



STURGILL  
TURNER

STURGILL, TURNER, BARKER & MOLONEY, PLLC

Todd Osterloh, Attorney

[Tosterloh@SturgillTurner.com](mailto:Tosterloh@SturgillTurner.com)

**OPEN MEETINGS  
&  
OPEN RECORDS**

# WHY?

**“I’m from the Government  
and I’m here to help.”**

# The Open Meetings Act and The Open Records Act

Free and open observation of public meetings and 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 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

Governmental Board,  
Commission, or Authority

Body Created by Public  
Agency

Body whose Members Are  
Appointed by Agency

Subcommittees

Not non-governmental  
non-profit agencies

# 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)

# SERIAL MEETINGS



Cereal Meeting

Serial Meeting

# SERIAL MEETINGS

Series of meetings that constitutes quorum

Public business discussed or action taken

Purpose is to avoid the OMA requirements

Exception: Educate members on specific issues

# TELEPHONE PARADOX

REGULAR MEETING

VS.

SERIAL MEETING

# 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

<b>Who May Call</b>	<b>Presiding Officer or Majority of Members</b>
<b>Notice Requirements</b>	<b>Content Delivery &amp; Posting</b>
<b>What can be discussed?</b>	<b>Agenda Items Only</b>
<b>Emergency Situations</b>	<b>Exception to Notice Requirements</b>

# CLOSED SESSION PROCEDURES

Specific  
MOTION  
in open  
session.  
Limit  
discussion.

Don't take  
"OFFICIAL"  
MINUTES  
(private notes  
ok)

Don't take  
FINAL ACTION –  
return to open  
session first

KRS 61.810(1)

**CLOSED SESSION**

**SELECTIVE ADMISSIONS**

# LIMITED TOPICS IN CLOSED SESSION

APPOINTMENT, DISCIPLINE, DISMISSAL OF  
EMPLOYEE (KRS 61.810((1)f))

REAL PROPERTY (1)(b)

HOMELAND SECURITY (1)(m)

JEOPARDIZE INCOMING BUSINESS (1)(g)

# LIMITED TOPICS IN CLOSED SESSION

LITIGATION (KRS 61.810(1)(c))

ATTORNEY-CLIENT PRIVILEGE

OAG 97-1

Not 13-OMD-026

# 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 61.815(1)(c))

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

# 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 A 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 not response from agency;

The Attorney General will issue a written decision with 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

and

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 people & access to government is a fundamental and necessary right of every citizen.

# 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

Governmental Entity

Governmental Officer

25 % of expenditures  
derived from state or  
local funds, excluding  
publicly bid contracts

# AGENCY MUST ADOPT RULES & REGULATIONS

1. Each Public Agency **Shall Adopt** Rules & 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 & 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 & 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.

# INSPECTION 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 charges of the records (KRS 61.870(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 & with name printed legibly



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)

Except: County Clerks

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

1. Unreasonable burden

2. Repeated requests

3. Personal nature

4. Preliminary documents

5. Homeland security

BE CAREFUL – WITHHOLDING RECORDS IS  
CLOSELY SCRUTINIZED

(KRS 61.878)

# 1. UNREASONABLE BURDEN

(KRS 61.872(6))

What is  
“unreasonable”?

Who decides?

Can the agency  
refuse is 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 v. 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 are the magnitudes of the privacy interest and public purpose?

# HOME ADDRESS

**1. Meter Reader**

**A. Privacy Interest?**

**2. Water District  
Commissioner**

**B. Is there a public  
purpose that will be  
advanced?**

**C. How great is the  
privacy interest?**

# Failed Applicants' Resumes

**1. Appointed Mayor**

**A. Privacy Interest?**

**2. University President**

**B. Is there a public purpose that will be advanced?**

**C. How great is the privacy interest?**

# Performance Evaluation

**School Principal**

07-ORD-125

**No proof of misconduct  
by him or employee**

**Library Director**

11-ORD-190

**Question raised on  
fiscal management,  
followed by evaluation**

**CHFS Employee**

10-ORD-163

**Filed complaint with  
governor over  
retaliatory evaluation**

# Performance Evaluation

- Criminal Defense Attorney requests evaluations of officers that investigated a homicide.
- Citing *Cape Publications*, AG mentions that evaluations of lower ranking employees are generally not subject to disclosure
- Also relies on fact that requestor was criminal defense attorney, who wanted evaluations for criminal appellate litigation, as opposed to a newspaper reporter.
- 13-ORD-063

# 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

# 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

(KRS 61.878(4))

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.

# 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 30 days. (KRS 61.880)

THE END



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