

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

KENTUCKY

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# KENTUCKY

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## **KENTUCKY**

**SIXTH EDITION**  
**2011**

Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.



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**FOREWORD***Open Records.*

The Kentucky General Assembly enacted the Kentucky Open Records Act (“ORA”) in 1976 — and it has not stopped tinkering with the Act since then. In response to business concerns and new technologies, the legislature substantially revised the ORA in 1986, 1992, and again in 1994.

The 1994 revisions are extensive and worth noting. Up until this time, electronically stored records were available, if at all, under the Public Access to Governmental Databases Act, Ky. Rev. Stat. 61.960 *et seq.* Under the Databases Act, a public agency was able to deny a request for electronic records if the records were requested for a commercial purpose. *See* 95-ORD-43; 95-ORD-12.

In 1994, the General Assembly scrapped this separate treatment by stretching the ORA to encompass electronic records. Unless specifically authorized by another statute, a public agency cannot deny a request for electronic records — or any other record — merely because it may be used for commercial purposes. *See* 61.874(4); 95-ORD-9.

The 1994 merger of the Databases Act and the ORA is good news for persons seeking access to electronic records, but it brings some bad news for persons seeking access to other records. The ORA now permits agencies to charge different fees for *all* records, regardless of format, depending on whether the proposed use is commercial or noncommercial. *See* Ky. Rev. Stat. 61.874(4).

If the records are to be used for commercial purposes, the requesters may be forced to pay the agency not only for the cost of duplication, but also for the staff time incurred in gathering the records and/or the agency’s expense in creating or acquiring the records. *Id.* Requesters using records for commercial purposes now face stiff penalties for the misuse of those records. *See* Ky. Rev. Stat. 61.8745.

While publication of public records by the media is not considered a commercial use, the media may be held liable if they obtain public records and then give their express permission for a commercial use of those records. *See* Ky. Rev. Stat. 61.870(4)(b), Ky. Rev. Stat. 61.874(5)(c).

For the media, the most important part of the 1994 amendments to the ORA is the legislature’s recognition that the State Archives and Records Act, which deals with records management and retention by public agencies, is inextricably linked with the ORA:

The General Assembly finds an essential relationship between the intent of this chapter and that of [Ky. Rev. Stat.] 171.410 to 171.740, dealing with the management of public records, and of [Ky. Rev. Stat.] 61.940 to 61.957, 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.

Ky. Rev. Stat. 61.8715.

Based on this declaration, the Kentucky Attorney General has recognized that public agencies have an obligation to establish a maintenance and retrieval scheme for their public records and that failure to do so violates the ORA: “Subversion of the intent of the Archives and Records Act thus constitutes subversion of the intent of the Open Records Act.” 94-ORD-121. Consequently, the Attorney General now applies “a higher standard of review relative to denials based on the nonexistence” or destruction of requested records. 94-ORD-142. Under this standard, “the loss or destruction of a public record creates a rebuttable presumption of records mismanagement.” 95-ORD-96. “In order to satisfy its statutory burden of proof, a public agency must, at a minimum, document what efforts were made to locate the missing records.” 94-ORD-142.

*Open Meetings.*

The Open Meetings Act (“OMA”) is two years older than the ORA, but has generated far fewer court decisions and Attorney General opinions than has the ORA. This might reflect the fact that most government business is conducted behind closed doors, or that aside from the media, few members of the public are interested in regularly attending public meetings.

There are many similarities between the OMA and the ORA: Both contain explicit statements favoring public access. *See* Ky. Rev. Stat. 61.871 (“free and open examination of public records is in the public interest”); Ky. Rev. Stat. 61.800 (“formation of public policy is public business and shall not be conducted in secret”).

&#183; Both state that exceptions to public access shall be “strictly construed.” *See* Ky. Rev. Stat. 61.871 (ORA), Ky. Rev. Stat. 61.800 (OMA).

&#183; Both provide a citizen the option of asking the Attorney General to review the agency’s action or of immediately instituting a court action. *See* Ky. Rev. Stat. 61.800 (ORA); Ky. Rev. Stat. 61.846 (OMA).

&#183; Both provide numerous exemptions to the mandate of openness. *See* 61.878 (ORA); 61.810 (OMA).

There are also some significant differences. The ORA’s definition of a “public agency” encompasses private agencies which receive significant government funding. *See* Ky. Rev. Stat. 61.870(1)(h). The OMA has no such provision. *Cf.* Ky. Rev. Stat. 61.805(2). The OMA only gives the attorney general ten days to review a complaint. Ky. Rev. Stat. 61.846(2). The ORA permits the Attorney General an initial twenty days to review a complaint, and also permits the Attorney General to obtain an additional thirty-day extension. *See* Ky. Rev. Stat. 61.880(2).

Finally, there are some apparent inconsistencies between the two acts. For example, the OMA permits meetings of the Kentucky Parole Board to be held behind closed doors. Ky. Rev. Stat. 61.810(1)(a). Under the ORA, the records of the parole board are not explicitly exempted from disclosure. *See* Ky. Rev. Stat. 61.878. Likewise, under the ORA the minutes from a public agency’s meeting are public records and presumptively open to disclosure — regardless of whether that meeting was closed under the OMA. Although the attorney general has tried to reconcile these inconsistencies, it is odd that the General Assembly has not tried to do the same.

Despite their many flaws, the ORA and the OMA have been very useful to both the media and the general public in gaining access to public records and meetings. Unfortunately, the passage of time has not erased all hostility to these acts. Many officials are still prone to charge excessive fees for records and to erroneously characterize records or meetings as exempt.

The Kentucky Press Association and Dinsmore & Shohl, LLP help reporters enforce the ORA and OMA by offering the Freedom of Information Hotline, (502) 540-2300.

# Open Records

## I. STATUTE -- BASIC APPLICATION

### A. Who can request records?

Under the Open Records Act (“ORA”), “[a]ll public records shall be opened for inspection by any person, except as otherwise provided . . . and suitable facilities shall be made available by each public agency for the exercise of this right.” Ky. Rev. Stat. 61.872(1).

A person is defined as being “bodies-politic and corporate, societies, communities, the public generally, individuals, partnerships and joint stock companies.” Ky. Rev. Stat. 446.010(26).

A requester, who is in litigation with the agency from which she is requesting records, is not prohibited from direct communications with agency employees or the agency’s attorney with regard to an open records request. 97-ORD-98.

#### 1. Status of requestor.

A person requesting to inspect a public record does not have to be a citizen of Kentucky. *See* 81-ORD-345.

#### 2. Purpose of request.

The requester may be required to disclose whether he will use the records for a “commercial purpose” and may be charged a higher fee. *See* Ky. Rev. Stat. 61.874(4). “Publication or related use of a public record by a newspaper or periodical” and “[u]se of a public record by a radio or television station in its news or other informational programs” is *not* a “commercial purpose.” Ky. Rev. Stat. 61.870(4)(b).

#### 3. Use of records.

If the requester intends to use the records for a commercial purpose, the requester must use the records only in the manner he or she has disclosed. Similarly, a requester may not request the records for a non-commercial purpose and then permit the records to be used for a commercial purpose. *See* Ky. Rev. Stat. 61.876(5). Otherwise, there is no restriction on subsequent use. *See* 95-ORD-77 (public agency cannot direct requester to refrain from reproducing records released to her).

The definition of commercial purpose is very broad, but excludes most uses of information by the media:

“Commercial purpose” means 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.

“Commercial purpose” shall not include:

1. Publication or related use of a public record by a newspaper or periodical;
2. Use of a public record by a radio or television station in its news or other informational programs; or
3. 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.

Ky. Rev. Stat. 61.870(4).

Although the agency may require a requester to state whether he or she intends to use the records for a commercial purpose, the agency cannot make a person intending to use records for a noncommercial purpose state his or her exact purpose. 95-ORD-17.

An example of a commercial use is a private investigator who requests a record revealing the name of a person who ran his car into the investigator’s client: “Because he will receive a fee or commission

for his services, the use to which [the investigator] intends to put the information contained in the requested records must be considered a commercial one.” *See* 95-ORD-151.

### B. Whose records are and are not subject to the act?

Every public agency is subject to the act. The term “public agency” is broadly defined to include governmental agencies and private agencies that receive significant funding from the government:

(1) “Public Agency” means:

- (a) Every state or local government officer;
- (b) Every state or local government department, division, bureau, board, commission and authority;
- (c) Every state or local legislative board, commission, committee and officer;
- (d) Every county and city governing body, council, school district board, special district board and municipal corporation;
- (e) Every state or local court or judicial agency;
- (f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution or other legislative act;
- (g) Any body created by state or local authority in any branch of government;
- (h) Any body that derives at least 25 percent of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;
- (i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j) or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;
- (j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council or agency, except for a committee of a hospital medical staff, established, created and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i) or (k) of this subsection; and
- (k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i) or (j) of this subsection.

Ky. Rev. Stat. 61.870.

