by the archivist of a public university, museum, or government depository from a donor or depositor other than a public agency. This exemption shall apply to the extent that nondisclosure is requested in writing by the donor or depositor of such records, but

shall not apply to records the disclosure or publication of which is mandated by another statute or by federal law.

The most discussed and controversial exemption to disclosure requirements involves that of records that are of a personal nature. The statute allows a public agency to withhold records that contain “information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”<sup>27</sup> The courts in Kentucky have established a balancing test in order for a public agency to determine whether documents may be withheld from disclosure based upon this personal nature exception.<sup>28</sup> That balancing interest weighs the difference in the privacy interest of the individual whose personal privacy may be invaded upon versus the public’s right to know what the government is doing. In that balancing test, there are essentially three questions that must be asked. First, does an individual have a cognizable privacy interest that should be protected? Second, will an open records related purpose be advanced by the disclosure? Third, what is the magnitude of the privacy interest?

Understanding the analysis that goes into this consideration. Consider the following hypothetical:

A newspaper reporter requests, in writing, a copy of the last paycheck of a water district meter reader. When the water district custodian of records locates the record, she notices that the paycheck has the employee’s home address. She questions whether she must redact that employee’s home address prior to producing a copy of the paycheck for inspection to the reporter.

The first question to ask is whether there is a privacy interest in the home address of anyone. The Attorney General has determined that there is a privacy interest in someone’s home address.<sup>29</sup> Now, how great is that privacy interest? Although the Attorney General has not given specific description, I would weigh that interest relatively low simply because there are several legal ways in which the public can learn of someone’s home address. In fact, it might be as simple as following someone home after work to see where they live. That is entirely legal (unless, of course, there is a protective order out against the person following the individual home). Ultimately, I would weigh that privacy interest of a home address relatively small. On a scale of 0 to 10, 0 being the lowest privacy interest and 10 being the privacy interest, the home address may be valued as 1 or a 2. The next question that must be asked is whether there is a public purpose that would be advanced by the disclosure of the home address. I can think of no reason why the public would need to know the home address of a meter reader, generally speaking. Accordingly, the public purpose to be advanced by disclosure would likely be a 0 on a scale of 0 to 10. Because in this scenario, the meter reader’s privacy interest is greater than the public purpose that would be advanced by disclosure of that home address, the public agency can lawfully withhold that record that discloses the home address from disclosure.

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<sup>27</sup> KRS 61.878(a).

<sup>28</sup> See, e.g., *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. App.1994).

<sup>29</sup> See, e.g., 06-ORD-031 (Feb. 13, 2006).

Contrast the meter reader scenario above with a similar request for a water district commissioner's last paycheck. As discussed above, there is a privacy interest in a home address and that the magnitude of that privacy interest would be the same regardless of who that individual is. It would still be a relatively low value or magnitude of privacy. Unlike a meter reader, however, water district commissioners have certain statutory residency requirements. Under KRS Chapter 74, a water district commissioner must reside within the boundaries of the water district. Because of that statute's residency requirement, there is a greater public purpose that would be advanced by disclosure: insuring that the water district commissioner does, in fact, reside within the water district boundaries as required by law. Because of that greater public purpose, I would weigh the purpose that would be advanced by disclosure of the home address for the water district commissioner to be greater than that water district's privacy interest. Accordingly, the records custodian should not redact the water district commissioner's home address prior to producing the paycheck for inspection.

The Attorney General has rendered numerous opinions on this personal privacy exemption, and it is clear that the Attorney General and the courts regard this issue as one that must be dealt with on a case by case basis.<sup>30</sup> There was a recent opinion that discussed whether an applicant's resume should be disclosed.<sup>31</sup> The Attorney General opined that with respect to the appointed mayor of Bowling Green, who was appointed by the City's Board of Commissioners, the public purpose was great enough to outweigh the privacy interest of the non-appointed applicant's resume because applicants for a public office forfeit a measure of their privacy when seeking public office. In that same opinion, however, the Attorney General opined that the same might not be true for a university president. The Attorney General was clearly anticipating possible open records specifically for the University of Kentucky, who was going through a change in presidency about the same time that opinion was rendered. And, in that opinion, the Attorney General indicated that university presidents are often hired from other institutions of higher learning and that individual would have a significant interest in protecting their privacy so that they would not be harmed at their home institution if they were not offered employment as the president of a Kentucky institution. This example provides clear guidance that the magnitude of privacy and public interest must be weighed independent from any other prior scenario.

Public agencies can also withhold documents if there is an unreasonable burden placed on the agency in order to produce those documents.<sup>32</sup> A question that is often raised is "what exactly is unreasonable?" A refusal under this section must be supported by clear and convincing evidence, which means that the agency will have a heavy burden in order to demonstrate that it is in fact unreasonable to produce the documents. In a recent decision, however, the Attorney General affirmed a public agency's request for production of email records that may have included student information from a school board.<sup>33</sup> The school board responded to the applicant and indicated that there were over 8500 emails that would have to be reviewed and redacted or excluded from production because of federal law that prevented the disclosure of certain student record information. The agency and the Attorney General

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<sup>30</sup> See *Bd. to Cape Publications v. City of Louisville*, 191 S.W.3d 10 (Ky. App. 2006)

<sup>31</sup> 11-ORD-046 (Mar. 28, 2011).

<sup>32</sup> KRS 61.872(6).

<sup>33</sup> 11-ORD-173 (Oct. 28, 2011).

determined that this was in fact an unreasonable burden on the agency and ultimately would have required the individual applicant to narrow the request in order to receive certain documents.

This clear and convincing standard found in the unreasonable burden exception is also found in the “repeated request” exception.<sup>34</sup> Public agencies often find themselves confronted with a local, grassroots activist that wants lots of information from the public agency. The public agency cannot deny repeated requests as such unless the agency has reason to believe that the repeated requests are intended to disrupt other essential functions of the public agency. This undoubtedly is a very high standard to meet.

Under paragraphs (i) and (j) of Section 1 of KRS 61.878, preliminary documents can be excluded from disclosure. Specifically, notes, drafts and correspondence with private individuals that is not correspondence which intended to give final action and recommendations and preliminary memoranda in which opinions are expressed or policies are formulated or recommended may be excluded. It is important to note that although the document may be a primary document, information contained therein may be non-exempt. Specifically, factual updates, gratuitous commentary, questions and the exchange of information as opposed to being subjective in nature or recommendations or opinions regarding the underlying request or complaint and the agency’s response thereto.<sup>35</sup>

Another category of documents that may be excluded from disclosure include public records the disclosure of which would have a reasonable likelihood of threatening public safety. This is generically referred to as the homeland security exemption. This designation is designed so that a public agency need not disclose records that may expose a vulnerability or would help in preventing, protecting against, mitigating or responding to a terrorist act. A terrorist act would include disclosing locations of critical systems, including fire, suppression, gas, electrical, water or wastewater systems.<sup>36</sup>

A recent Attorney General opinion opened the door to arguments on the extent of the homeland security exemption.<sup>37</sup> In that opinion, a city council member had specifically requested water system plans for the city that he was a council member for, and the Attorney General dodged the question as to whether or not those water plans would fall under this exemption. Many people believed that the Attorney General would use this exemption to determine that those documents should not be disclosed, but the Attorney General did not address that specific question. The statutory text of the homeland security exemption would seemingly apply. Because the Attorney General did not reach a decision on those grounds, one could infer that it is not clear cut as to whether water system plans would fall within this exception.<sup>38</sup>

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<sup>34</sup> KRS 61.872(6).

<sup>35</sup> See 11-ORD-052.

<sup>36</sup> KRS 61.878(1)(m)(1)(f).

<sup>37</sup> See 13-ORD-003 (Jan. 8, 2013).

<sup>38</sup> It is important to note that this specific scenario in which a council member was asking for documents related to his own city may fall into a different exemption in that the ORA should not prohibit or limit the “exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate governmental function.” KRS 61.878(5).

The ORA specifies that a public agency has a duty to redact if part of the record may fall within an exception, but the remainder of that record should be disclosed. The best example for this is a request for a payroll record. Generally speaking, the payroll record does not have an exemption under the ORA, but there may be information contained thereon that would be. For example, a social security number or a bank account number would clearly implicate the personal privacy exception, and the public agency should redact such information on the payroll record prior to producing that record.

If a request is received by a public agency and the public agency denies inspection or copying of documents based on the ORA, the individual making the request can appeal to the Attorney General. When that appeal is made, the Attorney General notifies the public agency and the Attorney General may request additional documentation from the public agency. Ultimately, the burden of proof is on the agency to show that the records are exempt from the ORA, but the Attorney General does not have the power to compel the public agency to provide those documents to the Attorney General in order to have the review undertaken. The Attorney General will then determine whether the public agency violated the ORA. If either the public agency or the individual requesting records disagrees with the Attorney General's decision, that entity or individual can appeal the Attorney General's decision to the circuit court in which the public agency is based within 30 days of the Attorney General's opinion.<sup>39</sup>

If a court finds a willful violation of the ORA by the public agency, the court may fine the agency \$25 per day that the documents were not disclosed and may award costs, including attorneys' fees, against the public agency. These fines can add up very quickly. In a recent case, Franklin Circuit Court ordered a public agency to pay \$16,000 worth of fines for their willful violation of the Act. More damaging, however, the court also required the agency to pay \$57,000 worth of attorneys' fees to the individual who was requesting the public records.<sup>40</sup> Public agency employees, particularly records custodians, must also know that there is a possibility that a court could order criminal jail time for willfully concealing or destroying documents with the intent to violate the ORA. Although there have not been any cases in which an individual was jailed for this reason, members of public agencies must know that that is a possible criminal penalty for violating the Act.

