# Commonwealth of Kentucky

# OFFICE OF THE ATTORNEY GENERAL

**Division 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 May 2003, 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, entitled "Your Duty Under the Law," is available to public officials to provide basic information about the Act. The second, entitled "Your Right to Know," is available to the citizens of Kentucky to assist them in obtaining access to public records.

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. We encourage you to visit our Website at kyattorneygeneral.com.

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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://www.gotsource.net/dscgi/ds.py/Get/File-20485/Standard_4060_Electronic_Mail.doc*

2. Enterprise Architecture Standard 2370, "Electronic Commerce – Electronic Signature."

   *http://www.gotsource.net/dscgi/ds.py/Get/File-9357/2370_-_Electronic_Commerce_-_Electronic Signature.doc*

3. 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*

4. "Status of E-Mail as a Public Record."
   *http://www.gotsource.net/dscgi/ds.py/Get/File-8820/Status_of_Electronic_Mail_as_a_Public_Record.doc.*

5. "Internet and Electronic Mail Acceptable Use Policy (C10-060)"

   *http://www.gotsource.net/dscgi/ds.py/Get/File-5282/CIO_email_internet_policy_82502.doc*

6. Recordkeeping and New Technologies: Policies and Guidelines

   *http://www.kdla.net/pubrec/Recordkeeping_and_new_technologi.htm*

7. State Records Retention Schedules

   *http://www.kdla.net/pubrec/state_rec_sched.htm*

8. Local Government Records Retention Schedules

   *http://www.kdla.net/pubrec/Localsched.htm*

# 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:

> 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. KRS 61.871.

**B.** The 1994 legislation amending the Act contains additional legislative findings:

> 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 194B.102, 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. KRS 61.8715 (amended 2000, ch. 536, § 17, effective 7/14/00).

*See*, 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-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 SW2d 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 SW2d 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*, SB 213 creating a new section of KRS Chapter 7 at KRS 7.119c (effective June 24, 2003) – 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 court agencies are not subject to the Open Records Act. *Ex Parte Farley*, Ky., 570 SW2d 617 (1978); *York v. Commonwealth*, Ky. App., 815 SW2d 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*, 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.** 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 SW2d 151 (1995). Hospital patient records are not public records, and therefore not subject to the statutory reproduction cost limitation of KRS 61.874.

**b.** See, 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 SW2d 330 (1996) (holding that 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.** *See*, 96-ORD-21, 94-ORD-67, 94-ORD-13.

**b.** *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 SW2d 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 (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;

**b.** Protect public records from damage and disorganization;

**c.** Prevent excessive disruption of the agency's essential functions;

**d.** Provide assistance and information upon request;

**e.** Insure efficient and timely action in response to application for inspection.

**2.** The rules and regulations must include (but are not limited to):

**a.** The principal office of the public agency and its regular office hours;

**b.** The title and address of the official custodian of the public agency's records;

**c.** The fees, to the extent authorized by KRS 61.874 or other statute, charged for copies;

**d.** The procedures to be followed in requesting public records.

**3.** The rules and regulations must be displayed by the public agency in a prominent location accessible to the public.

*See*, 98-ORD-69, 95-ORD-49, 95-ORD-28, 94-ORD-99, 94-ORD-12, 92-ORD-1567.

**4.** The finance and administration cabinet may promulgate uniform rules and regulations for all state administrative agencies.

**a.** These regulations have been promulgated and are set forth at 200 KAR 1:020.

*See*, 99-ORD-69.

**5.** A public agency cannot avoid its duties under the Open Records Act by resolution, ordinance, regulation, or executive order.

*See*, 97-ORD-136, 97-ORD-22, 96-ORD-55, 95-ORD-84.

## 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*, 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 (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-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.** 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, and *Edmondson v. Alig*, Ky. App., 926 SW2d 856 (1996).

**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 SW2d 856, 858 (1996), the Court of Appeals opined, "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 (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)); 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 SW3d 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 SW2d 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.** One dollar ($1.00) a copy has been held to be an unreasonable fee.