#### 1. Executive branch.

##### a. Records of the executives themselves.

Records pertaining to any investigation with regards to suitability for employment of applicants to the Department of State Police, including the applicant’s age, moral character, physical condition and educational qualifications, are subject to the ORA. Ky. Rev. Stat. 16.040. The statute exempts access to records pertaining to “the identity of any witness or informant” which may be found in any investigation. *Id.* The identity of any such witness or informant is subject to subpoena power by a court of proper jurisdiction. *Id.*

Records containing the home address, telephone number, date of birth, Social Security number, background investigation, medical examination, psychological examination and polygraph examination for any person seeking certification as law enforcement officers under Ky. Rev. Stat. 15.380 to 15.404 are not covered by the ORA. Persons cov-

ered by these statutes are peace officers categorized under Ky. Rev. Stat. 15.404 and persons defined as:

- (a) State Police officers, but for the commissioner of the State Police;
- (b) City, county and urban-county police officers;
- (c) Deputy sheriffs not identified in Ky. Rev. Stat. 70.045 and 70.263(3);
- (d) State or public university safety and security officers appointed pursuant to Ky. Rev. Stat. 164.950;
- (e) School security officers employed by local boards of education who are special law enforcement officers appointed under Ky. Rev. Stat. 61.090;
- (h) Division of Insurance Fraud Investigation investigators appointed under Ky. Rev. Stat. 304.47-040; and
- (i) County detectives appointed in a county containing a consolidated local government with the power of arrest in the county and the right to execute process statewide in accordance with Ky. Rev. Stat. 69.360.

Ky. Rev. Stat. 15.380(1).

#### **b. Records of certain but not all functions.**

All entities defined as public or private entities, except for the Court of Justice, that deal “with crimes or criminals or with delinquency or delinquents are required to install and maintain records needed by the Public Safety Cabinet to report statistical crime data.” Ky. Rev. Stat. 17.150. These records are covered by the “administrative and judicial remedies for inspection of public records and penalties for violations” of the ORA. Ky. Rev. Stat. 17.150(5).

Government officials’ appointment books or itineraries are exempt from the ORA. The court of appeals views an official’s “appointment schedule as nothing more than a draft of what may or may never take place; a notation for inter or intra office use, so the daily affairs. . . can be conducted with some semblance of orderliness; and all of which should be free from media interference.” *Courier-Journal v. Jones*, 895 S.W.2d 6, 10 (Ky. Ct. App., 1995) (holding that the Courier Journal did not have access to the Governor’s appointment book under the ORA).

### **2. Legislative bodies.**

The General Assembly is not exempt from the ORA. “The General Assembly did not exclude itself from the Open Records Act, but made the Act binding upon itself by defining the term public agency to include ‘any body created by state or local authority in any branch of government.’” 98-ORD-92 (*citing* Ky. Rev. Stat. 61.870(1)(g)). “Every state or local legislative board” is a public agency under the ORA. Ky. Rev. Stat. 61.870(1)(c).

### **3. Courts.**

Despite their inclusion in the ORA, Kentucky courts have held they are not subject to the ORA. *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978). The logic of this holding rests on the Kentucky constitution’s separation of powers: “[T]he custody and control of the records generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation.” *Id.* at 624; *see also* 93-ORD-122 (discussing courts and the ORA).

The attorney general has conformed with this standard, finding additional support in Ky. Rev. Stat. 26.A200, which grants exclusive control of any record generated for or received by any agency of the Court of Justice to the Kentucky Supreme Court. *See* 98-ORD-6. Moreover, Ky. Rev. Stat. 26.A220 grants the Kentucky Supreme Court control of court records held by “all public officers, public agencies or other persons having custody, control or possession of court records by statute or otherwise.”

### **4. Nongovernmental bodies.**

#### **a. Bodies receiving public funds or benefits.**

A nongovernmental body that receives 25 percent of its institutional funding from Kentucky state or local authorities is a public agency and subject to the ORA. *See* Ky. Rev. Stat. 61.870 (1)(h).

Entities which have been held to be public agencies include the Kentucky State University Foundation Inc., a fundraising organization, *see Frankfort Publishing Co. v. Kentucky State Univ. Foundation Inc.*, 834 S.W.2d 681 (Ky. 1992), the Governmental Services Corporation, *see* 94-ORD-13, the Kentucky Employers Mutual Insurance Authority, *see* 97-ORD-66, and University Health Care, Inc., a non-profit health maintenance organization funded by the Department for Medicaid Services, *see* 10-ORD-115. Entities established and controlled by a public agency under ORA, such as the University of Louisville Foundation, are also considered public agencies. *Univ. of Louisville Found. v. Cape Publications Inc.*, No. 01-CI-003349, 2004 WL 22748265, at \*5 (Ky. Ct. App. May 12, 2004) *aff’d*, 260 S.W.3d 818 (Ky. 2008); Ky. Rev. Stat. 61.870(j).

Entities that are considered private agencies include doctors who receive Medicare and Medicaid reimbursements, *see* 93-ORD-90, and a private hospital that leases its building from a public agency, *see* 92-66.

An agency that receives only a portion of its funding from state or local authority funds, pursuant to Ky. Rev. Stat. 61.870(1)(h), will solely disclose records pertaining to the “functions, activities, programs or operations funded by state local authority.” Ky. Rev. Stat. 61.870(2).

#### **b. Bodies whose members include governmental officials.**

Entities having a governing body a majority of which was appointed by a public agency as defined under Ky. Rev. Stat. 61.872 or by a member of a public are subject to the ORA, pursuant to 61.870(i).

An interagency body of two (2) or more public agencies where each public agency is defined as an agency under the ORA is collectively a public agency under this act. Ky. Rev. Stat. 61.870(k).

The control of a private entity by a government official does not necessarily convert the entity’s records into public records. *See Kentucky Central Life Ins. Co. v. Park Broad. of Kentucky, Inc.*, 913 S.W.2d 330 (Ky. Ct. App. 1996) (“The company’s records should not lose their private status simply because the public agency has used, possessed or has access to them.”).

An agency “established, created and controlled by a public agency,” including “every state or local government officer,” is a public agency. Ky. Rev. Stat. 61.870 (1).

### **5. Multi-state or regional bodies.**

The Act, attorney general opinions and reported court decisions do not address multistate or regional bodies.

### **6. Advisory boards and commissions, quasi-governmental entities.**

Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council or agency established, created, and controlled are defined as public agencies and therefore subject to the Act. *See* Ky. Rev. Stat. 61.870(1)(j). Also, entities with governing bodies a majority of which are appointed by a public agency are public agencies. Ky. Rev. Stat. 61.870(i). However, committees of hospital medical staffs are not defined as public agencies and are not covered by the act. *Id.*

### **7. Others.**

“Every county and city governing body, council, school district board, special district board and municipal corporation” is a public agency under the ORA. Ky. Rev. Stat. 61.870(d).

“Every state or local government agency, including the policymaking board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution or other legislative act” is a public agency under the ORA. Ky. Rev. Stat. 61.870(f).

### C. What records are and are not subject to the act?

#### 1. What kind of records are covered?

The definition of “public records” covers virtually every record, paper or electronic or otherwise, owned or controlled by a public agency. If an entity is considered a “public agency” solely because it “derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds,” Ky. Rev. Stat. 61.870(1)(h), then only the records that relate to the operations funded by the government are considered “public” records:

“Public record” means 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 this section that are not related to functions, activities, programs or operations funded by state or local authority.

Ky. Rev. Stat. 61.870(2).

In *Hardin County v. Valentine*, 894 S.W.2d 151 (Ky. Ct. App., 1995), the court held that the patient medical records of a publicly owned hospital are not public records under the definition listed above: “Clearly, the medical records of those patients in a public hospital are not related to the functioning of the hospital, the activities carried on by the hospital, its programs or its operations.” *Id.* at 152.

#### 2. What physical form of records are covered?

All forms of public records are covered. *See* Ky. Rev. Stat. 61.870(2). Agencies may provide records in either hard copy or electronic formats:

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 copies 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.

Ky. Rev. Stat. 61.874(2)(a); *see also* 95-ORD-12 (requester has right to choose either hard or electronic format if agency has both available).

#### 3. Are certain records available for inspection but not copying?

There is no limitation on copying records after inspection: “Upon inspection, the applicant shall have the right to make abstracts of public records and memoranda thereof, and to obtain copies of all public records not exempted by the terms of [Ky. Rev. Stat.] 61.878.” Ky. Rev. Stat. 61.874(1); *see also* 92-30 (agency “cannot refuse to provide copies upon inspection”).

### D. Fee provisions or practices.

#### 1. Levels or limitations on fees.

There are different fee limits depending on whether the public record is to be used for a commercial or noncommercial purpose. Generally, the fee for a noncommercial purpose is limited to the costs of duplication, not including the agency’s staff time. Fees for commercial purposes may include other costs, including staff time:

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for non-

commercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. 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.

