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ATTORNEYS AT LAW, FOUNDED 1957

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ATTORNEY

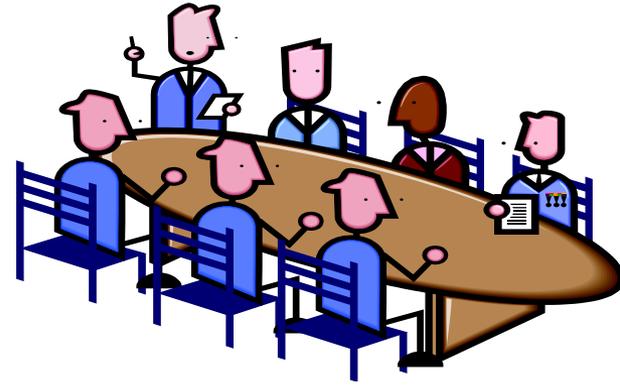
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# OPEN MEETINGS & OPEN RECORDS



as they  
apply to

- WATER DISTRICTS
- WATER ASSOCIATIONS
- MUNICIPAL UTILITIES



# Why?

“I am from the government.  
And I am here to help.”

# the OPEN MEETINGS ACT & the OPEN RECORDS ACT

Free and open observation of public meetings  
& the open examination of public records  
is in the public interest.

The formation of public  
policy is public business  
and shall not be conducted in secret.



# Open Meetings Act

## Why do I care?

If a court finds a willful violation of the Open Meetings Act, the court may issue a fine of **\$100 per violation** and may award **costs**, including attorney's fees.

There can be criminal fines of **\$100** for each time a member of a public agency attends a meeting knowing that it is in violation of the Open Meetings Act.

# MANDATES OF THE OPEN MEETINGS ACT

A MEETING of a QUORUM of a PUBLIC AGENCY

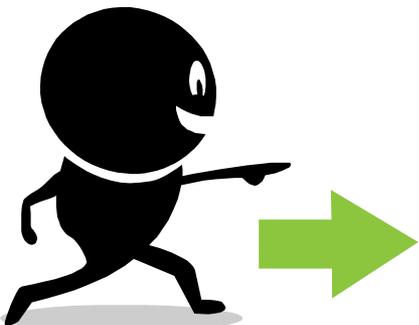
at which

PUBLIC BUSINESS is DISCUSSED

OR

ACTION IS TAKEN

IS A PUBLIC MEETING.



# OMA Public Agency

Water Districts

Municipalities

Municipal Utilities

**Not Water Associations**

**Not Water Companies**

# Quorum

More than half.

At least 2 for a 3 member board.

At least 3 for a 5 member board.

At least 4 for a 6 member board.

At least 4 for a 7 member board.

# PUBLIC MEETINGS

ALL GATHERINGS OF EVERY KIND,  
WHERE PUBLIC BUSINESS  
IS DISCUSSED

REGARDLESS OF...

- WHERE it is held,
- WHAT KIND (regular, special, informational or a casual gathering),
- IF HELD in anticipation of or in conjunction with a regular or special meeting.

KRS 61.805(1)



# PUBLIC MEETINGS

Serial Meeting

Cereal Meeting



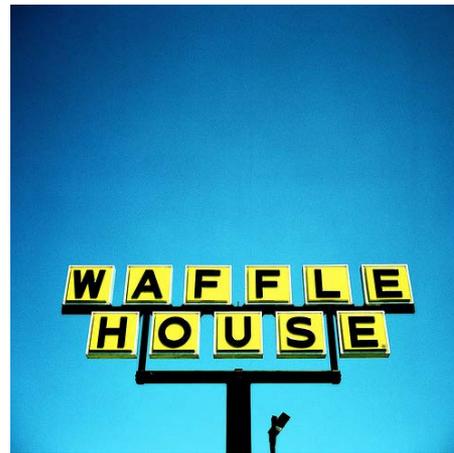
# SERIAL MEETINGS

(KRS 61.810(2))

A SERIES of MEETINGS with LESS than a QUORUM  
of MEMBERS ATTENDING EACH



Old Country Store



THAT COLLECTIVELY  
MAKE UP A QUORUM

# PUBLIC BUSINESS

the DISCUSSION OF

ALTERNATIVES TO AN ISSUE that

AN AGENCY HAS THE OPTION

TO TAKE ACTION ON...