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<sup>39</sup> KRS 61.880.

<sup>40</sup> See *Cabinet for Health and Family Servs. v. Lexington Herald Leader*, No. 2010-CA-002194-MR (Ky. App. Oct. 19, 2012).

*Protecting Your Right  
To Know:*

**The Kentucky  
Open Records and  
Open Meetings Acts**

Office of the Attorney General  
Andy Beshear, Attorney General

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August 2016

*Protecting Your Right To Know* provides basic information about Kentucky's Open Records and Open Meetings Laws. The Attorney General provides this booklet to assist the citizens of Kentucky in understanding their right of access to records and meetings under the Open Records and Open Meetings Laws.

The Office of the Attorney General welcomes suggestions for improvements to this work, as well as ideas for future publications. Comments may be sent to Attorney General's Office, 700 Capital Avenue, Capitol Building, Suite 118, Frankfort, Kentucky 40601.

Please visit our website, <http://ag.ky.gov>, for more information about the Office of the Attorney General and the Open Records and Open Meetings Laws.

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# The Open Records and Open Meetings Acts

## *Protecting your right to know*

Kentucky's laws on open records and open meetings ensure your right to know how your government operates. It is important that you understand your rights under those laws. This brochure provides an overview of the Open Records and Open Meetings Acts, and is designed to aid you in understanding your rights. It contains a description of the general requirements of the laws, the procedures you must follow in using them, the exceptions that may be invoked in appropriate circumstances, and the role of the Attorney General in interpretation and enforcement. Please note that the italicized and bulleted text reflects the courts' and the Attorney General's interpretation of the Acts. Because the Attorney General's Office acts as an impartial tribunal in open records and open meetings appeals, we cannot advise you in particular cases. The following information should, however, prove useful to you in protecting your right to know.

## The Open Records Act

In 1976, the General Assembly enacted the Open Records Act, KRS 61.870 to KRS 61.884, which establishes a right of access to public records. The General Assembly recognized that free and open examination of public records is in the public interest. All public records, whether they are stored in a computer or on paper, must be open for inspection unless the records are exempted by one or more of the fourteen exemptions found in the Act. You may inspect any nonexempt public record regardless of your identity, and you may seek enforcement of the Act if you are denied this right.

### What are public records?

The Open Records Act applies to public records maintained by state and local government agencies. The agencies covered by the Act include:

- State and local government officers, departments, and legislative bodies;
- County and city governing bodies, school district boards, special district boards, and municipal corporations;
- State or local government agencies created by statute or other legislative acts;

- Bodies that receive at least 25% of their funds from state or local authority excluding compensation for goods or services provided under a competitively bid public contract;
- An entity where the majority of its governing body is appointed by a public agency;
- Boards, commissions, committees, etc., that are established, created, and controlled by public agencies; and
- Interagency bodies of two or more public agencies.

Subject to fourteen exceptions, records that are prepared, owned, used, possessed, or retained by a public agency are public records, and must be made available upon request.

- *The term “public records” includes all such records even if they are not subject to inspection under an exemption and therefore not “open records.”*
- *The term “public record” includes emails, databases, and other records electronically generated and/or stored.*
- *The term “public record” may include public agency records that are not maintained on the agency’s premises.*

## **What is the procedure for inspecting a public record?**

To inspect a public record, you may be required to make a written request to the official custodian of the records of the agency. The custodian is the agency employee who is responsible for maintaining the agency records. You should describe the records you want to inspect, sign the request, and print your name on it. You may hand-deliver, mail, or fax your request to the agency.

If you request copies of public records, the agency’s copying charges must be limited to the actual cost of reproduction, including material and mechanical reproduction cost, but not including the cost of personnel required to copy the records. Public agencies may require you to state, in writing, whether your request is submitted for a commercial or noncommercial purpose. Commercial purpose is defined as “any use by which the user expects a profit either through commission, salary, or fee,” but excludes print or electronic media and attorneys representing parties in litigation. Requesters who intend to use the records for a commercial purpose, as that term is defined in the statute, may be required to pay a higher charge, to include copying and personnel costs. Since July 2016, use of a booking

photograph or official inmate photograph for a commercial purpose is expressly prohibited.

The public agency must respond to your request, in writing, and within three days, not including Saturdays, Sundays, and legal holidays. If the agency denies all or any part of your request, it must tell you which Open Records Act exemption it is relying on. The agency must also explain how the exemption applies to the record.

If the record that you want to inspect is in use or temporarily unavailable, the agency should notify you, in writing, and designate a place, time, and date for inspection no more than three days from the date it received your request. If the delay is greater than three days, the agency must give you a detailed explanation of the cause for the additional delay, in writing, and tell you the earliest date the records will be available.

You may inspect public records during the regular office hours of a public agency or by receiving copies of the records through the mail. If you live or work outside the county in which the records are located, and you precisely describe the records, the public agency must mail copies to you. The agency may require advance payment of the copying fee and postage. In providing you with copies, the agency is not required to convert records from paper to electronic format, but if the agency maintains the records in electronic format, you have the option to choose to receive the records in paper or electronic format.

- *You must be permitted to conduct onsite inspection of the records if you wish to do so, even if the agency prefers to mail you copies.*
- *You must be permitted to conduct onsite inspection of the records during the agency's regular office hours, and the agency cannot restrict your hours of access.*
- *The agency may require you to conduct an onsite inspection, before receiving copies, if you live or have your principal place of business in the county where the records are located and/or if you fail to precisely describe the records.*
- *You must request records, not information. An agency is not required to honor a request for information. An agency must honor a request for an existing public record that contains the information you seek unless the requested records are exempt.*

**Wrong:**        *How much are the city's employee's paid?*

**Right:** *Please provide me with copies of the city's current payroll records.*

- *The agency may provide you with a preprinted open records form, but you cannot be required to use it. Your request must be accepted if it is in writing, describes the records you wish to inspect or obtain copies of, and contains your signature and your name printed legibly on it.*
- *Do not submit your request by email. Agencies are not required to honor emailed requests. Submit your request by U.S. Mail, fax, or hand-delivery.*
- *The agency's three day response time begins to run the day after it receives your request.*
- *If your purpose in requesting records is noncommercial, the agency may only charge you ten cents per page for copies of standard size paper records, unless the agency's statutes allow higher charges.*
- *You cannot be charged for inspecting records.*

### **What records are exempt from public inspection?**

The Open Records Act permits a public agency to withhold certain records from you unless you obtain a court order directing their release. These include:

- (a) Records containing information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (b) Records confidentially disclosed to an agency and compiled and maintained for scientific research;
- (c) Records that are confidentially disclosed to an agency or required by the agency to be disclosed to it which are generally recognized as confidential or proprietary and which if disclosed would permit an unfair commercial advantage to competitors, including records which are compiled and maintained in conjunction with an application for or the administration of a loan or grant; the application for or the regulation of assessments, incentives, inducements, or tax credits; or the regulation of a commercial enterprise;

- (d) Records that relate to the prospective location of a business or industry which has not previously disclosed that it is interested in locating, relocating, or expanding in Kentucky;
- (e) Records developed by an agency in conjunction with the regulation or supervision of financial institutions which reveal the agency's internal examining or audit criteria;
- (f) Real estate appraisals, engineering or feasibility estimates, and evaluations made by or for a public agency in the course of acquiring property, until all of the property has been acquired;
- (g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;
- (h) Records of law enforcement agencies or agencies involved in administrative adjudication if disclosure of the records would harm the agency by premature release. Such records may be inspected after enforcement action is completed or a decision is made to take no action, unless they were compiled and maintained by a county or commonwealth's attorney or unless another exception applies;
- (i) and (j) Preliminary documents, including drafts, notes, correspondence with private individuals, recommendations, and memoranda in which opinions are expressed or policies formulated;
- (k) and (l) Public records that are prohibited from disclosure by state or federal law;
- (m) Records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act, as defined in the exemption, and limited to eight precisely described categories of records;
- (n) Records having historic, literary, artistic, or commemorative value that are accepted by the archivist of a public university, museum, or government depository from a donor or depositor

other than a public agency if nondisclosure is requested in writing by the donor or depositor.