(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.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requester stating the commercial purpose for which they shall be used, and may require the requester 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.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public records or records;
2. Cost to the public agency of the creation, purchase or other acquisition of the public records.

Ky. Rev. Stat. 61.874.

The constitutionality of this statute was challenged almost immediately after enactment of the 1994 amendments. In *Amelkin v. McClure*, 936 F.Supp. 428 (W.D. Ky. 1996), the plaintiffs alleged that the agency in charge of implementing the “reasonable fee” provision for commercial purposes did so in an arbitrary and discriminatory manner. The United States District Court for the Western District of Kentucky permanently enjoined enforcement of the statute. On appeal, the Sixth Circuit Court of Appeals vacated and remanded the District Court’s decision. The United States Supreme Court vacated and remanded the Sixth Circuit’s decision based on other grounds. Upon rehearing, the Sixth Circuit reiterated its decision to vacate and remand the District Court’s opinion. The United States Supreme Court denied a petition for writ of certiorari.

The Attorney General has held that public agencies may not charge sales tax for copies. “Providing copies of nonexempt public records is not a sale of the records. There is no provision in the Open Records Act that authorizes an agency to charge a sales tax for copies of public records provided pursuant to an open records request.” 98-ORD-88.

#### 2. Particular fee specifications or provisions.

Public agencies are limited to charging a “reasonable fee” for making copies of public records. Ky. Rev. Stat. 61.874(3). For a noncommercial use, the only permissible fee is “the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required.” *Id.*

In an administrative regulation adopted long before the 1994 amendments, the Finance and Administration Cabinet stated that “all state administrative agencies” were limited to charging “ten (10) cents a page for each record.” 200 KAR 1:020 § 3(1).

For a commercial use, the fee must also be “reasonable” but the public agency is permitted to charge for staff time and/or the cost of acquiring the records:

The fee provided for in subsection (a) of this section may be based on one or both of the following:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;
2. Cost to the public agency of the creation, purchase or other acquisition of the public records.

Ky. Rev. Stat. 61.874(4)(c).

If there is no cost to a public agency in providing a record for inspection, the agency may not charge any fee, regardless of whether the requester has a commercial purpose. *See* 94-ORD-145.

**a. Search.**

Agencies may not charge for the labor or time incurred in searching for records when those records have been requested for a noncommercial use; search charges are permitted for commercial uses.

**b. Duplication.**

Duplication costs are limited to the actual costs of reproduction. In *Friend v. Rees*, 696 S.W.2d 325 (Ky. Ct. App., 1985), 10 cents per page was found to be a reasonable charge for reproduction. *See also* 200 KAR 1:020 § 3(1) (directing state agencies to charge 10 cents per page for copies).

An agency cannot charge a fee for copies and postage when it provides hard copies to a requester in lieu of providing onsite inspection via computer access as requested. The requester should be allowed to view the hard copies onsite. 00-ORD-8.

**c. Other.**

*Computer access, printouts.* Requesters seeking online computer access may be required to sign contracts or licensing agreements with the public agency and to pay fees for the access. The exact fee depends on whether the requester intends to use the public records for non-commercial or commercial uses:

Online access to public records in electronic form, as provided under this section, 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:

- (a) The cost of physical connection to the system and reasonable cost of computer time access charges; and
- (b) If the records are requested for a commercial purpose, a reasonable fee based on the factors set forth in subsection (4) of this section.

Ky. Rev. Stat. 61.874(6).

Computer printouts are treated the same as hard copies of any other public record.

*Microfiche.* Treated as any other public record.

*Non-print audio and audio-visual records.* Treated as any other public record.

**3. Provisions for fee waivers.**

There is no provision for waiving fees. *See* 94-ORD-90 (finding reporter not entitled to waiver of fees for copying records).

**4. Requirements or prohibitions regarding advance payment.**

Public agencies may demand advance payment for providing copies: "When copies are requested, the custodian may require a written request and advance payment of the prescribed fee, including postage

where appropriate." Ky. Rev. Stat. 61.874(1). An administrative regulation directs state agencies to produce copies "upon payment" of the fee. *See* 200 KAR 1:020 § 3(1).

**5. Have agencies imposed prohibitive fees to discourage requesters?**

Agencies continue to charge excessive fees, but such fees have been struck down when challenged: "In spite of repeated admonitions that a public agency can only assess a reasonable copying charge . . . a number of public agencies continue to impose clearly excessive fines." 94-ORD-77 (striking down \$5 per page copying fee); *see also* 93-ORD-44 (finding a \$100 "production cost" violated the ORA).

**E. Who enforces the act?**

Aside from any individual agency internal policy, the Kentucky State Attorney General and the Circuit Courts enforce the ORA via an appeals process that becomes available when an agency denies a records request or the agency circumvents the purpose of the act. *See* Ky. Rev. Stat. 61.880.

**1. Attorney General's role.**

If after properly complying with request procedures detailed in the act (i.e. making a written request and waiting the required three (3) business days for a response) the agency denies the request, the requester may ask the attorney general to review the decision. Ky. Rev. Stat. 61.880(1)-(2). The requester must forward the attorney general a copy of the written request and a copy of the agency's denial. Ky. Rev. Stat. 61.880(2).

The attorney general will also review a request when the requester feels the intent of the act is "being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant." Ky. Rev. Stat. 61.880(4).

If either party is unsatisfied with the attorney general's decision, the party may file an appeal with the Circuit Court within 30 days from the date of the attorney general's decision. Ky. Rev. Stat. 61.880(5)(a). A timely appeal will be treated as if it was brought in Circuit Court pursuant to Ky. Rev. Stat. 61.882. If not timely appealed, the attorney general's decision has the force of law. Ky. Rev. Stat. 61.880(5)(b).

**2. Availability of an ombudsman.**

The act does not provide for an ombudsman.

**3. Commission or agency enforcement.**

Each agency is required to adopt rules regarding its compliance with the ORA, and is supposed to designate an official custodian of records. Ky. Rev. Stat. 61.876.

**F. Are there sanctions for noncompliance?**

A Circuit Court may award a successful requester costs and reasonable attorney fees incurred if the requester prevails against the agency and the agency willfully violated the act. Ky. Rev. Stat. 61.882(5). The court has discretion to "award the person an amount not to exceed twenty-five (25) dollars for each day that he was denied the right to inspect or copy said public record." *Id.*

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open records statute.**

Certain records are excluded from the ORA and may only be viewed pursuant to court order. The court cannot authorize inspection of materials pertaining to civil litigation beyond what is provided by the Rules of Civil Procedure governing pre-trial discovery. Ky. Rev. Stat. 61.878 (1). If, however, the public record contains material not exempted, the agency must omit the exempted information from the record and provide a redacted copy of the nonexempt material. Ky. Rev. Stat. 61.878(4).

No exemption in the section can be construed to prevent the disclosure of statistical information not descriptive of any readily identifiable person. Ky. Rev. Stat. 61.878(2).

## 1. Character of exemptions.

### a. General or specific?

Specific. See Ky. Rev. Stat. 61.878(1).

### b. Mandatory or discretionary?

The exemptions are discretionary: “[T]he exceptions to the Open Records Law are permissive rather than mandatory.” 94-ORD-120.

### c. Patterned after federal Freedom of Information Act?

Some similarities exist between the ORA and the Freedom of Information Act (“FOIA”) and Kentucky courts and the attorney general often look to the FOIA for guidance when state law is scarce. See, e.g., 94-ORD-108 (looking to cases interpreting “the federal analogue to Ky. Rev. Stat. 61.878(1)(i) which is found at 5 U.S.C. § 552(b)(5)”).

## 2. Discussion of each exemption.

Many of these exemptions were modified and/or renumbered when the ORA was amended in 1992 and again in 1994. Take care when researching cases and attorney general opinions issued prior to these dates.

Ky. Rev. Stat. 61.878(1): “The following public records are excluded from the application of Ky. Rev. Stat. 61.870 to 61.884 and shall be 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.”

This limitation does not prevent a newspaper from using the ORA when the newspaper is not a party to litigation between another private entity and the Department of Corrections. *Department of Corrections v. Courier-Journal & Louisville Times Co.*, 914 S.W.2d 349 (Ky. Ct. App., 1996); see also 95-ORD-18 (discussing limitation). In *Dept. of Revenue v. Wyrick*, the Kentucky Supreme Court further clarified that this limitation does not prevent even a party to a lawsuit from obtaining records that are open to others. 2010 Ky. LEXIS 260 at \*8-9 (Ky. 2010). Rather, the court said that the civil litigation limitation “is an explanation of a court’s authority to order inspection of documents otherwise exempted from disclosure under Ky. Rev. Stat. 61.878(1)(a)-(n). It is **not** an exception to an agency’s duty to disclose nonexempted records.” *Id.* (emphasis in original).