# REGULAR MEETING REQUIREMENTS

- ANNOUNCE Time and Place
- ADOPT Regular Schedule
- KEEP Minutes of Meetings
- ALLOW Public Attendance

# SPECIAL MEETING REQUIREMENTS

- Who May Call –
  - Presiding Officer or  
Majority of Members
- Notice Requirements –
  - Content
  - Delivery and Posting
- What Can Be Discussed – Agenda Items only
- Emergency Situations – Exception to Notice Requirements



# CLOSED SESSION PROCEDURES



- Specific MOTION-  
in open session
- Don't take "OFFICIAL" MINUTES-  
(private notes ok)
- Don't take FINAL ACTION –return to open  
session first

(KRS 61.810 (1))

# LIMITED TOPICS ARE ALLOWED TO BE DISCUSSED IN CLOSED SESSION

- APPOINTMENT, DISCIPLINE, DISMISSAL OF EMPLOYEE (KRS 61.810((1)f))
- LITIGATION (KRS 61.810(1)(c))
- REAL PROPERTY (KRS 61.810(1)(b))
- HOMELAND SECURITY (KRS 61.810(1)(m))

# COMMON VIOLATIONS OF THE OPEN MEETINGS ACT

1. Private Meeting of a quorum where public business is discussed *or* action is taken (KRS 61.810(1))
2. Serial Meeting (KRS 61.810(2))
3. Failure to Adopt a Schedule of regular meetings (KRS 61.820)

# COMMON VIOLATIONS ...

4. Inadequate Notice of Special Meetings  
(KRS 61.823(3))
5. Deviate from Agenda for special meetings  
(KRS 61.823(3))
6. Failure to observe Formalities for closed session (KRS 61.815(1))

# COMMON VIOLATIONS ...

7. Discuss Improper Topic in closed session.

(KRS 61.810(1) and KRS 61.815(1)(d))

8. Take Final Action in closed session

(KRS 61.815(1)(c))

9. Conduct Meeting at Inconvenient Time or Place (KRS 61.820)

# COMMON VIOLATIONS...

10. Fail To Properly Record Minutes or To Make Minutes Available (KRS 61.835)
  
11. Condition Attendance At Meeting
  - mandate identification
  - prohibit recording meeting
  - meeting room inadequate (KRS 61.840)
  
12. Fail To Respond to an Open Meetings Complaint (KRS 61.846(1))

# IF OPEN MEETINGS VIOLATION

(KRS 61.846)



## Complaint Must Be

- In writing
- Directed to Agency's presiding officer
- Stating the circumstances constituting a violation
- Propose remedial action

# HOW AGENCY MUST RESPOND TO COMPLAINT

- In Writing To Complainant-  
Written by the presiding officer or designee
- Within three (3) business days
- If admitting violation & accepting proposed remedy, state so
- If Denying a violation or rejecting a proposed remedy,  
state why (be specific)

(KRS 61.846)

IF COMPLAINT IS

NOT RESOLVED...

An Appeal can be made to the Attorney General  
- within sixty (60) days of a written denial  
or if no response from agency;

The Attorney General – will issue a written  
decision within 10 days. This  
Opinion will be final unless  
either party appeals.

(KRS 61.846)

# APPEAL OF THE ATTORNEY GENERAL OPINION

- Appeal is Made to Circuit Court:
  - where the Agency has its principal place of business or where the violation occurred.

&

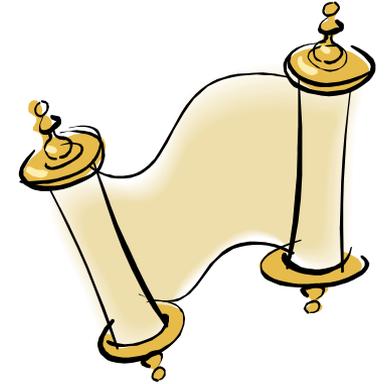
- Within Thirty(30) Days of the Attorney General's Opinion.



QUESTIONS????