- *Public agencies cannot withhold a public record because it contains both protected and unprotected information. Agencies must mask the protected information and release the unprotected information to you.*
- *If you are a public agency employee, you may inspect any record that relates to you, even if the record is otherwise exempt, unless the record you request is part of an ongoing criminal or administrative investigation by the agency, the record is an examination, or the record is made confidential by federal or state law.*
- *Records of the courts and judicial agencies, and records of the General Assembly, are not subject to the Open Records Act. Commonwealth's and county attorney's litigation records are permanently protected from public inspection, but these officials must still respond to your request and provide you with nonlitigation records that are not protected (for example, contracts, payroll records, time sheets, travel vouchers).*

## **What you can do if your request is denied**

If your request is denied, you may file an appeal with the Attorney General for review of the agency's actions. Your appeal must consist of a copy of your written request, a copy of the agency's written denial, if available, and, if you wish, a letter of appeal describing the circumstances of the appeal. Unless you are an inmate confined in a jail or correctional facility who is aggrieved by a denial issued by the Department of Corrections, you may bypass the Attorney General's Office and file your appeal in circuit court. If you choose to go directly to circuit court, you will incur the costs of bringing a lawsuit, including filing fees and your attorney's fee.

The Attorney General will review your appeal and issue a decision within twenty business days, or, in unusual circumstances, fifty business days. The decision will state whether the agency violated the Open Records Act by denying your request. You will receive a copy of the decision along with the agency. You or the public agency may appeal the Attorney General's decision to the circuit court of the county where the agency has its principal place of business or where the record is maintained. The Attorney General should be notified of any circuit court action, but may not be named as a party in the action.

If an appeal is not filed within thirty days, the Attorney General's decision has the force and effect of law and can be enforced in circuit court. However, the

Attorney General does not have authority to force an agency to release records or otherwise enforce the decision after it is issued.

If you prevail against an agency in circuit court, you may be awarded costs, including reasonable attorney fees, if the court finds that the records were willfully withheld. The court may also award you up to \$25 for each day that you were denied the right to inspect the records.

- *The Attorney General will not consider your appeal if it does not include a copy of your written request and the agency's written denial, if the agency issued a denial.*
- *Upon receipt of your open records appeal, the Attorney General will issue notification of the appeal to you and the public agency against which the appeal was filed, and the agency may respond in writing to the Attorney General; the agency must send you a copy of its response.*
- *Because the Open Records Act provides for judicial review of the issues in an appeal, the Attorney General will not reconsider an open records decision.*
- *The Attorney General will not consider an appeal if the requested documents are released to you after your appeal is filed but before an open records decision is rendered.*
- *The Attorney General will consider an appeal based on the allegation that the public agency "subverted the intent of the Act short of denial of inspection;" this includes appeals based on the imposition of excessive copying fees.*
- *Since 1992, open records decisions have been designated ORDs rather than OAGs because they are legally binding on the parties if not appealed.*
- *The designation "Not to be Published" that appears in ORDs issued from 1992 to 1999 does not mean that you cannot cite the ORD or make it public; such ORDs carry the same weight as ORDs designated "To be Published."*
- *The Attorney General's role in open records appeals is to issue a decision stating whether the public agency violated the Open Records Act; the Attorney General cannot enforce his decision by imposing penalties.*
- *If you are dissatisfied with an ORD, you may appeal the decision within thirty days; if you do not appeal the decision, the decision has the force and effect of law.*

## The Open Meetings Act

In 1974, the General Assembly enacted the Open Meetings Act, KRS 61.800 to KRS 61.850, which establishes a right of access to public meetings. The General Assembly recognized that the formation of public policy is public business, and should not be conducted in secret. The Act requires that all meetings of a quorum of the members of a public agency where public business is discussed or action is taken must be public meetings. Public meetings must be open to the public at all times, unless the subject of the meeting falls within one or more of the thirteen exceptions found in the statute. You may attend any public meeting, and you cannot be required to identify yourself in order to attend.

### What is a public meeting?

The Open Meetings Act applies to public meetings held by state and local government agencies. The agencies covered by the Act include:

- State and local government boards, commissions, and authorities;
- State and local legislative boards, commissions, and committees;
- County and city governing bodies, councils, school district boards, special district boards, and municipal corporations;
- State and local government agencies, including policymaking boards of educational institutions, that are created by state or local statute or other legislative act;
- Bodies created by state or local statute or legislative act in the legislative or executive branch of government;
- An entity where the majority of its governing body is appointed by a public agency;
- Boards, commissions, committees, subcommittees, etc., which are established, created, and controlled by a public agency;
- Interagency bodies of two or more public agencies.

Subject to thirteen exemptions, all gatherings of a quorum of the members of a public agency at which public business is discussed or action is taken are public meetings and must be open to the public, regardless of where they are held and



regardless of whether they are regular, special, informational, or casual gatherings held in anticipation of a regular or special meeting. An agency's meetings may be conducted by video teleconference, which is defined as a meeting occurring in two or more locations where individuals can see and hear each other by means of video and audio equipment, but cannot be conducted by telephone.

- *The courts have stated that the Open Meetings Act must be "interpreted most favorably to the public" since "failure to comply with the strict letter of the law in conducting meetings violates the public good."*
- *The Open Meetings Act applies to meetings of a quorum of the members of a public agency at which public business is discussed or action is taken; a discussion of public business by a quorum of the agency's members triggers the requirements of the Act even if no action is taken.*
- *The definition of "public agency" under the Open Meetings Act is narrower than the definition of "public agency" under the Open Records Act and does not include "state and local government officers" and bodies which receive "at least 25% of their funds from state or local authority funds;" this means for example, that the mayor of a city is a public agency for open records purposes but not for open meetings purposes.*
- *A committee of a public agency, even if its function is purely advisory, is a public agency for open meetings purposes and a quorum of its members is calculated on the basis of the committee's membership and not the membership of the public agency that created it (the city commission, consisting of five members, creates a budget committee consisting of three members – a quorum of the commission exists if three members are present and a quorum of the committee exists if two members are present); the committee must comply with all requirements of the Act.*
- *A work session and a retreat are public meetings under the Open Meetings Act, but a quorum of the members of a public agency may attend a conference sponsored by another entity without triggering the requirements of the Act as long as the members do not discuss the public business of the agency they serve while at the conference.*
- *"Public business" is not defined by statute but has been defined by the courts as "the discussion of the various alternatives to a given issue about which the [agency] has the option to take action."*
- *A quorum of the members of a public agency can attend a social gathering, sporting event, church service, etc. without triggering the requirements of the Open Meetings*

*Act but cannot discuss the public business of the agency they serve while at these gatherings.*

- *Public agencies cannot conduct their meetings by telephone; an absent member may listen to the meeting by speakerphone but cannot be counted toward the quorum and cannot vote or otherwise participate.*

## **What are the rules governing opening meetings?**

The Open Meetings Act requires that all public meetings be held at times and places that are convenient to the public in meeting rooms that provide adequate space, seating, and acoustics, and that the agency adopt a schedule of its regular meetings and make the schedule available to the public. The agency must record minutes of actions taken at its meetings, and these minutes must be open for public inspection no later than its next meeting. The meeting room must allow effective public observation of the meeting, including adequate space, seating, and acoustics, and the only conditions for attendance are those required for the maintenance of order. The Open Meetings Act does not govern the conduct of meetings and citizen participation. Each agency must adopt its own rules of procedure.

A “special meeting” may be called by the presiding officer or a majority of the members of the public agency. The agency must give written notice consisting of the date, time, and place of the meeting and the agenda. Discussions and actions at the meeting must be limited to the items listed on the agenda. Written notice must be delivered to the members of the agency, and every media organization that has requested advance notice, by U.S. Mail, fax, hand-delivery or, if certain conditions are met, email, at least twenty-four hours before the meeting. Notice must also be posted in a conspicuous place in the building where the meeting will take place and the building that houses the agency’s headquarters. If an emergency prevents the agency from following these procedures, it must make a reasonable effort to notify the members of the agency, the media, and the public, and discussions at the emergency meeting must be limited to the emergency for which the meeting was called.