Previous attorney general opinions support the Kentucky Supreme Court’s holding in *Wyrick*. They, too, indicate that the civil litigation limitation does not prohibit access by a party litigant to public records held by a public agency against which the litigant has brought suit or by which the litigant has been sued. See 95-ORD-18; 96-ORD-138; 98-ORD-39; 98-ORD-87. The agency may refuse disclosure only if the records are both exempt and non-discoverable. See also 98-ORD-15 (“records requested by party litigant which pertain to pending litigation, and fall within the attorney-client privilege, may be withheld under Ky. Rev. Stat. 61.878(1) because they are protected from pretrial discovery by the Rules of Civil Procedure”). 00-ORD-97.

Ky. Rev. Stat. 61.878(1)(a): “Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;”

Kentucky courts apply a balancing test when weighing whether disclosure constitutes a clearly unwarranted invasion of privacy:

[G]iven 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 the antagonistic inter-

ests. Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case-specific approach by providing for *de novo* judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is “clearly unwarranted” is intrinsically situational, and can only be determined within a specific context.

*Kentucky Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327-28 (Ky., 1992).

The Kentucky Supreme Court applied this test in *Cape Publ’ns., Inc. v. Univ. of Louisville Found.*, when it held that the names of donors to a university foundation were open, except for the donors who had specifically requested anonymity and who believed, at the time of the gift, that the donation was being made to a private entity. 260 S.W.3d 818, 824 (Ky. 2008). There, the court said:

“When weighed against the public’s interest in the source of Foundation funds – and ultimately, University funds – we conclude that the anonymous donors’ interest in privacy are superior in this instance.”

*Id.*

The court went on to say that future donors’ names would not be closed to the public, because the court’s opinion had put donors on notice that they were giving their money to a public institution. *Id.*

In applying the balancing test, the courts have given greater weight to the privacy interests of private individuals and low-level public employees than to those of high-level public officials and employees. This is because courts view the ORA as being designed to keep track of the government, and not of private individuals:

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 is accumulated in various government files that reveals little or nothing about an agency’s own conduct.

*Zink v. Kentucky Dept. of Workers’ Claims*, 902 S.W.2d 825, 829 (Ky. Ct. App., 1994).

In *Zink*, the court refused an attorney’s request to examine injury reports submitted to the Kentucky Department of Workers’ Claims. The court found this would constitute an unwarranted invasion of privacy because the records were of private citizens and included their names, marital status, dates of birth, number of dependents, salaries, Social Security numbers, home addresses and telephone numbers. *Id.* at 827.

The court later distinguished *Zink* in *Palmer v. Driggers*, 60 S.W.3d 591, 598-99 (Ky. Ct. App. 2001), finding that a former Owensboro police officer’s records revealing alleged misconduct in the form of an inappropriate relationship with another officer while on duty was in the public interest and therefore subject to disclosure. *Id.* The court held that the public had a legitimate interest in “knowing the underlying basis for a disciplinary charge against a police officer who has been charged with misconduct.” *Id.*

Another example of the public interest tilting toward disclosure can be found in 98-ORD-45 (“we find that complaints of sexual harassment and consequent disciplinary action, or the decision to take no action, are matters of legitimate public concern which outweigh the privacy rights of the public servant”).

Similarly, the attorney general has held that public officials’ salaries are subject to disclosure. 99-ORD-209 (“The principle that the salary of a public servant is a matter of legitimate public interest, and records reflecting a public servant’s salary must be made available for inspection, is as old as the Open Records Act itself”). See also 85-94; 86-38; 87-76; 88-13; 89-97; 93-ORD-144; 97-ORD-85; and 98-ORD-184.

The attorney general has consistently refused to release evaluations of lower level public employees, however, reasoning that the public interest in the performance of these employees does not outweigh the employees' privacy interests. *Zink*, 902 S.W.2d at 827; see also 94-ORD-132 (withholding evaluation of public university department chair); 94-ORD-108 (withholding evaluations of professors).

With regard to settlement agreements, the exemption is not invoked by placing a confidentiality clause within the agreement. *Central Kentucky News-Journal v. George*, 306 S.W.3d 41, 45 (Ky. 2010); *Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader Co.*, 941 S.W.2d 469, 473 (Ky. 1997). In *Lexington-Fayette Urban County Government*, the Kentucky Supreme Court held that "settlement of litigation between private citizens and a governmental entity is a matter of legitimate public concern which the public is entitled to scrutinize." 941 S.W.2d at 473. The Kentucky Supreme Court further clarified that point in *Central Kentucky News-Journal*, when it held that confidentiality clauses within such agreements do not make them exempt from disclosure under the personal privacy exception to the ORA. 306 S.W.3d at 45.

If the confidentiality clause contains a provision requiring the public agency to notify the affected party upon receipt of an open records request for the settlement agreement, the public agency must do so within the three days with which it has to comply with the open records request. 98-ORD-24.

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

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

In a case of first impression, the Supreme Court determined that records of the Department of Insurance relating to health insurance rates and form filings are subject to the ORA. Documents that constitute confidential or proprietary information, which would give a competitor an unfair advantage, however, are exempt from disclosure under this exception. *Southeastern United Medigroup Inc. v. Hughes*, 952 S.W.2d 195, 198-99 (Ky. 1997).

Audited financial records submitted by Marina Management Services ("MMS") to the Cabinet for Tourism are exempt from the ORA. *Marina Management Services Inc. v. Kentucky Cabinet for Tourism*, 906 S.W.2d 318 (Ky., 1995). The records were submitted in connection with MMS's license agreement with the state to operate marinas in state parks; they included asset values, rental amounts on houseboats, profit margins, net earnings and capital income. *Id.* at 319; see also 92-66 (withholding audit of private hospital).

*Ky. Rev. Stat. 61.878(1)(c)(2)*: "Upon and after July 15, 1992, records confidentially disclosed to an agency, or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

- a. In conjunction with an application for or the administration of a loan or grant;
- b. In conjunction with an application for or the administration of assessments, incentives, inducements and tax credits as described in Ky. Rev. Stat. Chapter 154;
- c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae or processes, which are used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities obtained from a person; or
- d. For the grant or review of a license to do business;"

To successfully raise this exception an agency must establish that the records "1) are confidentially disclosed to the agency or required by the agency to be disclosed to it; 2) are generally recognized as confidential or proprietary; and 3) are compiled and maintained for the grant or review of a license to do business." 99-ORD-220.

Financial records that General Electric submitted to the Kentucky Industrial Revitalization Authority for investment tax credits are exempt from disclosure. *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766 (Ky., 1995). The 61.878(1)(c)(2) exemption is designed "to protect those companies which participate in the revitalization and development of industry in Kentucky." *Id.* at 769.

An application for a racing license does not satisfy the requirements for this exception. The agency may redact those portions of the application, however, which concern the "inner workings" of the business and are "generally recognized as confidential and proprietary." 99-ORD-220.

Similarly, the Attorney General found that a Hardin County Drug Task Force grant application must be released in part under the Act. The agency was not required to disclose, however, the "names of investigators; geographic target areas; types of targeted substances; and strategic plans of attack." 97-ORD-132.

A private agency's proposal to the state Department for Social Services concerning the use of refugee resettlement funds is not exempt: "We believe such records are of uniquely public interest, insofar as they substantiate that federal funds will be put to proper use, and cannot be characterized as confidential or proprietary." 93-ORD-43; see also 95-ORD-107 (stressing that exception only applies where records are confidential).

*Ky. Rev. Stat. 61.878(1)(c)(3)*: "The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;"

*Ky. Rev. Stat. 61.878(1)(d)*: "Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;"

*Ky. Rev. Stat. 61.878(1)(e)*: "Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;"

*Ky. Rev. Stat. 61.878(1)(f)*: "The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition or property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;"

This exception only applies to real property, and not to personal property. See 95-ORD-98 (holding records relating to the planned acquisition of computers cannot be withheld under this exception).

*Ky. Rev. Stat. 61.878(1)(g)*: "Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination before the exam is given or if it is to be given again;"

"Given the importance of the KIRIS exam as a tool for measuring the efficiency and improvement of [Kentucky's] schools, [the Court of Appeals held that] the KIRIS exam should not be open for general public viewing without a special showing of necessity beyond simple curiosity as to its content." *Triplett v. Livingston County Board of Education*, 967 S.W.2d 25, 34 (Ky. Ct. App., 1997).

*Ky. Rev. Stat. 61.878(1)(b)*: “Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of [Ky. Rev. Stat.] 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 [Ky. Rev. Stat.] 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by [Ky. Rev. Stat.] 61.870 to 61.884;”

A convicted murderer may not obtain the Commonwealth Attorney’s file while preparing a petition for *habeas corpus*: “[T]he defense of the prospective *habeas corpus* proceedings is a part of the ‘law enforcement action’ in the appellant’s case.” *Skaggs v. Redford*, 844 S.W.2d 389, 390 (Ky., 1992); see also 99-ORD-170.

*Ky. Rev. Stat. 61.878(1)(i)*: “Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;”

This exception and 61.878(1)(j) “are intended to insure the integrity of an agency’s decision making process by protecting its pre-decisional documents.” 93-ORD-37.