# THE OPEN RECORDS ACT

(KRS 61.870 – KRS 61.884)



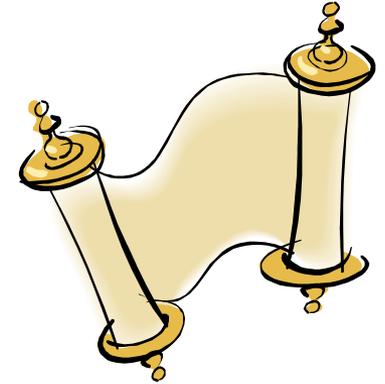
GOVERNMENT IS THE SERVANT OF THE  
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ACCESS TO GOVERNMENT IS A  
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# Open Records Act

## Why Do I Care?

If a court finds a willful violation of the ORA, the court may issue a fine of **\$25 per day** that the documents were not disclosed and may award **costs**, including attorney's fees.

There is also possible **jail time** for willfully concealing or destroying documents with an intent to violate the Open Records Act.

KRS 61.991(1)

# ORA Public Agency

Water Districts

Municipalities

Municipal Utilities

25% of expenditures derived from state or local funds

**Maybe Water Associations?**

**Maybe Water Companies?**

# AGENCY MUST ADOPT RULES & REGULATIONS

1. Each Public Agency **Shall Adopt** Rules and Regulations...
  - to Provide Full Access to Public Records,
  - to Protect Public Records from Damage and Disorganization,
  - to Prevent Excessive Disruption of its Essential Functions,
  - to Provide Assistance and Information Upon Request; and,
  - to Insure Efficient & Timely Action in Response to Application for Inspection. (KRS 61.876(1))
- 2 Each Public Agency shall display a copy of its rules and regulations pertaining to public records in a Prominent Location Accessible to the Public. (KRS 61.876(2))

# WHAT ARE PUBLIC RECORDS?

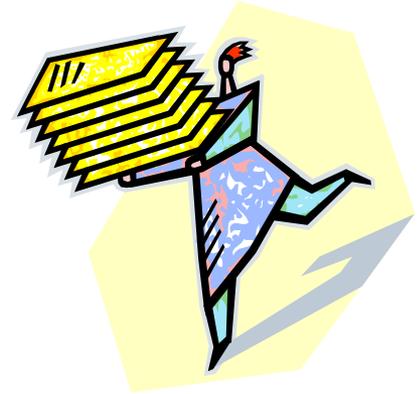


- All books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation;
- regardless of the physical form;
- prepared, owned, used, in the possession of or retained by a public agency.

(KRS 61.870(2))

**“ALL MEANS ALL”**

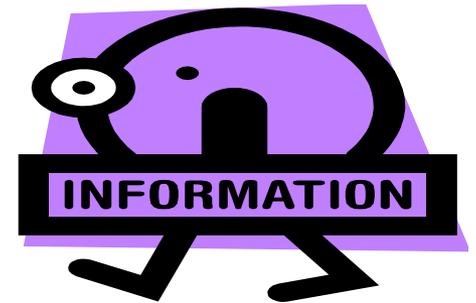
# RECORDS v INFORMATION



Open Records Requirements Pertain To Existing, TANGIBLE Records Regardless of Form.

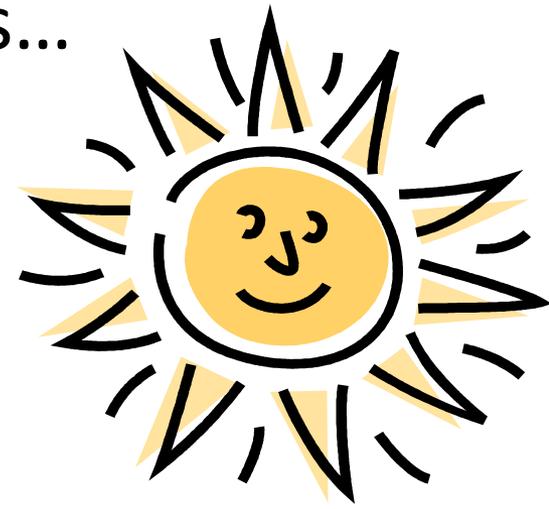
Information Requests Are Not Covered By Open Records Requirements

Public Agencies Are Not Required, Under The Open Records Act, To Create Records That Do Not Exist, Or to Respond To Request For Information.