- *The courts have stated that the Open Meetings Act does not require agencies to conduct business “only in the most convenient locations at the most convenient times”; the Act is “designed to prevent governmental bodies from conducting [their] business at such inconvenient times or locations as to effectively render public knowledge or participation impossible, not to require agencies to seek out the most convenient time or location.”*
- *Agencies are not required to take minutes in closed sessions.*

- *If the public agency directs that an audio or video recording of its meeting be made, and the recording is created with agency equipment at agency expense, the recording of the meeting is a public record upon creation and you are entitled to a copy within three business days of an open records request.*
- *You are entitled to attend a public meeting under the Open Meetings Act but this does not include the right to participate in the meeting and address the members of the agency; it is your statutory right “to observe with your eyes and ears what transpires at those meetings.”*
- *Like the media, you must be permitted to record a meeting.*
- *The notice of a special meeting must include the agenda, containing specific agenda topics (“new business,” “old business,” “open to floor,” etc. are not acceptable), in addition to the date, time, and place of the meeting. Because an agenda is not statutorily required for regular meetings, discussions at a regular meeting are not restricted to agenda topics if an agenda is prepared.*
- *Although the public agency can deliver notice of a special meeting by email, or post notice of the special meeting on the agency website, emailed or web notice of the meeting does not satisfy the statutory requirement and must be in addition to, rather than in lieu of, delivery of the notice by U.S. Mail, facsimile, or in person and posting of the notice in a conspicuous place.*
- *The public agency is not obligated to provide notice to “interested” individuals who have requested notice of special meetings, only to the parties identified in the statute.*

## **What subjects may be discussed in a closed session?**

The Open Meetings Act permits a public agency to discuss certain subjects in a closed or executive meeting if notice is given in the regular meeting of the general nature of the business to be discussed, and the agency cites the specific exemption authorizing the closed session. A closed session may be held only after a motion is made and carried in open session, and no final action may be taken in closed session. A videoteleconference cannot be used for a closed session. The exemptions to the Open Meetings Act include:

- (a) Deliberations of the Kentucky Parole Board.
- (b) Deliberations on the future acquisition or sale of real property by a public agency when publicity would be likely to affect the value of the property;

- (c) Discussions of proposed or pending litigation involving a public agency;
- (d) Grand or petit jury sessions;
- (e) Collective bargaining negotiations between public employers and their employees;
- (f) Discussions or hearings that might lead to the appointment, dismissal, or discipline of an individual employee, member, or student. However, general personnel matters may not be discussed in private;
- (g) Discussions between an agency and a representative of a business entity in relation to a specific proposal if open discussion would jeopardize the siting, retention, expansion, or upgrading of the business;
- (h) State and local cabinet meetings and executive cabinet meetings;
- (i) Committees of the General Assembly other than standing committees;
- (j) Deliberations of judicial or quasi-judicial bodies involving individual adjudications or appointments. This does not include meetings of planning commissions, zoning commissions, or boards of adjustment;
- (k) and (l) Meetings which federal or state law or the Constitution require to be conducted privately;
- (m) Portions of meetings devoted to a discussion of a specific public record exempted from disclosure under KRS 61.878(1)(m) (the homeland security exemption).

The Open Meetings Act also prohibits any series of less than quorum meetings, where the members attending one or more of the meetings collectively constitute at least a quorum of the members of the agency, if the meetings are held to avoid the requirements of the Act. This prohibition does not prohibit discussions between individual members if the purpose of the discussion is to educate the members on specific issues.

- *The courts have stated that public agencies must give “specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting;” the Attorney General has stated that “notification must include both a statement of the exception authorizing the closed session and a description of the business to be discussed couched in sufficiently specific terms to enable the public to assess the propriety of the agency’s actions.”*
- *The courts have stated that the exemption for proposed or pending litigation applies to “matters inherent to litigation, such as preparation, strategy, or tactics, but not just when an attorney is present.”*
- *Before going into closed session to discuss a personnel issue under KRS 61.810(1)(f), an agency must state whether the discussion will relate to either the appointment of, the dismissal of, or the discipline of an individual employee, member, or student, but the agency is not required to identify the individual by name.*

## **What you can do if you believe an agency has violated the Open Meetings Act**

If you believe that a public agency has violated the Open Meetings Act, you may challenge the agency’s actions by submitting a written complaint to the presiding officer of the agency. You must state the circumstances of the violation, and what the agency should do to correct it.

Within three business days of receipt of your complaint, the public agency must decide whether to correct the violation and notify you in writing of its decision. If the agency denies the violation and rejects your proposed remedy, it must issue a written response which cites the statute authorizing its actions, and briefly explaining how the statute applies.

You may file an appeal with the Attorney General for review of the agency’s action within sixty days of receipt of the agency’s response. You must include a copy of your written complaint and a copy of the agency’s response, if available. The Attorney General will review your appeal and issue a decision stating whether the agency violated the Open Meetings Act within ten business days. Both you and the agency will receive a copy of the decision. You or the public agency may appeal the Attorney General’s decision to the circuit court of the county where the public agency has its principal place of business or where the violation occurred. If an appeal is not filed within thirty days, the Attorney General’s decision has the force and effect of law, and can be enforced in circuit court.

If you prevail against an agency in circuit court, you may be awarded costs, including attorney fees, if the court finds that the violation was willful. The court may also award you up to \$100 for each violation.

- *You must appeal a public agency's denial of, or failure to respond to, your open meetings complaint within sixty days, and if you do not do so the appeal is time-barred; there is no similar statutory limitation on bringing an open records appeal.*
- *Upon receipt of your open meetings appeal, the Attorney General will issue notification of your appeal, and a copy of the appeal, to the public agency against which the appeal was filed, and the agency may respond in writing to the Attorney General. The agency must send you a copy of its response.*
- *The Attorney General will not consider your appeal if it does not include a copy of your written complaint and a copy of the written denial, if the agency issued a denial.*
- *Because the Open Meetings Act provides for judicial review of the issues raised in an appeal, the Attorney General will not reconsider an open meetings decision.*
- *Since 1992, open meetings decisions have been designated OMDs rather than OAGs because they are legally binding on the parties if not appealed.*
- *The designation "Not to be Published" that appears in OMDs issued from 1992 to 1999 does not mean that you cannot cite the OMD or make it public; such OMDs carry the same weight as OMDs designated "To be Published."*
- *The Attorney General's role in an open meetings appeal is to issue a decision stating whether the public agency violated the Open Meetings Act; the Attorney General cannot comment on, or direct the implementation of, proposed remedial measures. Nor can he enforce his decision by imposing penalties.*
- *If you are dissatisfied with an OMD, you may appeal the decision within thirty days; if you do not appeal the decision, the decision has the force and effect of law.*

# Sample Forms

## Sample open records request

John Smith, City Clerk  
Municipal Building  
Anytown, Kentucky 40999

Dear Mr. Smith:

I respectfully request the following records:

1. All contracts that the city has with Home Wrecker Service;
2. Any correspondence between the mayor and the Home Wrecker Service since January 1, 2016.

If these documents are temporarily unavailable, please inform me of the earliest date when I may inspect them.

I also request a copy of the contract between the city and Home Wrecker Service dated October 14, 2016. I understand that I will have to pay the actual cost of making this copy.

Thank you for your attention to this request.

Sincerely,

Jane Q. Citizen

## Sample open records appeal

Attorney General  
700 Capital Avenue  
Capitol Building, Suite 118  
Frankfort, KY 40601

Re: Open Records Appeal

Dear Attorney General:

I am appealing the refusal of the city clerk of Anytown, Kentucky, to allow me to inspect records in his possession. A copy of my written request is attached. A copy of the clerk's response denying my request is also attached.

The clerk claims that the records are not open records because they are preliminary recommendations. I do not agree because the records I request to inspect are binding contracts between the city and a wrecker service.

Sincerely,

Jane Q. Citizen



## Sample open meetings complaint

William Jones, Mayor  
Municipal Building  
Anytown, KY 40999

Dear Mr. Jones:

Because you are the presiding officer at city council meetings, I am submitting to you a complaint concerning an action that took place at the city council meeting held on January 30, 2016. At that meeting, the council voted to go into a closed or executive session to discuss general personnel matters

The council cannot legally go into a closed or executive session to discuss general personnel matters.

I am requesting that the council discuss at a future meeting, in an open and public session, those matters that were discussed at the improperly called closed session on January 30, 2016. Any action taken as a result of the improperly called session should be declared null and void.

Sincerely,

John Q. Citizen

## Sample open meetings appeal

Attorney General  
700 Capital Avenue  
Capitol Building, Suite 118  
Frankfort, KY 40601

Re: Open Meetings Appeal

Dear Attorney General:

I am appealing the denial of my complaint by the mayor of Anytown, Kentucky, concerning the closing of a council meeting held on January 30, 2016, at which the council discussed general personnel matters. I am enclosing a copy of my complaint to the mayor and a copy of the mayor's denial of my complaint.

The mayor maintains that the session of the council meeting in question may be closed to the public because personnel matters were discussed. In my opinion, the closing of such a session to the public is a violation of KRS 61.810(1)(f).

Sincerely,

John Q. Citizen

## Open meetings and open records publications and decisions online and related publications:

Open Meetings Decisions and Open Records Decisions (OMDs and ORDs) issued by the Attorney General from 1993 to the present may also be accessed on our website at <http://ag.ky.gov/civil/civil-enviro/orom/Pages/default.aspx>. If you know the OMD or ORD number you wish to review, you may locate the OMD or ORD in the chronological "List [of] Open Records and Open Meetings Decisions" link located on the right of the screen. (For example, 04-ORD-216 may be accessed by selecting the year 2004 and scrolling through the decisions for that year until 04-ORD-216 is located). If you wish to review OMDs or ORDs relating to a specific subject, you may search by entering a word search or query (for example, "work sessions," "accident reports," "timely access," or "adequate notice") in the search box that appears at the top of the screen in the right corner. You may also access a particular ORD or OMD by typing the ORD or OMD citation in the search query box.