Correspondence means “communication by exchange of letters” and does not apply to “oral complaints or communications recorded on an audio tape.” 94-ORD-133.

“Writings from private citizens to government agencies are not considered correspondence from private citizens where an agency is expected to rely on the correspondence to take some action, such as take a disciplinary action against a licensee, or enter into a government contract based on bids.” 99-ORD-220.

The governor’s daily schedule is a preliminary document exempt from disclosure: “We view the Governor’s appointment schedule as nothing more than a draft of what may or may never take place; a notation for inter or intra office use, so the daily affairs of the chief executive can be conducted with some semblance of orderliness; and all of which should be free from media interference.” *Courier-Journal & Louisville Times Co. v. Jones*, 895 S.W.2d 6, 10 (Ky. Ct. App., 1995).

This section does not prevent the disclosure of a previous open records request and the agency’s response to another requester. 92-ORD-1440.

A tape recording of a city council meeting is not a preliminary document exempt from disclosure. 92-111.

*Ky. Rev. Stat. 61.878(1)(j)*: “Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;”

This exception “is intended to protect the integrity of the agency’s internal decision-making process by encouraging the free exchange of opinions and recommendations.” *Id.* (citing 94-ORD-132, p.3); see also 90-97; 89-39; 88-85; 88-24; and 86-64.

This exception includes drafts, notes and outlines. A draft is defined as “a preliminary outline, plan or version.” 97-ORD-183 (citing Webster II New Riverside University Dictionary 402 (1988)). The term note is defined as “a brief record, especially one written down to aid the memory.” *Id.* (citing Webster at 804). An outline is “a tentative version, sketch or outline of a formal and final written product such as the draft report dealt with in 89-34, 93-ORD-125, and 94-ORD-38.” *Id.*

While preliminary drafts, recommendations and memoranda are exempt under Ky. Rev. Stat. 61.878(1)(i) and Ky. Rev. Stat. 61.878(1)(j), those materials must be disclosed if the agency adopts them as part of its final action:

The public has a right to know what complaints have been made to a public agency once final action is taken. Once notes or recommendations are adopted by the public agency as part of its action the preliminary characterization of those notes or recommendations is lost. Such records would lose their exemption . . . and would become releasable . . . .

*Kentucky State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. Ct. App., 1983); see also *University of Kentucky v. Courier-Journal*, 830 S.W.2d 373, 378 (Ky., 1992) (“[I]nvestigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.”).

Even though a memorandum may have been the final or last memorandum on a particular topic by a particular individual or department, it remains preliminary as long as the final decision maker does not incorporate that memorandum into his or her final action. For instance, a report by a police department’s internal affairs department remains preliminary if the chief of police does not adopt its recommendations as part of the chief’s final action — even though the report is the “final” report by the internal affairs department. See *City of Louisville v. Courier-Journal & Louisville Times Co.*, 637 S.W.2d 658 (Ky. Ct. App., 1982); see also 94-ORD-132 (discussing the “dichotomy” between final department reports and final agency actions); 94-ORD-89 (finding a post-decisional memorandum to be preliminary).

An example of a preliminary document that lost its preliminary status is the annual evaluation of the director of the Jefferson County Health Department by the Health Board. See 94-ORD-120. The county judge had the choice of accepting the board’s evaluation or formulating his own. When he chose to go with the board’s evaluation, the evaluation lost its preliminary status and was no longer exempt from disclosure. *Id.*

In a second example, the attorney general found that a use of force inquiry was no longer preliminary in nature “[b]ecause the Commissioner adopted the findings and recommendations of the investigating officer by affixing his signature to the report.” 97-ORD-168.

*Ky. Rev. Stat. 61.878(1)(k)*: “All public records or information the disclosure of which is prohibited by federal law or regulation;”

An example of a federal law prohibiting disclosure of information is The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g. See 94-ORD-17 (finding Act, as incorporated by ORA, prohibits disclosure of students’ home addresses and telephone numbers). See also 98-ORD-1 (The Drivers’ Privacy Protection Act, 18 U.S.C. § 2721 *et seq.* “prohibits the release and use of certain personal information from state motor vehicle records”); and 97-ORD-178 (a state correctional facility is prohibited from disclosing FBI Rap Sheets pursuant to 28 USC § 534); 05-ORD-128 (finding that pursuant to Ky. Rev. Stat. 61.878(k)(1) and by incorporation of 49 C.F.R. Part 24.9(b) federal regulation prohibits disclosure of information pertaining to financial data regarding the airport expansion program and a subsequent voluntary relocation program operated by the Louisville International Airport.)

*Ky. Rev. Stat. 61.878(1)(l)*: “Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.”

An example of a state law prohibiting disclosure under the ORA is Ky. Rev. Stat. 610.320(3), which mandates confidentiality for law enforcement records regarding juveniles. See 93-ORD-42 (discussing Ky. Rev. Stat. 610.320(3) and the ORA); see also 95-ORD-121 (discussing Ky. Rev. Stat. 197.025, which permits nondisclosure of some jail records); 94-ORD-97 (discussing Ky. Rev. Stat. 365.880, the Uniform Trade Secrets Act).

*Ky. Rev. Stat. 61.878(m)*: “Public Records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terroristic act and limited to:

- a. Critical lists resulting from consequence assessments;
- b. Vulnerability assessments;
- c. Antiterrorism protective measures and plans;
- d. Counterterrorism measures and plans;
- e. Security and response needs assessment;
- f. Infrastructure records that expose vulnerability referred to in this subparagraph through the disclosure of the location, configuration or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.”

#### **B. Other statutory exclusions.**

Various state statutes dealing with specific records make those records confidential. *Ky. Rev. Stat. 61.878(1) (l)* incorporates these into the ORA.

#### **C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.**

None.

#### **D. Are segregable portions of records containing exempt material available?**

Public agencies are required to redact records containing both exempt and non-exempt information: “If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the non-excepted material available for examination.” *Ky. Rev. Stat. 61.878(4)*; *see also* 200 KAR 1:020 § 4 (“the custodian of the record shall . . . segregate or remove the excluded material”); 93-ORD-42 (“Those portions of the records which disclose the identities of the juveniles . . . may be redacted . . . insofar as disclosure would constitute a clearly unwarranted invasion of privacy.”).

That being said, an agency may contest the disclosure of records if the redaction would impose an unreasonable burden. *See Ky. Rev. Stat. 61.872(6)* (permitting nondisclosure if request “places an unreasonable burden in producing public records”); *see also* 97-ORD-88 (finding redaction of licensure reports for at least 314 nursing facilities, where each report consisted of 25 forms and some forms consisted of as many as 59 pages, to be unreasonably burdensome); 96-ORD-51 (discussing examples of unreasonable burdens imposed by redaction of numerous personnel records); 95-ORD-2 (finding redaction of 200 records is not unreasonable burden).

An agency may not charge a requester for the costs incurred in redacting the material. *See 95-ORD-82* (requiring police “to separate excepted material from nonexcepted material” and to “bear the cost of redaction”).

#### **E. Homeland Security Measures.**

The Attorney General has found that records relating to security measures taken for protection of a high United States Government official are not covered by ORA, pursuant to *Ky. Rev. Stat. 61.878(1)(m)*, which exempts records regarding antiterrorism protective measures and plans; and security and response needs assessment. 05-ORD-119 (This decision is pending appeal in court).

Certain records deemed to have a “reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terroristic act” are exempt from the ORA. *Ky. Rev. Stat. 61.878(1)(m)*.

### **III. STATE LAW ON ELECTRONIC RECORDS**

Since 1994, the ORA has treated all public records similarly, regardless of their format. A requester is entitled to obtain a hard copy of a public record or an electronic file if available. As with all public records in Kentucky, a requester intending to use the information for commercial purposes faces a higher fee.

#### **A. Can the requester choose a format for receiving records?**

The requester may obtain a hard copy or an electronic copy of a public record if the record is stored in an electronic format. The agency is not required to convert a hard copy into an electronic file:

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 copies 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.

*Ky. Rev. Stat. 61.874(2)(a)*.

If the requester asks for a hard copy, the agency cannot instead provide a copy on a computer disk: “[P]roduction of records in a format which renders them inaccessible, at least as to the person requesting them, constitutes a subversion of the law.” 93-ORD-62.

The standard format for electronic files is ASCII. If the public agency’s records are stored in a different format, the requester may accept a copy of the record in that format or request a hard copy:

The minimum standard format in paper form shall be defined as not less than 8-1/2 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 requester’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 non-standardized request.

*Ky. Rev. Stat. 61.874(2)(b)*.

If the requester desires an electronic format other than ASCII, the agency has the choice of complying with this request and charging the requester for its time and expenses:

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.

*Ky. Rev. Stat. 61.874(3)*.