*See*, OAGs 91-98, 89-9, 88-74, 84-91.

**d.** 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, OAG 92-79.

**e.** 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).

**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*, 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 SW2d 349 (1996) (holding that 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 (holding that 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 SW3d 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 *Board of Education v. Lexington-Fayette Urban County Human Rights Commission*, Ky. App., 625 SW2d 109 (1981), the court adopted a test of balancing the interests of the parties in the litigation as well as those of the public, measured by the standard of a reasonable person. Each case must turn on its own facts.

**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*, 49 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*, 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 SW3d 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 SW2d 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 SW3d 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 (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.

**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 91-202, 91-185, 91-81, 91-48, 90-60, 87-37, 79-275.

*See*, OAG 91-35.

**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 SW2d 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.

**f.** *Kentucky Board of Examiners of Psychologists v. The Courier-Journal and Louisville Times Company*, Ky., 826 SW2d 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 SW2d 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 SW2d 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 SW2d 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 SW3d 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 SW3d 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.

**l.** *See also, Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998); *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998); and *Déja Vu of Nashville Inc., et al. v. The Metropolitan Government of Nashville & Davidson County TN, et al.*, 274 F3d 377 (6th Cir. 2001) (recognizing a constitutional right to nondisclosure of certain types of private information that implicate a fundamental liberty interest).

**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 SW2d 318 (1995) holding that 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*, *Southeastern United Medigroup, Inc. v. Hughes*, Ky., 952 SW2d 195 (1997). *See also*, 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 SW2d 766 (1995) holding that 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 SW3d 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 SW2d (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 SW2d 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.** *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.

**c.** 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.

**d.** 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.

**e.** *Courier-Journal and Louisville Times Co. v. Kent Downey and John Doe*, Ky. App., 1999-CA-002466-MR (3/30/01) unpublished opinion (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 SW2d 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 SW2d 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 SW2d 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 SW2d 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 SW3d 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*, 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 USC § 534 (b)), 97-ORD-2 (drug test results acquired under Omnibus Employee Drug Testing Act, 49 USC § 31306), 99-ORD-150, 98-ORD-1 and 18 USC § 2721 (records protected by the Drivers' Privacy Protection Act), OAG 90-90 (FBI documents); 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 U.S.C. § 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).

*But see*, *Hardin County Schools v. J. Kyle Foster*, Ky. 40 SW3d 865 (2001) (statistical compilation of disciplinary actions within a school system is not an 'educational record" within the meaning of FERPA).

**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, 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 SW3d 771 (2001); 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); 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) but see 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); 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).

**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 SW3d 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 U.S.C. § 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 SW3d 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 SW3d 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*, 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 (6th Cir. 1998); *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998); *Déja Vu of Nashville Inc., et al. v. The Metropolitan Government of Nashville & Davidson County TN, et al.*, 274 F.3d 377 (6th Cir. 2001) (recognizing that liability might exist under 42 U.S.C. 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*, 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*, 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.

**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 (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 ("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 (inmate in a penal institution must first seek relief from the Attorney General regarding denial of a records request per KRS 197.025(3)).

**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 SW3d 133 (2002) (prevailing party is not automatically entitled to award of his costs (overruling *Blair v. Hendricks*, Ky.App., 30 SW3d 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 ("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 SW3d 860 (2001).

**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 SW2d 836 (1994); *Stuart G. Yeoman v. Commonwealth of Kentucky Health Policy Board*, Ky., 875 SW2d 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.** Note that 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 SW2d 873 (1994).

**b.** 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.

**c.** 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.

**d.** 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;

(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 SW2d 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.** 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.

**b.** 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.

**c.** 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.

**d.** 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.

**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:

**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 SW2d 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*, 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 SW2d 651 (1979).

**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).

## 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 SW2d 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).

**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), and (l) 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 SW2d 589 (1981); *Jefferson County Board of Education v. The Courier-Journal*, Ky. App., 551 SW2d 25 (1977).

## 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 SW2d 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*, 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*, 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*, 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).

**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).