These additional resources will further enhance your understanding of the Open Meetings and Open Records Acts as well as related records management duties:

1. "Kentucky Open Meetings Open Records Laws: Statutes and Q&A"  
<http://www.lrc.ky.gov/Lrcpubs/OpenMtgsRecords.pdf>
2. Local Records Retention Schedules  
<http://kdla.ky.gov/records/retentionschedules/Pages/LocalRecordsSchedules.aspx>
3. State Records Retention Schedules  
<http://kdla.ky.gov/records/retentionschedules/Pages/statescchedules.aspx>
4. "Managing Government Records: An Introduction to Kentucky's Public Records Management Law"  
[http://kdla.ky.gov/records/Documents/Managing\\_Government\\_Records\\_Final.pdf](http://kdla.ky.gov/records/Documents/Managing_Government_Records_Final.pdf)
5. Kentucky Revised Statutes Chapter 61  
KRS 61.800 – 61.850, Kentucky Open Meetings Act  
KRS 61.878 – 61.884, Kentucky Open Records Act  
<http://www.lrc.ky.gov/statutes/chapter.aspx?id=37294>

*Your Duty Under the Law*

**The Kentucky Open Records  
and Open Meetings Acts**

**Office of the Attorney General  
Andy Beshear, Attorney General**

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**August 2016**

*Your Duty Under the Law* explains the procedural and substantive provisions of the Open Meetings Act, KRS 61.800 to 61.850, and the Open Records Act, KRS 61.870 to 61.884, and contains basic information about the Acts. Pursuant to KRS 15.257(1), the Office of the Attorney General distributes this written information to assist the public officials of Kentucky in complying with the Open Meetings and Open Records Acts.

The Office of the Attorney General welcomes suggestions for improvements to this work, as well as ideas for future publications. Comments may be sent to the Attorney General's Office, 700 Capital Avenue, Frankfort, Kentucky 40601, or to our website, <http://ag.ky.gov>.

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# **The Open Records and Open Meetings Acts:**

## *Your duty under the law*

Kentucky's laws on open records and open meetings affect every public official and every public agency. It is important that you be prepared to deal with the numerous legal questions that arise under those laws. This brochure provides an analysis of the Open Records and Open Meetings Acts and is designed to assist you in answering these questions. It contains a description of the general requirements of the laws, the procedures you must follow in implementing them, the exceptions you may invoke in appropriate circumstances, and the role of the Attorney General in interpretation and enforcement. Please note that the italicized and bulleted text reflects the courts' and the Attorney General's interpretation of the Acts. Because the Attorney General's Office acts as an impartial tribunal in open records and open meetings appeals, we cannot advise public agencies and public officials on how to deal with specific situations. The following information should, however, prove useful to you in complying with Kentucky's laws on open records and open meetings.

## **The Open Records Act**

In 1976, the General Assembly enacted the Open Records Act, KRS 61.870 to KRS 61.884, which establishes a right of access to public records. The General Assembly recognized that the free and open examination of public records is in the public interest. The General Assembly has also recognized that there is an essential relationship between proper records retention and management and records access. All public records, whether they are stored in a computer or on paper, must be open for inspection unless the records are exempted by one or more of the fourteen exemptions found in the Act. All public agencies are required to make nonexempt public records available to any requester, and to provide suitable facilities for exercise of the right of inspection. A public agency may not consider the requester's identity or purpose in seeking access to public records.

### **What are public records?**

The Open Records Act applies to public records maintained by state and local government agencies. The agencies covered by the Act include:

- state and local government officers, departments, and legislative bodies;
- county and city governing bodies, school district boards, special district boards, and municipal corporations;

- state or local government agencies created by statute or other executive and legislative acts;
- bodies created by state or local authority in any branch of government;
- bodies that receive at least 25% of their funds from state or local authority, within any fiscal year, excluding funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained by a public procurement process;
- an entity where the majority of its governing body is appointed by a public agency;
- agencies created and controlled by public agencies; and
- interagency bodies of two or more public agencies.

Subject to fourteen exemptions, records that are prepared, owned, used, possessed, or retained by a public agency are public records and must be made available upon request.

- *The term “public records” includes all such records even if they are not subject to inspection under an exemption and therefore not “open records.”*
- *The term “public record” includes emails, databases, and other records electronically generated and/or stored.*
- *The term “public record” includes public agency records that are not maintained on the agency’s premises.*
- *As of July 2016, the Open Records Act includes a definition of “booking photographs and photographic record of inmate.” The term is defined at KRS 61.870(9) as “a photograph or image of an individual generated by law enforcement for identification purposes when the individual is booked into a detention facility as defined in KRS 520.010 or photograph and image taken pursuant to KRS 196.099.”*

This definition corresponds to KRS 61.8746, also in effect as of July 2016. The new statute prohibits the use in a publication or the posting on a website of booking photographs or official inmate photographs if removal of the photograph requires payment of a fee. It also creates a right of action for injunctive or other appropriate relief in circuit court for any person who was required to pay a fee for removal of a booking photograph or official inmate photograph from a publication or website. Additionally, it establishes monetary damages for these civil actions.

## **What are the general requirements of the Open Records Act?**

*Suitable facilities.* Each public agency must make suitable facilities available for persons who wish to exercise the right to inspect nonexempt public records.



*Time for inspection.* Each public agency must permit inspection of nonexempt public records during the regular office hours of the agency. Agencies must, upon request, mail copies to a person whose residence or principal place of business is outside the county in which the records are located. The person must first precisely describe the public records, and the records must be readily available within the public agency. The agency may require advance payment of copying fees and the cost of mailing.

*Official custodian.* Each public agency must appoint an official custodian of the agency's records. The official custodian is the chief administrative officer or any other officer or employee of the agency who is responsible for the maintenance, care, and keeping of the agency's records, regardless of whether the records are in his actual personal custody and control.

*Rules and regulations.* Each public agency must adopt rules and regulations which conform to the Open Records Act. The rules and regulations must be displayed by the agency in a prominent location which is accessible to the public. The rules and regulations must include:

- the principal office of the public agency and its regular office hours;
- the title and address of the official custodian of record;
- the fees charged for copies;
- the procedures to be followed in requesting public records.

The uniform rules and regulations drafted by the Finance and Administration Cabinet, which are found at 200 KAR 1:020, may be adapted for each agency's use. (See, Sample open records rules and regulations at page 22.)

*Compiling information/creating documents/specially tailoring format.* A public agency is not required to compile information or to create a document that does not already exist in response to an open records request. If a public agency is asked to produce a record in a format other than the format it already maintains the record in, or to tailor the format to meet a request, the agency may, but is not required to, provide the requested format. The agency may then recover staff costs as well as any actual costs it incurs.

- *A requester must be permitted to conduct on-site inspection of records if he or she expresses a desire to do so, even if the public agency prefers to honor his or her request by delivery of copies through the mail.*
- *Public agencies must permit on-site inspection during regular office hours and no other restriction on hours of access can be imposed.*
- *Public agencies may require a requester to conduct an on-site inspection, before receiving copies, if the requester resides or has his or her principal place of business in the county where the records are located and/or if he or she fails to precisely describe the records.*

- *The absence of the public agency's official records custodian does not extend the agency's response time; the agency should designate an acting custodian to ensure a timely response.*
- *Masking exempt information contained in an otherwise nonexempt public record is not equivalent to records creation; the agency must discharge this statutory duty and bear associated costs.*
- *A request for information ("How much are the city's employees paid?") need not be honored; a request for existing public records containing the information sought ("Please produce copies of the city's payroll records.") must be honored unless the requested records are exempt.*

## **What is the procedure for inspecting a public record?**

*Request to inspect records.* The request should be made to the official custodian of the public agency's records. The custodian may require that the request be in writing, signed by the requester, with his name printed legibly on it, describing the records to be inspected. The request may be hand-delivered, mailed, or sent via facsimile to the agency.

*Response to request.* The public agency must respond to the request in writing and within three days, excluding Saturdays, Sundays, and legal holidays. If the request is denied, the response must include a statement of the specific exception which authorizes the agency to withhold the record, and a brief explanation of how the exception applies to the record withheld. The response must be issued by the official custodian or under his authority.

*Application to wrong agency.* If the public agency which receives the request does not have custody or control of the record requested, the agency must notify the requester and furnish the name and location of the official custodian of the appropriate agency's public records.

*Record not available.* If the record requested is in active use, in storage, or not otherwise available, the public agency must notify the requester in writing and indicate a place, time, and date for inspection not to exceed three days from receipt of the request. If the record cannot be produced within three days, the agency must notify the requester in writing and provide a detailed explanation of the cause for the delay. The agency must also state the earliest date on which the record will be available.

*Overly burdensome request.* The public agency may refuse to permit inspection, or mail copies, if the request places an unreasonable burden on the agency in producing records or if the custodian believes that repeated requests are intended to disrupt the agency's essential functions. Refusal for either of these reasons must be supported by clear and convincing evidence.

*Copies of records.* A requester has the right to obtain copies of all nonexempt public records upon payment of a reasonable fee, including postage

where appropriate. The agency may require prepayment for copies of records. Nonexempt public records must be made available for copying in either standard electronic or standard paper format, depending on the requester's wishes, if the agency maintains the records in both formats. If the agency maintains the records in paper format only, it must make the records available in paper format. Agencies are not required to convert paper format records to electronic format.