#### **B. Can the requester obtain a customized search of computer databases to fit particular needs?**

If the database exists, a requester is entitled to have a search for nonexempt material in that database. However, “a public agency is not required to create a list or a database to satisfy a particular request.” 93-ORD-118.

In addition, the agency does not have to provide unfettered access to its computers so that the requester can attempt to prove that he didn’t receive the records he requested. 00-ORD-8; 99-ORD-96.

#### **C. Does the existence of information in electronic format affect its openness?**

No, not since the 1994 repeal of the Public Access to Governmental Databases Act.

## D. How is e-mail treated?

E-mail messages are not treated differently than any other public record.

### 1. Does e-mail constitute a record?

E-mail messages constitute records under Ky. Rev. Stat. 61.870(2), which defines a public record as “all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics...” *Id.*

### 2. Public matter on government e-mail or government hardware

Records created on public equipment, whether for agency or personal purposes, must be disclosed under the Act unless the agency can articulate a specific exception. 00-ORD-97. *See also* 99-ORD-112 (a school district improperly withheld a copy of pornographic materials allegedly copied from an Internet site by a school district employee. “Records which were obtained on public time and on public equipment are, in our view, public records”); 98-ORD-92 (“telephone records for calls originating from a telephone line used in a legislative leadership office may be disclosed”); 98-ORD-31 (“a tape recording documenting a personal conversation of some duration between a Division of Fire and Emergency Service employee and another employee on a telephone extension dedicated to public use for 911 emergency calls may be disclosed”); and 96-ORD-238 (“records reflecting the names and facsimile numbers of all facsimile transmissions made for personal, and not agency purposes on agency equipment, may be disclosed”).

### 3. Private matter on government e-mail or government hardware

Private matters conveyed over government e-mail are subject to the ORA where the sender is a state employee and the e-mail was sent on a work computer during work hours. *Justice and Public Safety Cabinet v. Malmer*, Franklin Circuit Court No. 06-CI-1373 (Nov. 19, 2007) (“The public has a right to know the contents of non-work related emails transmitted through the state email system by state employees being paid with tax dollars during working hours.”) This rule does not apply to a private citizen who served solely in a volunteer capacity in state government. *Gannett v. Governor Ernie Fletcher*, Franklin Circuit Court No. 05-CI-1015 (May. 17, 2006).

### 4. Public matter on private e-mail

The ORA defines a public record as any record “prepared, owned, used, in the possession of or retained by a public agency.” Ky. Rev. Stat. 61.870(2). As such, if a public agency prepared, owned, used, possessed or retained the document, it would be subject to the ORA, even if it were contained on a private e-mail account.

### 5. Private matter on private e-mail

Private matters conveyed over private e-mail would be open records if they were maintained by a public agency, as defined by Ky. Rev. Stat. 61.870(1), and not otherwise exempt by an exception in Ky. Rev. Stat. 61.878(1).

## E. How are text messages and instant messages treated?

Text messages and instant messages that are “prepared, owned, used, in the possession of or retained by a public agency,” are subject to the ORA because it includes all documentation “regardless of physical form or characteristics.” Ky. Rev. Stat. 61.870(2). However, for practical purposes, public agencies may not retain such records unless they are required to do so under their document retention schedules. Document retention schedules, which are determined by the Kentucky Department of Libraries and Archives, vary by agency and can be found at <http://www.kdla.ky.gov/recmanagement/state-schedule.htm>.

### 1. Do text messages and/or instant messages constitute a record?

*See* Ky. Rev. Stat. 61.870(2). There is no other statutory or case law addressing this issue.

### 2. Public matter message on government hardware.

*See* Ky. Rev. Stat. 61.870(2). There is no other statutory or case law addressing this issue.

### 3. Private matter message on government hardware.

*See* Ky. Rev. Stat. 61.870(2). There is no other statutory or case law addressing this issue.

### 4. Public matter message on private hardware.

*See* Ky. Rev. Stat. 61.870(2). There is no other statutory or case law addressing this issue.

### 5. Private matter message on private hardware.

*See* Ky. Rev. Stat. 61.870(2). There is no other statutory or case law addressing this issue.

## F. How are social media postings and messages treated?

Social media postings and messages that are “prepared, owned, used, in the possession of or retained by a public agency,” are subject to the ORA because the ORA includes all documentation “regardless of physical form or characteristics.” Ky. Rev. Stat. 61.870(2). However, for practical purposes, public agencies may not retain such messages unless they are required to do so under their document retention schedules. Document retention schedules, which are determined by the Kentucky Department of Libraries and Archives, vary by agency and can be found at: <http://www.kdla.ky.gov/recmanagement/state-schedule.htm>.

## G. How are online discussion board posts treated?

Online discussion board posts would be treated the same as texts, instant messages and social media posts. *See* Ky. Rev. Stat. 61.870(2). There is no other statutory or case law addressing this issue.

## H. Computer software

### 1. Is software public?

Computer software is exempted from disclosure if it constitutes “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.” Ky. Rev. Stat. 61.870(3)(b). *See also* *Commonwealth v. Courier-Journal*, Franklin Circuit Court No. 08-CI-83 (May 15, 2009), at 6.

### 2. Is software and/or file metadata public?

*See* Ky. Rev. Stat. 61.870(3)(b). There is no other statutory or case law addressing this issue.

## I. How are fees for electronic records assessed?

The agency may prescribe a fee equal to its cost of reproduction, which may vary by medium. Ky. Rev. Stat. 61.874(3). The fee may not include staff costs unless the record is for commercial use. *Id.* (“The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required.”)

## J. Money-making schemes.

### 1. Revenues.

*See* Section IV (E).

## 2. Geographic Information Systems.

There is no statutory or case law directly addressing this issue. See definition of “public record.” Ky. Rev. Stat. 61.870(2).

### K. On-line dissemination.

Ky. Rev. Stat. 61.874(6) reads:

Online access to public records in electronic form, as provided under this section, 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. . . .

*Id.*

However, in *Commonwealth of Kentucky v. Courier-Journal*, Franklin Circuit Court No. 08-CI-863 (May 15, 2009), the court held that nothing in Ky. Rev. Stat. 61.874(6) “serves to relieve the obligations of the agency under Ky. Rev. Stat. 61.874(2). Thus, although online access may be provided, the agency still must comply with requests for records in hard copy or electronic format.” *Id.* at 5.

## IV. RECORD CATEGORIES -- OPEN OR CLOSED

### A. Autopsy reports.

A coroner’s autopsy may be withheld while a criminal prosecution is pending. Otherwise, it is presumptively available. See 82-458.

### B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

Generally, records relating to ongoing or prospective investigations are exempt from disclosure. Once the investigation is complete, the records are open to inspection. Ky. Rev. Stat. 61.878(1)(h). The statute reads:

Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of Ky. Rev. Stat. 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 Ky. Rev. Stat. 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by Ky. Rev. Stat. 61.870 to 61.884. . . .

*Id.*

#### 1. Rules for active investigations.

Generally closed. See Ky. Rev. Stat. 61.878(1)(h).

#### 2. Rules for closed investigations.

Open once enforcement action is complete or a decision is made to take no action. Ky. Rev. Stat. 61.878(1)(h).

### C. Bank records.

A public agency’s bank records are generally open, however, public records that reveal the audit criteria or internal examining methods of public agencies that regulate financial institutions are exempt. See

Ky. Rev. Stat. 61.878. Information relating to private investors would likely be exempt under Ky. Rev. Stat. 61.878(1)(a).

### D. Budgets.

Budgets that are prepared, owned, used, in the possession of or retained by a public agency are open records. Ky. Rev. Stat. 61.870(2).

### E. Business records, financial data, trade secrets.

May be exempt under Ky. Rev. Stat. 61.878(1)(c).

Records, which constitute the “inner workings” of the business, are generally exempt from disclosure under Ky. Rev. Stat. 61.878(1)(c). 99-ORD-220.

### F. Contracts, proposals and bids.

Material, correspondence and transactions relating to bidding on a contract with a public agency are open to public inspection once the bids are open. See 92-32; 84-254.

### G. Collective bargaining records.

Collective bargaining records are presumptively open, but an agency may be able to withhold them under Ky. Rev. Stat. 61.810(1)(e), which allows for closed collective bargaining negotiations.

### H. Coroners reports.

Open.

### I. Economic development records.

Ky. Rev. Stat. 61.878 exempts certain economic development records from the ORA. Ky. Rev. Stat. 61.878(c)(2) reads:

Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

- a. In conjunction with an application for or the administration of a loan or grant;
- b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in Ky. Rev. Stat. Chapter 154;
- c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or
- d. For the grant or review of a license to do business.

*Id.*

Furthermore, economic development records that indicate final agency action are open, while records that are preliminary in nature – including those that relate to proposals, financial incentives, and negotiations – can be withheld under Ky. Rev. Stat. 61.878(1)(i) and (j). See OAG 87-21 (holding that records involved with an ongoing competitive negotiation process are preliminary pending final resolution of the matter); 97-ORD-62 (holding that records generated in the course of negotiations and disclosing the substance of those negotiations may be withheld pursuant to Ky. Rev. Stat. 61.878(1)(i) and (j) since “premature disclosure of records reflecting the negotiations . . . could seriously compromise the project.”); see also 04-ORD-81 (unaccepted proposals and incentives “remain preliminary and inchoate as they were never accepted and no final agreement reached”).