# INSPECTIONS OF PUBLIC RECORDS

- All Public Records shall be open for inspection (unless there is an exception),
- Anyone can request a public record,
- The reason why someone wants to review or copy a public record is...
  - legally irrelevant, and the
  - agency has the same legal obligation to all. (KRS 61.872)



# AGENCY MUST PROVIDE:

- Suitable Facilities for Inspection (KRS 61.872(1))
- Time for Inspection during regular business hours (KRS 61.872(3)(a))
- An Official Custodian in charge of the records, (KRS 61.872(2))
- A person requesting records can generally be required to review them before an agency makes copies and mails them. (KRS 61.872(3)(b))



# APPROPRIATE WAY TO REQUEST DOCUMENTS

In Writing,

Directed to the Official Custodian,

Signed by the Requestor and with Name Printed Legibly, and

Records Requested Must Be Described.

(KRS 61.872(2))



# AGENCY RESPONSE

MUST BE

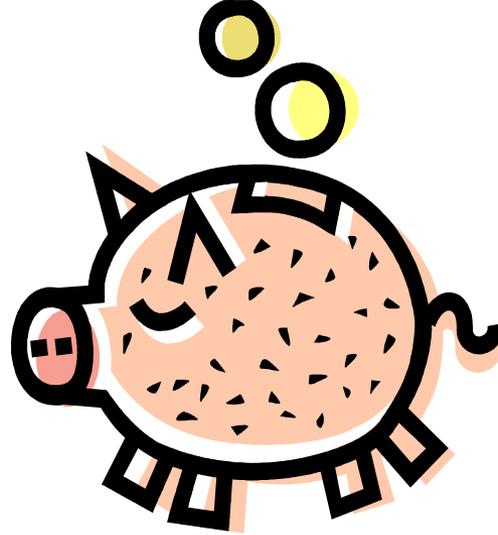


- In Writing;
- Within Three (3) Business Days;
- If a Delay- Explain Why & When Documents will be Available;
- If Request is Denied, Cite What is Not Produced & the Specific Exception;
- Issued By the Official Custodian, Or Under His\Her Authority.



(KRS 61.872(5))

# COPYING CHARGES



- \$.10 a page, if agency charges more, be ready to prove actual expense - (not easy).
- Staff Time & Cost - Cannot be included in charges- regardless of how much time is required to produce the documents.
- Agency may charge more if the request is for a commercial purpose.

# AGENCY MAY REFUSE INSPECTION IF

(KRS 61.878)

1. Unreasonable Burden,
2. Repeated Requests,
3. Personal Nature,
4. Preliminary Documents,
5. Homeland Security.



BE CAREFUL - WITHHOLDING RECORDS  
IS CLOSELY SCRUTINIZED

# 1. UNREASONABLE BURDEN

(KRS 61.872(6))

- What is “unreasonable”?
- Who decides?
- Can the agency refuse if meeting the request will be time consuming?



Refusal under this section must be supported by clear and convincing evidence. (hard to accomplish)

## 2. REPEATED REQUESTS

The Custodian of Records Must Have Reason to Believe That The Repeated Requests Are **Intended To Disrupt Other Essential Functions** Of The Public Agency.



Proof that the request is made to disrupt the agency must be by clear and convincing evidence.

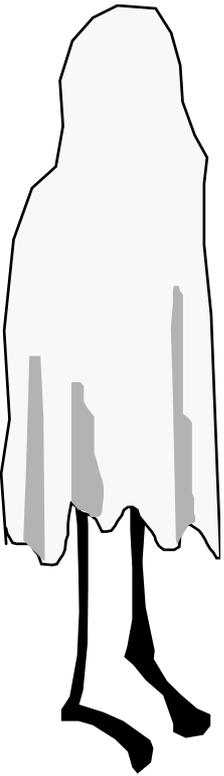
(KRS 61.872(6))

### 3. PERSONAL NATURE

Would public disclosure constitute a clearly unwarranted invasion of personal privacy?  
(KRS 61.878(1)(a))

The courts in Kentucky have established a balancing test ...

Privacy Interest vs. the Public's  
Right to Know What their Government  
is Doing.



# BALANCING TEST

Does an individual have a cognizable privacy interest that should be protected?



Will an open records related public purpose be advanced by the disclosure?

What is the magnitude of the privacy interest?