The agency may prescribe a reasonable fee for making copies of nonexempt public records. The fee must not exceed the agency's actual costs of copying the record, including the cost of the medium on which it is copied and the cost of mechanically reproducing it, but not including staff costs. In general, ten cents per copy has been deemed a reasonable fee for records in paper format. The Open Records Act authorizes public agencies to impose a higher copying fee for requests made for a commercial purpose. Commercial purpose is defined as "any use by which the user expects a profit either through commission, salary, or fee," but excludes print or electronic media and attorneys representing parties in litigation. As explained on page 5, commercial use of booking photographs or official inmate photographs is prohibited where the commercial user publishes or posts the photograph and requires payment of a fee for removal of the photograph from the publication or website.

*Online access.* A public agency may provide online access to public records in electronic format. The agency may require that the requester enter into a contract, license, or other agreement with the agency, and may charge fees. The fees cannot exceed the cost of physical connection to the system and the reasonable cost of computer time access charges.

- *Public agencies may use a preprinted request form but cannot require use of the form or demand more information on the form than the statute allows (requester's name printed legibly, signature, description of records).*
- *Public agencies are not required to honor emailed open records request but should develop a standard response notifying the requester to submit his or her request by U.S. Mail, fax, or in person and immediately issue the standard response.*
- *A public agency's three day response time begins to run the day after the request is received.*
- *Denials based on an unreasonable burden to the agency or a belief that requests are intended to disrupt its essential functions must be supported by clear and convincing evidence; for example, the number of records requested, the estimated amount of time and expense to the agency to fulfill the request, the duplicative nature of the requests.*
- *An agency may impose copying fees greater than ten cents per page only if a specific statute authorizes the agency to do so or the agency can prove that its actual copying costs, not including staff costs, are greater than ten cents per page.*

- *No fee can be imposed for inspecting public records.*

## **What records are exempt from public inspection?**

The Open Records Act permits a public agency to withhold certain records from a requester unless the requester obtains a court order directing their release. The exemptions are located at KRS 61.878(1) and include:

- (a) records containing information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (b) records confidentially disclosed to an agency and compiled and maintained for scientific research;
- (c) records confidentially disclosed to an agency or required by the agency to be disclosed to it which are generally recognized as confidential or proprietary and which if disclosed would permit an unfair commercial advantage to competitors, including records which are compiled and maintained in conjunction with an application for or the administration of a loan or grant; the application for or the administration of assessments, incentives, inducements, or tax credits; or the regulation of a commercial enterprise;
- (d) records that relate to the prospective location of a business or industry which has not previously disclosed that it is interested in locating, relocating, or expanding in Kentucky;
- (e) records developed by an agency in conjunction with the regulation or supervision of financial institutions which reveal the agency's internal examining or audit criteria;
- (f) real estate appraisals, engineering or feasibility estimates, and evaluations made by or for a public agency, in the course of acquiring property, until all of the property has been acquired;
- (g) test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;
- (h) records of law enforcement agencies or agencies involved in administrative adjudication if disclosure of the records would harm the agency by premature release (such records

may be inspected after enforcement action is completed or a decision is made to take no action, unless they were compiled and maintained by a county or Commonwealth's attorney or unless another exception applies);

- (i) and (j) preliminary documents including drafts, notes, correspondence with private individuals, recommendations, and memoranda in which opinions are expressed or policies formulated;
  - (k) and (l) public records that are prohibited from disclosure by state or federal law;
  - (m) records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act, as defined in the exemption, and limited to eight precisely described categories of records; and
  - (n) records having historic, literary, artistic, or commemorative value that are accepted by the archivist of a public university, museum, or government depository from a donor or depositor other than a public agency if nondisclosure is requested in writing by the donor or depositor.
- *The exemptions are "a shield and not a shackle" and an agency may elect to release records that are otherwise exempt except for records made confidential by federal or state law; an agency should also exercise caution before releasing records protected by the privacy exemption.*
  - *A public agency employee is entitled to inspect any record that "relates" to him or her, even if the record is otherwise exempt, unless the requested record is part of an ongoing criminal or administrative investigation by the agency, the requested record is an examination, or the requested record is a record made confidential by federal or state law.*
  - *Public agencies are encouraged to share otherwise exempt public records with other public agencies if the sharing of the records serves a "legitimate governmental need."*
  - *A public agency cannot withhold a public record which contains both exempt and nonexempt information, but must mask the exempt portion of the record and release the nonexempt portion of the record.*
  - *Although Commonwealth's and county attorneys' litigation records are permanently exempt from public inspection, Commonwealth's and county attorneys are not relieved of their duty to respond to an open records request for those records, and cannot deny access to other nonexempt*

*records of their offices (for example, contracts, payroll records, time sheets, travel vouchers).*

## **What is the role of the Attorney General?**

If a public agency denies a request for public records, the requester may file an appeal with the Attorney General for review of the agency's actions. The appeal consists of a letter describing the circumstances of the denial, a copy of the written request, and a copy of the agency's written denial, if the agency issued a denial. Unless the requester is an inmate confined in a jail or correctional facility, and he or she is aggrieved by a denial issued by the Corrections Cabinet, the requester may bypass the Attorney General's Office and file an appeal in circuit court.

The Attorney General may request additional documentation from the agency, and may also request a copy of the disputed records. The Attorney General will not, however, disclose the records.

The Attorney General will review the appeal and issue a decision stating whether the agency violated the Open Records Act. The burden of proof rests with the agency to sustain its action. On the day he issues his decision, the Attorney General will mail a copy to the agency and a copy to the person who requested the disputed records. The decision will be issued in twenty days, excluding Saturdays, Sundays, and legal holidays. In unusual circumstances, this deadline may be extended an additional thirty days, excluding Saturdays, Sundays, and legal holidays.

Both the requester and the agency may appeal the Attorney General's decision to the circuit court of the county where the agency has its principal place of business or where the record is maintained. The Attorney General should be notified of any circuit court action, but should not be named as a party in the action.

If an appeal is not filed within thirty days, the Attorney General's decision has the force and effect of law, and can be enforced in circuit court. If the requester prevails against an agency in circuit court, he may be awarded costs, including reasonable attorney fees, if the court finds that the records were willfully withheld. The court may also award the requester up to \$25 for each day that he was denied the right to inspect the records. The Open Records Act contains criminal penalties for public officials who willfully conceal or destroy records with the intent to violate the act. Officials who fail to produce records after entry of final judgment directing that records be produced may be found guilty of contempt.

- *The Attorney General will not consider an appeal that does not include a copy of the written request and the written denial, if the agency issued a denial.*

- *Upon receipt of an open records appeal, the Attorney General will issue notification of the appeal, and a copy of the appeal, to the public agency against which the appeal was filed, and the agency may respond in writing to the Attorney General; the agency must send a copy of its response to the individual who filed the appeal.*
- *Because the Open Records Act provides for judicial review of the issues raised in an appeal, the Attorney General will not reconsider an open records decision.*
- *The Attorney General will not consider an appeal if the requested documents are released to the requester after his or her appeal is filed but before an open records decision is rendered.*
- *The Attorney General will consider an appeal based on the allegation that the public agency “subverted the intent of the Act short of denial of inspection;” this includes appeals based on the imposition of excessive copying fees.*
- *Since 1992, open records decisions have been designated ORDs rather than OAGs because they are legally binding on the parties if not appealed.*
- *The designation “Not to be Published” that appears in ORDs issued from 1992 to 1999 does not mean that the ORD cannot be cited as precedent or made public; such ORDs carry the same weight as ORDs designated “To be Published.”*
- *Because the public agency has the burden of proof to support its actions, the courts have directed that the agency “provide particular and detailed information in response to a request for documents,” and not just a “brief explanation;” the agency should also take the opportunity to try to meet its burden of proof in preparing its supplemental response to the notification of appeal.*
- *The Attorney General’s role in open records appeals is to issue a decision stating whether the public agency violated the Open Records Act; the Attorney General cannot enforce his decision by imposing penalties.*
- *A public agency that is dissatisfied with an ORD must appeal the decision within thirty days; if the public agency fails to appeal the decision, the decision has the force and effect of law, the agency is legally bound by the decision, and the circuit court must enforce it.*

# The Open Meetings Act

In 1974, the General Assembly enacted the Open Meetings Act, KRS 61.800 to KRS 61.850, which establishes a right of access to public meetings. The General Assembly recognized that the formation of public policy is public business and should not be conducted in secret. The Act requires that all meetings of a quorum of the members of a public agency where public business is discussed or action is taken must be public meetings. Public meetings must be open to the public at all times unless the subject of the meeting falls within one or more of the thirteen exceptions found in the statute. Members of the public may attend any public meeting and cannot be required to identify themselves in order to attend.

## What is a public meeting?

The Open Meetings Act applies to all meetings held by state and local government agencies. The agencies covered by the act include:

- state and local government boards, commissions, and authorities;
- state and local legislative boards, commissions, and committees;
- county and city governing bodies, councils, school district boards, special district boards, and municipal corporations;
- state and local government agencies, including policy making boards of educational institutions, that are created by state or local statute or other legislative act;
- bodies created by state or local statute or legislative act in the legislative or executive branch of government;
- an entity where the majority of its governing body is appointed by a public agency;
- agencies, including committees, advisory committees, and ad hoc committees, which are established, created, and controlled by a public agency; and
- interagency bodies of two or more public agencies.