### J. Election records.

#### 1. Voter registration records.

May be closed to some requesters under Ky. Rev. Stat. 61.878(1)(l), which exempts records made confidential by an enactment of the

General Assembly, but appear to be available to media using the records as part of a “publication, broadcast, or related use by a newspaper, magazine, radio station, television station, or other news medium in its news or other publications or broadcasts.” 31 KAR 3:010(4)(2); see 07-ORD-155.

## 2. Voting results.

Individual voting results are closed. Ky. Rev. Stat. 118.025(1) (“voting in all elections shall be by secret ballot on voting machines.”) Aggregate voting results by precinct are open. Ky. Rev. Stat. 117.275(3)-(4).

## K. Gun permits.

A record that lists the names of every individual in the Commonwealth of Kentucky who is licensed to carry a firearm is open to public inspection in the form of a hard copy. Ky. Rev. Stat. 237.110(8). The list may not contain any identifying information other than names. *Id.*

## L. Hospital reports.

A hospital’s medical records of individual patients are not public records. See *Hardin County v. Valentine*, Ky. Ct. App., 894 S.W.2d 151 (1995).

Reports of ambulance runs by a county ambulance service are exempt from disclosure on the grounds that disclosure would result in an invasion of privacy. See 83-344.

## M. Personnel records.

### 1. Salary.

The salaries of public employees are open. 10-ORD-226 (“In a line of open records opinions/decisions dating from the earliest days of the Act, this office recognized [\*6] that “[a]mounts paid from public coffers are perhaps uniquely of public concern . . . [T]he public is entitled to inspect records documenting exact amounts paid from public monies to include amounts paid for . . . salaries, etc.”) (internal citations omitted).

### 2. Disciplinary records.

Charging documents and final reprimands of public employees are open. *City of Louisville v. Courier-Journal and Louisville Times Co.*, 637 S.W.2d 658 (Ky. Ct. App. 1982); *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. Ct. App. 2001). The attorney general has held that “disciplinary action taken against a public employee is a matter related to his job performance and a matter about which the public has a right to know.” OAG 91-198. However, certain statutes outside the ORA may prevent disclosure. See Ky. Rev. Stat. 161.790(10) (permitting a private reprimand of a teacher).

### 3. Applications.

Open if the applicant is named, but records related to the unsuccessful, unidentified candidates are subject to the personal privacy exemption of Ky. Rev. Stat. 61.878(1)(a). See 10-ORD-196, (a requester cannot get the application of unsuccessful, unidentified candidates for the position of district superintendent); see also 03-ORD-084, (application letter of an unsuccessful candidate to become the president of a university was open because his name had been disclosed and thus there was no longer a privacy interest).

### 4. Personally identifying information.

As discussed further in Section II(A)(2), the ORA exempts “records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” Ky. Rev. Stat. 61.878(1)(a). As such, agencies may redact information such as home address, telephone number, date of birth and Social Security number in records that are otherwise nonexempt. Ky. Rev. Stat. 51.878(4); 93-ORD-118; 95-ORD-151.

### 5. Expense reports.

To the extent that expense reports are “prepared, owned, used, in the possession of or retained by a public agency,” they are open. Ky. Rev. Stat. 61.870(2).

## 6. Other.

N/A.

### N. Police records.

Police records relating to ongoing or prospective investigations are exempt from disclosure. Once the investigation is completed, the records are open to inspection. See Ky. Rev. Stat. 61.878(1)(h), which states:

Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of Ky. Rev. Stat. 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 Ky. Rev. Stat. 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by Ky. Rev. Stat. 61.870 to 61.884...

Police records of juveniles are exempt. See 93-ORD-42 (discussing exemption mandated by Ky. Rev. Stat. 610.320(3)).

### 1. Accident reports.

Traffic accident reports are specifically exempted from the ORA under Ky. Rev. Stat. 189.635(5), which provides that “[a]ll accident reports filed with the Department of Kentucky State Police ... shall not be considered open records under Ky. Rev. Stat. 61.872 to 61.884 and shall remain confidential ...” However, Ky. Rev. Stat. 189.635(8) permits such reports to be made available to news-gathering organizations “solely for the purpose of publishing or broadcasting news.” Ky. Rev. Stat. 189.635(8) contains other limitations on use of the reports by news-gathering organizations.

The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization’s publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

*Id.*

### 2. Police blotter.

Open. See *Cape Publications v. City of Louisville*, 147 S.W. 3d 731, 733 (Ky. Ct. App. 2004) (“[P]olice incident reports are matters of public interest and are public records. 93-ORD-42, citing OAG 76-443. As a result, the public should be allowed to scrutinize the police to ensure they are complying with these statutory duties.”).

### 3. 911 tapes.

In *Bowling v. Brandenburg*, 37 S.W.3d 785 (Ky.App. 2000), the Kentucky Court of Appeals affirmed a lower court decision that a 911 call was not subject to the ORA because of the personal privacy exception in Ky. Rev. Stat. 61.878(1)(a). However, in a later unpublished case, the court of appeals found that a 911 call was subject to the ORA, because, unlike *Bowling*, “the 911 caller was neither an alleged victim of domestic violence nor subject to future threats from the alleged domestic violence perpetrator.” *Marshall County v. Paxton Media Group*, No. 2008-CA-001100MR, (Ky. Ct. App. 2009). See also 10-ORD-221.

#### 4. Investigatory records.

See Ky. Rev. Stat. 61.878(1)(h).

##### a. Rules for active investigations.

Closed. See Ky. Rev. Stat. 61.878(1)(h).

##### b. Rules for closed investigations.

Open. See Ky. Rev. Stat. 61.878(1)(h).

#### 5. Arrest records.

Generally open. See *Cape Publications v. City of Louisville*, 147 S.W.3d 731, 733 (Ky. Ct. App. 2004) (“[P]olice incident reports are matters of public interest and are public records.”) See also Section IV(N).

#### 6. Compilations of criminal histories.

Open, however, the primary compiler of criminal histories is the Administrative Office of the Courts, an entity not subject to the ORA. *Ex Parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978) (“[T]he custody and control of the records generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to regulation.”).

If a database exists and is subject to the ORA, a requester is entitled to have a search for nonexempt material in that database. However, “a public agency is not required to create a list or a database to satisfy a particular request.” 93-ORD-118. See also *Commonwealth v. Courier-Journal*, Franklin Circuit Court No. 08-CI-863 (May 15, 2009) (Kentucky State Police was required to supply newspaper with electronic database of sex offenders in ASCII format, even though data was stored in a different, proprietary format.)

#### 7. Victims.

Generally open, except for the names and identifying information of victims of sexual offenses. In *Cape Publications v. City of Louisville*, the Kentucky Court of Appeals held that “the Division may not withhold the identities of all crime victims as a matter of policy...” 147 S.W.3d 731, 732 (Ky. Ct. App. 2004). The Court went on to exclude the victims of sex crimes from the general policy of openness, because of the personal nature of the crime. *Id.* at 732-733. However, the Court noted that: “[W]e believe that in rare instances, such as where the victim of a sexual offense has “gone public,” or other circumstances in which the victim has evidenced a waiver of privacy, that victim’s privacy interests may be subordinate to the public’s interest in disclosure.” *Id.*

#### 8. Confessions.

See Ky. Rev. Stat. 61.878(1)(h); see also 08-ORD-016.

#### 9. Confidential informants.

See Ky. Rev. Stat. 61.878(1)(h).

#### 10. Police techniques.

Generally open. See Ky. Rev. Stat. 61.878(1)(h).

#### 11. Mug shots.

Generally open. See Ky. Rev. Stat. 61.878(1)(h).

#### 12. Sex offender records.

Open.

#### 13. Emergency medical services records.

Generally open, subject to the personal privacy exemption of Ky. Rev. Stat. 61.878(1)(a) and assuming that the agency meets the definition of a public agency under Ky. Rev. Stat. 61.870(1).

#### O. Prison, parole and probation reports.

“[R]ecords containing the names of persons lodged in a jail as inmates must be released.” 93-ORD-102. In addition, the visitors log of a jail and the jail’s general business records are not exempt from

disclosure. *Id.* However, Ky. Rev. Stat. 197.025 exempts from disclosure certain jail records if release of those records would “constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution or any other person.” See 95-ORD-121 (discussing Ky. Rev. Stat. 197.025).

Parole reports are presumptively open, but the agency may be able to withhold under Ky. Rev. Stat. 61.810(1)(a), which allows the Kentucky Parole Board to bar the public from attending its “deliberations for decisions.” Ky. Rev. Stat. 61.810(1)(a).