# Home address

1. Meter Reader
  - A. Privacy Interest?
  - B. Is there a public purpose that will be advanced?
  - C. How great is the privacy interest?
2. Water District Commissioner

# Failed Applicants' Resumes

1. Meter Reader
  - A. Privacy Interest?
  - B. Is there a public purpose that will be advanced?
  - C. How great is the privacy interest?
2. Appointed Mayor
3. University President

# 4. PRELIMINARY DOCUMENTS

KRS 61.878(1)(i) and (j)

Drafts, notes, and correspondence with private individuals that is not correspondence which is intended to give notice of final action.

Recommendations and preliminary memoranda, in which opinions are expressed or policies formulated or recommended.

Once final action is taken, the preliminary material that is adopted by the agency is no longer exempt.



# 4. PRELIMINARY DOCUMENTS

Non-exempt:

- **factual updates** (however brief)
- **gratuitous commentary**
- **questions** (not answers thereto which contain recommendations)
- **the exchange of information**, as opposed to being subjective in the nature of recommendations or opinions regarding the underlying request or complaint and the agency's response thereto

See 11-ORD-052

# 5. HOMELAND SECURITY

(KRS 61.878(m))

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.

If denying a request for this reason, you must  
notify the AG's Office for Security Coordination.



# WHAT IS A TERRORIST ACT?

A criminal act intended to:

- Intimidate or coerce a public agency ...
- Disrupt a system including but not limited to electrical, fire suppression, WATER, WASTEWATER, SEWAGE, and gas systems;
- Cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency;

(KRS 61.878(1)(m)(2))



# WHAT RECORDS QUALIFY UNDER HOMELAND SECURITY?

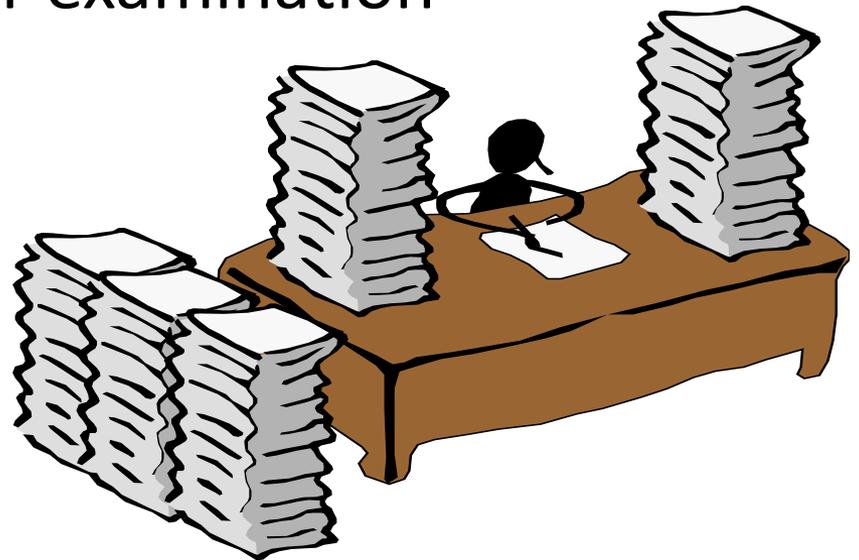
- \* INFRASTRUCTURE RECORDS that expose location, configuration, or security of critical systems, including public utility critical systems.
- \* Detailed drawings, schematics, maps or specifications of STRUCTURAL ELEMENTS...floor plans of
- \* Any building or facility owned, occupied, leased, or maintained by a public agency.

# DUTY TO REDACT

IF PART OF A RECORD IS TO BE WITHHELD  
UNDER ANY EXCEPTION...

and the public record contains material which is not  
excepted under this section, the public agency shall  
separate the excepted and make the non-excepted  
material available for examination

(KRS 61.878(4))



# Open Records

## Appeal Process

- Appeal is made to the Attorney General who then Notifies Public Agency of the Appeal;
- Attorney General May Request Additional Documentation/Disputed Documents;
- Burden of Proof is on the Public Agency;
- Attorney General Determines Whether the Public Agency Violated Open Records Act.

Appeal of Attorney General's Decision  
is Made to the Circuit Court within Thirty Days  
(KRS 61.880)

# THE END