Subject to thirteen exceptions, all gatherings of a quorum of the members of a public agency at which public business is discussed or action is taken are public meetings and must be open to the public, regardless of where they are held, and whether they are regular or special or informational or casual gatherings held in anticipation of a regular or special meeting. An agency's meetings may be conducted by videoteleconference, which is defined as a meeting occurring in two or more locations where individuals can see and hear each other by means of video and audio equipment, subject to specific legal requirements.



- *The courts have stated that the Open Meetings Act must be “interpreted most favorably to the public” since “failure to comply with the strict letter of the law in conducting meetings violates the public good.”*
- *The Open Meetings Act applies to meetings of a quorum of the members of a public agency at which public business is discussed **or** action is taken; a discussion of public business by a quorum of the agency’s members triggers the requirements of the Act even if no action is taken.*
- *The definition of “public agency” under the Open Meetings Act is narrower than the definition of “public agency” under the Open Records Act and does not include “state and local government officers” and bodies which receive “at least 25% of their funds from state or local authority funds;” this means, for example, that the mayor of a city is a public agency for open records purposes but not for open meetings purposes.*
- *A committee of a public agency, even if its function is purely advisory, is a public agency for open meetings purposes and a quorum of its members is calculated on the basis of the committee’s membership and not the membership of the public agency that created it (the city commission, consisting of five members, creates a budget committee, consisting of three members – a quorum of the commission exists if three members are present and a quorum of the committee exists if two members are present); the committee must comply with all requirements of the Act.*
- *A work session and a retreat are public meetings under the Open Meetings Act, but a quorum of the members of a public agency may attend a conference sponsored by another entity without triggering the requirements of the Act as long as the members do not discuss the public business of the agency they serve while at the conference.*
- *“Public business” is not defined by statute but has been defined by the courts as “the discussion of the various alternatives to a given issue about which the [agency] has the option to take action.”*
- *A quorum of the members of a public agency can attend a social gathering, sporting event, church service, etc. without triggering the requirements of the Open Meetings Act but cannot discuss the public business of the agency they serve while at these gatherings.*
- *Public agencies cannot conduct their meetings by telephone; an absent member may listen to the meeting by speakerphone but cannot be counted toward the quorum and cannot vote or otherwise participate.*

## **What are the general requirements of the Open Meetings Act?**

*Time and place of meetings.* All meetings of public agencies, and committees or subcommittees thereof, must be held at specified times and places which are convenient to the public. Public agencies must evaluate space requirements, seating capacity, and acoustics in considering locations for public meetings so as to ensure, insofar as feasible, meeting room conditions that allow effective public observation. Public agencies should provide for a schedule of regular meetings by ordinance, order, resolution, bylaws, or by other means. This schedule of regular meetings must be made available to the public.

*Minutes of meetings.* Public agencies must keep minutes of action taken at every meeting which set forth an accurate record of votes and actions taken. These minutes must be open for inspection by the public no later than the conclusion of the agency's next public meeting.

*Public attendance at meetings.* To the extent possible, meeting room conditions should allow for effective public observation of the meetings. No person attending the meeting can be required to identify himself in order to attend a meeting. The agency cannot place conditions on attendance of the public at a meeting other than the conditions required to maintain order. Since the General Assembly has not established procedural rules for the conduct of meetings and citizen participation, each agency must adopt its own rules of procedure, but those rules cannot conflict with the Open Meetings Act.

*News media coverage.* Public agencies must permit news media coverage, including recording and broadcasting.

*Requirements for holding special meetings.* All meetings which are not regular scheduled meetings are special meetings, and are subject to the following requirements:

*Who may call a special meeting.* The presiding officer or a majority of the members of the public agency may call a special meeting.

*Notice requirements and content.* The public agency must provide written notice of the special meeting consisting of the date, time, and place of the special meeting and the agenda. Discussion and actions at the meeting must be limited to the items on the agenda.

As soon as possible, written notice must be personally delivered, transmitted by facsimile, or mailed to every member of the agency and each media organization which files a written request to receive notice of special meetings. Notice should be received at least twenty-four hours before the special meeting.

Written notice of special meetings may be transmitted by electronic mail to public agency members and media organizations that have filed a written request with the public agency indicating a preference to receive email notification. The written request must include the electronic mail address of the agency member or media organization.

As soon as possible, written notice must also be posted in a conspicuous place in the building where the special meeting will take place and in a conspicuous place in the building where the agency has its headquarters. Notice should be posted at least twenty-four hours before the special meeting.

In the case of an emergency which prevents the public agency from complying with these requirements, the agency must make a reasonable effort to notify the members of the agency, media organizations which have filed a written request to be notified, and the public, of the emergency meeting. At the beginning of the emergency meeting, the person chairing the meeting must describe for the record the emergency which prevented compliance with the notice provisions, and these comments should appear in the minutes. Discussions and actions at the emergency meeting must be limited to the emergency for which the meeting was called.

- *The courts have stated that the Open Meetings Act does not require agencies to conduct business “only in the most convenient locations at the most convenient times”; the Act is “designed to prevent governmental bodies from conducting [their] business at such inconvenient times or locations as to effectively render public knowledge or participation impossible, not to require agencies to seek out the most convenient time or location.”*
- *Agencies are not required to take minutes in closed sessions.*
- *If the public agency directs that an audio or video recording of its meeting be made, and the recording is created with agency equipment at agency expense, the recording of the meeting is a public record upon creation and must be made available for inspection within three business days of an open records request.*
- *The right of the public to attend a public meeting under the Open Meetings Act does not include the right to participate in the meeting and address the members of the agency; it is a statutory right “to observe with their eyes and ears what transpires at those meetings.”*
- *A member of the public, as well as the media, must be permitted to record a meeting.*
- *The notice of a special meeting must include the agenda, containing specific agenda topics (“new business,” “old business,” “open to floor,” etc. are not acceptable), in addition to the date, time, and place of the meeting. Because an agenda is not statutorily required for **regular** meetings, discussions at a regular meeting are not restricted to agenda topics if an agenda is prepared.*
- *Although the public agency can post notice of the special meeting on the agency website, web notice of the meeting does not satisfy the statutory requirement and must be in addition to, rather than in lieu of, delivery of the notice by U.S. Mail, facsimile, in person, or by email, where requested, and physical posting of the notice in a conspicuous place.*
- *The public agency is not obligated to provide notice to “interested” individuals who have requested notice of special meetings, only to the parties identified in the statute.*
- *The Attorney General has rarely found that conditions were sufficiently grave to justify a public agency’s decision to call an emergency meeting.*

## What subjects may be discussed in a closed session?

The Open Meetings Act permits a public agency to discuss certain subjects in a closed or executive meeting if notice is given in the regular meeting of the general nature of the business to be discussed, the reason for the closed session, and the specific exception authorizing the closed session. A closed session may be held only after a motion is made and carried in open session, and no final action may be taken in closed session. The exceptions to the Open Meetings Act are found at KRS 61.810(1) and include:

- (a) deliberations of the Kentucky Parole Board;
- (b) deliberations on the future acquisition or sale of real property by a public agency when publicity would be likely to affect the value of the property;
- (c) discussions of proposed or pending litigation involving a public agency;
- (d) grand or petit jury sessions;
- (e) collective bargaining negotiations between public employers and their employees;
- (f) discussions or hearings that might lead to the appointment, dismissal, or discipline of an individual employee, member, or student. However, general personnel matters may not be discussed in private;
- (g) discussions between a public agency and a representative of a business entity and discussions concerning a specific proposal, if open discussions would jeopardize the siting, retention, expansion, or upgrading of the business;
- (h) state and local cabinet meetings and executive cabinet meetings;
- (i) committees of the General Assembly other than standing committees;
- (j) deliberations of judicial or quasi-judicial bodies involving individual adjudications or appointments. This does not include meetings of planning commissions, zoning commissions, or boards of adjustment; and
- (k) and (l) meetings which federal or state law or the Constitution require to be conducted privately; and
- (m) portions of meetings devoted to a discussion of a specific public record exempted from disclosure under KRS 61.878(1)(m).

The Open Meetings Act prohibits any series of less than quorum meetings, where the members attending one or more of the meetings collectively constitute at least a quorum of the members of the agency, if the meetings are held to avoid the requirements of the Act. This prohibition does not restrict discussions between individual members if the purpose of the discussion is to educate the members on specific issues.

- *The courts have stated that public agencies must give “specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting;” the Attorney General has stated that “notification must include both a statement of the exception authorizing the closed session and a description of the business to be discussed couched in sufficiently specific terms to enable the public to assess the propriety of the agency’s actions.”*
- *The courts have stated that the exception for proposed or pending litigation applies to “matters inherent to litigation, such as preparation, strategy, or tactics, but not just when an attorney is present.”*
- *Before going into closed session to discuss a personnel issue under KRS 61.810(1)(f), an agency must state whether the discussion will relate to either the appointment of, the dismissal of, or the discipline of an individual employee, member, or student, but the agency is not required to identify the individual by name.*
- *The prohibition on a series of less than quorum meetings conducted for the purpose of avoiding the requirements of the Open Meetings Act was added in 1992, prompting the courts to declare that the Act “prohibits a quorum from discussing public business in private or meeting in numbers less than a quorum for the express purpose of avoiding the open meetings requirement of the Act.”*
- *The Act does not prohibit all discussions between public officials outside of a public meeting (for example, at a social event, at church, or during a casual encounter), but does prohibit a quorum of the members of the agency from privately discussing the agency’s business or privately meeting in groups consisting of less than a quorum to discuss the agency’s business in order to defeat the requirements of the Act. This includes telephone discussions.*

## **What is the role of the Attorney General?**

If a person believes that a public agency has violated the Open Meetings Act, he may file a written complaint with the presiding officer of the agency. The complaint must state the circumstances of the violation and what the agency should do to correct it.

Within three business days of receipt of the complaint, the public agency must decide whether to correct the violation and notify the complaining party of its decision in writing. If the agency believes that no violation has occurred and rejects the proposed remedy, it must issue a written response which cites the statute authorizing its actions and briefly explain how the statute applies.

The complaining party may appeal to the Attorney General for review of the agency’s action within sixty days of receipt of the agency’s response. The appeal must include a copy of the written complaint and a copy of the agency’s response, if the agency issued a denial. The Attorney General will review the

appeal and issue a decision stating whether the agency violated the Open Meetings Act within ten business days. Both the complaining party and the agency will receive a copy of the decision. Both may appeal the Attorney General's decision to the circuit court of the county where the public agency has its principal place of business or where the violation occurred. If an appeal is not filed within thirty days, the Attorney General's decision has the force and effect of law and can be enforced in circuit court.

If the complaining party prevails against an agency in circuit court, he may be awarded costs, including attorney fees, if the court finds that the violation was willful. The court may also award the complaining party up to \$100 for each violation.

- *A complainant must appeal a public agency's denial of, or failure to respond to, his or her open meetings complaint within sixty days, and if he or she does not do so the appeal is time-barred; there is no similar statutory limitation on bringing an open records appeal.*
- *Upon receipt of an open meetings appeal, the Attorney General will issue notification of the appeal, and a copy of the appeal, to the public agency against which the appeal was filed, and the agency may respond in writing to the Attorney General; the agency must send a copy of its response to the individual who filed the appeal.*
- *The Attorney General will not consider an appeal that does not include a copy of the written complaint and a copy of the written denial, if the agency issued a denial.*
- *Because the Open Meetings Act provides for judicial review of the issues raised in an appeal, the Attorney General will not reconsider an open meetings decision.*
- *Since 1992, open meetings decisions have been designated OMDs rather than OAGs because they are legally binding on the parties if not appealed.*
- *The designation "Not to be Published" that appears in OMDs issued from 1992 to 1999 does not mean that the OMD cannot be cited as precedent or made public; such OMDs carry the same weight as OMDs designated "To be Published."*
- *The Attorney General's role in an open meetings appeal is to issue a decision stating whether the public agency violated the Open Meetings Act; the Attorney General cannot comment on, or direct the implementation of, proposed remedial measures. Nor can he enforce his decision by imposing penalties.*
- *A public agency that is dissatisfied with an OMD must appeal the decision within thirty days; if the agency fails to appeal the decision, the decision has the force and effect of law, the agency is legally bound by it, and the circuit court must enforce it.*

## Sample Forms

### Sample open records response

Jane Q. Citizen  
100 Maple Avenue  
Anytown, Kentucky

Dear Ms. Citizen:

This will acknowledge receipt of your request for public records. You requested access to and copies of:

1. All contracts that the city has with Home Wrecker Service;
2. All invoices that the city has received from Home Wrecker Service;
3. All complaints received by the city that relate to Home Wrecker Service's performance of duties under its contract with the city.

Contracts and invoices are available for inspection in my office Monday through Friday from 8:00 a.m. to 4:30 p.m. You may wish to contact me in advance to schedule an appointment and facilitate prompt access to these records.

Alternatively, we will send you copies of these records by mail at a cost of 10¢ per page. The cost to you, including postage, which is payable in advance, will be \$2.46 (15 pp. at 10¢ per page, plus 96¢ postage). Please contact me if you would prefer to receive copies by mail.

One complaint has been filed against Home Wrecker Service. The city is currently investigating that complaint and considering an enforcement action. Release of the complaint at this time might harm the city by revealing the identity of the complainant, who has requested anonymity. Therefore, pursuant to KRS 61.878(1)(h), we must deny that portion of your request.

Sincerely,

John Q. Public  
City Clerk

## Sample open meetings response

John Q. Citizen  
Commonwealth Avenue  
Anytown, Kentucky

Dear Mr. Citizen:

In your recent letter to the city you stated that the city council, at its meeting held on June 30, 2016, went into an executive or closed session to discuss general personnel matters.

While the city recognizes that it cannot discuss general personnel matters in a closed or executive session, the city is permitted, pursuant to KRS 61.810(1)(f), to go into a closed session to discuss matters that might lead to the appointment of an individual employee.

The office of director of the streets and parks department is currently vacant and two persons have applied for the position. The matters discussed by the council during the closed session on June 30, 2016, involved the council's evaluations of the two applicants for that office and such matters may be discussed at a closed session.

Sincerely,

Jane Q. Public  
Mayor



# Sample open records rules and regulations

## NOTICE

### ADMINISTRATIVE REGULATIONS GOVERNING INSPECTION OF THE PUBLIC RECORDS OF THE

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(Name of State Administrative Agency)

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(Office, Bureau, Division, etc.)

Pursuant to KRS 61.870 to 61.884, the public is notified that, as provided herein, the public records of the above named Agency of the Commonwealth of Kentucky are open for inspection by any person on written application to \_\_\_\_\_ (name), \_\_\_\_\_ (title), official custodian of the public records of the \_\_\_\_\_ (state administrative agency) whose address is \_\_\_\_\_ or to \_\_\_\_\_ (name), \_\_\_\_\_ (title), official custodian of the public records of the \_\_\_\_\_, (office, bureau, division, etc.) whose address is \_\_\_\_\_, from \_\_\_\_ a.m. to \_\_\_\_ p.m., Monday through Friday, each week, except holidays. Application forms for the inspection of the public records of this agency will be furnished on request to any person by an employee in this office. Assistance in completing the application form will be provided by an employee on request.

Applicants for the inspection of public records shall be advised of the availability of the records requested for inspection, and shall be notified in writing not later than three (3) working days after receipt of an application for inspection of any reason the records requested are not available for public inspection.

Copies of written material in the public records of this agency shall be furnished to any person requesting them on payment of a fee of ten (10) cents a page; copies of nonwritten records (photographs, maps, material stored in computer files or libraries, etc.) shall be furnished on request, on payment of a charge equal to the actual cost of producing copies of such records by the most economic process not likely to damage or alter the record.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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(Agency Head or Designated Representative)

## Open meetings and open records publications and decisions on-line and related publications:

Open Meetings Decisions and Open Records Decisions (OMDs and ORDs) issued by the Attorney General from 1993 to the present may also be accessed on our website at <http://ag.ky.gov/civil/civil-enviro/orom/Pages/default.aspx>. If you know the OMD or ORD number you wish to review, you may “Find all decisions for a particular year” (for example, 04-ORD-216 may be accessed by selecting the year 2004 and scrolling through the decisions for that year until 04-ORD-216 is located). If you wish to review OMDs or ORDs relating to a specific subject, you may “Search for an ORD or OMD” by word search or query (for example, “work sessions,” “accident reports,” “timely access,” or “adequate notice”). You may also access a particular ORD or OMD by typing the ORD or OMD citation in the search query box.

These additional resources will further enhance the public official’s understanding of his or her duties under the Open Meetings and Open Records Acts as well as related records management duties:

1. “Kentucky Open Meetings Open Records Laws: Statutes and Q&A”  
<http://www.lrc.ky.gov/Lrcpubs/OpenMtgsRecords.pdf>
2. Local Records Retention Schedules  
<http://kdla.ky.gov/records/recretentionschedules/Pages/LocalRecordsSchedules.aspx>
3. State Records Retention Schedules  
<http://kdla.ky.gov/records/recretentionschedules/Pages/statechedules.aspx>
4. “Managing Government Records: An Introduction to Kentucky’s Public Records Management Law”  
[http://kdla.ky.gov/records/Documents/Managing\\_Government\\_Records\\_Final.pdf](http://kdla.ky.gov/records/Documents/Managing_Government_Records_Final.pdf)
5. Kentucky Revised Statutes Chapter 61  
KRS 61.800 – 61.850, Kentucky Open Meetings Act  
KRS 61.878 – 61.884, Kentucky Open Records Act  
<http://www.lrc.ky.gov/statutes/chapter.aspx?id=37294>