An inmate may request copies of all non-confidential information contained in his file. *Commonwealth of Kentucky, Dep’t of Corr. v. Chestnut*, 250 S.W.3d 655, 658 (Ky. 2008). Though an inmate’s open records request is subject to the limitations contained in Ky. Rev. Stat. 197.025, an inmate is not required to submit a particularized open records request in order to access his own file. *Id.* at 662. As such, the Department of Corrections could not enforce such a limitation. *Id.* (“[A]n administrative agency ‘cannot by its rules and regulations, amend alter, enlarge or limit the terms of legislative enactment.’”)

Ky. Rev. Stat. 197.025 limits the dissemination of records where “disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.”

#### P. Public utility records.

Individual usage records are closed under the personal privacy exception in 61.878(1)(a), but aggregate information is open. See 09-ORD-196 (disclosing aggregate water and sewer usage would not identify usage of specific individuals, and thus does not fall under the personal privacy exception to the ORA.)

#### Q. Real estate appraisals, negotiations.

##### 1. Appraisals.

Ky. Rev. Stat. 61.878(1)(f) exempts “[t]he 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.”

##### 2. Negotiations.

See Section IV(Q).

##### 3. Transactions.

See Section IV(Q).

##### 4. Deeds, liens, foreclosures, title history.

Open.

##### 5. Zoning records.

Open.

#### R. School and university records.

##### 1. Athletic records.

Generally open, unless they fall under “education records” as described in Section IV(R)(3).

##### 2. Trustee records.

Open – there is no exception in the ORA for trustee records.

##### 3. Student records.

Closed, if they fit the definition of “education records” within the meaning of 20 U.S.C. § 1232g(4)(A). Disclosure of such records is prohibited under the Family Educational Rights and Privacy Act of 1974 (“FERPA”), codified at 20 U.S.C. § 1232g and incorporated into the Open Records Act by operation of Ky. Rev. Stat. 61.878(1)(k), which prohibits the dissemination of “public records or information the disclosure of which is prohibited by federal law or regulation.” See

10-ORD 150. In 00-ORD-148, the attorney general held that student records “do not have to be related to academic matters to be ‘education records’ under FERPA.” *Id.* (citing *U.S. v. Miami University*, 91 F.Supp 1132, 1149 n. 17 (S.D. Ohio 2000)).

FERPA does not prohibit disclosure of “directory information.” 20 U.S.C. § 1232g(b)(1). Directory information includes: “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” *Id.* at 1232g(a)(5).

#### 4. Other.

In 2010, Kentucky’s legislature mandated that a written evaluation of a public school superintendent be made available to the public upon request. Ky. Rev. Stat. 156.557(4)(d). *See also* 92-ORD-1145. Additionally, the Attorney General has interpreted Ky. Rev. Stat. 161.790(10) to permit a private reprimand of a teacher.

#### S. Vital statistics.

Access to vital records, including birth and death records, is governed Ky. Rev. Stat. 213.131 *et seq.* Ky. Rev. Stat. 213.131(1) and (2) provide for limited access to vital records. Ky. Rev. Stat. 213.131(1) states:

(1) To protect the integrity of vital records, to insure their proper use, and to insure the efficient and proper administration of the system of vital statistics, it shall be unlawful for any person to permit inspection of, or to disclose information contained in vital records or to copy or issue a copy of all or part of any record except as authorized by this chapter, by regulation, or by order of a court of competent jurisdiction. Administrative regulations adopted by the cabinet shall provide for adequate standards of security and confidentiality of vital records and shall conform to subsection (4) of this section.

##### 1. Birth certificates.

Under Ky. Rev. Stat. 213.131(2) the state registrar is required to prepare annually an alphabetical list of all people born the preceding year. *Id.* The list must show the person’s name, the mother’s maiden name and the date and county of birth. *Id.* The list is an open record. However, Ky. Rev. Stat. 213.131(1) limits further access to birth records, as discussed in Section IV(S). *See* 08-ORD-219 (denying access to State Birth Index).

##### 2. Marriage & divorce.

Certificates of marriage and dissolution of marriage are vital records subject to Ky. Rev. Stat. 213.131 *et seq.* *See* Section IV(S). Court records relating to divorce, like all other court records, are not governed by the ORA. *See Ex Parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978).

##### 3. Death certificates.

*See* Section IV(S). Ky. Rev. Stat. 213.131 *et seq.*, governs access to death certificates. *See* 07-ORD-003 (Cabinet of Health and Family Services satisfied the ORA by offering to send the requester an alphabetical list of death records containing the only information to which he is entitled under Ky. Rev. Stat. 213.131(2)).

##### 4. Infectious disease and health epidemics.

There is no statutory or case law addressing this issue.

### V. PROCEDURE FOR OBTAINING RECORDS

#### A. How to start.

Each public agency is required to promulgate rules and regulations which shall include the title and address of the official custodian, the fees charged for copies, and the procedures to be followed in requesting public records. Ky. Rev. Stat. 61.876; *see also* 200 KAR 1:020 (administrative regulation for state agencies).

In addition, each public agency is directed to provide “suitable facilities” for persons to inspect public records. Ky. Rev. Stat. 61.872(1); *see also* 93-ORD-39 (“public agencies must work in a spirit of cooperation with individuals wishing to inspect their records”).

#### 1. Who receives a request?

A request for a public record should be directed at the “official custodian” of the records, which is the “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.” Ky. Rev. Stat. 61.870(5).

If the person to whom the request is sent is not the official custodian, that person is required to notify the requester and provide the official custodian’s name and address. Ky. Rev. Stat. 61.872.

#### 2. Does the law cover oral requests?

##### a. Arrangements to inspect & copy.

The ORA permits oral requests, but the agency’s 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.” Ky. Rev. Stat. 61.872(2). State agencies generally require a written request. *See* 200 KAR 1:020 § 3 (permitting person “on written application” to inspect records).

Regardless of whether oral requests are permissible, a request should be in writing in order to quickly enforce the ORA. *See* Ky. Rev. Stat. 61.880(2)(a).

The requester may choose to make an onsite inspection and no unreasonable restrictions may be imposed. 97-ORD-12. Nonetheless the attorney general has held that “when there is a mechanism in place for providing public access to public records, without resorting to on site use of agency’s computers, the agency discharges its duty to access under Ky. Rev. Stat. 61.872 by utilizing the alternative mechanism, and the requester’s right of inspection is not abridged.” 00-ORD-8.

##### b. If an oral request is denied:

##### (1). How does the requester memorialize the refusal?

The public agency is required to provide in writing its decision whether to provide or deny inspection of the public record. Ky. Rev. Stat. 61.880(1).

##### (2). Do subsequent steps need to be in writing?

Yes, which is why it is preferable to put the request in writing. *See* Ky. Rev. Stat. 61.880(2).

#### 3. Contents of a written request.

The Kentucky Finance and Administration Cabinet has adopted a regulation directing any person requesting records from a state administrative agency do so by filing “a written application . . . on a form prescribed by the Finance and Administration Cabinet.” 200 KAR 1:020 § 5(1). In practice, no one uses this official form. Instead, requesters typically write letters to the official custodian.

##### a. Description of the records.

The request must precisely describe the records to be inspected: “Blanket requests for information on a particular subject without specifying certain documents need not be honored.” 95-ORD-121; *see also* Ky. Rev. Stat. 61.872(3)(b) (directing requester to “precisely describe” the records).

##### b. Need to address fee issues.

If the requester seeks to have the copies of the records mailed to the requester, the requester must first pay all fees and the cost of mailing. Ky. Rev. Stat. 61.872(3)(b).

### c. Plea for quick response.

There is no specific provision for expedited requests.

### d. Can the request be for future records?

The requester has no right to the inspection of records that do not currently exist. 95-ORD-43 (stating that “a ‘standing request’ . . . is not proper” under the ORA). *See also* 97-ORD-18.

### e. Other.

The official agency custodian may refuse inspection or to mail copies if producing the records creates an unreasonable burden or if there is reason to believe that repeated requests are intended to disrupt agency functions. Ky. Rev. Stat. 61.872(6).

## B. How long to wait.

### 1. Statutory, regulatory or court-set time limits for agency response.

A public agency has three days after receipt of a request to notify in writing the requester of the agency’s decision to allow or deny inspection of the public record. Ky. Rev. Stat. 61.880(1).

An agency which is in litigation with the requester may not rely on Ky. Rev. Stat. 61.878(1) “to extend its response time to thirty days, under FRCP 34(b), and . . . [is] instead bound to conform to the procedural requirements of the Open Records Act, and in particular the requirement that it respond to the request within three days.” 97-ORD-98.

### 2. Informal telephone inquiry as to status.

The time limit for an agency’s response does not depend on the method by which the request was made, i.e. in writing, by telephone, or in person. *Cf.* Ky. Rev. Stat. 61.880(1).

### 3. Is delay recognized as a denial for appeal purposes?

If the agency refuses to provide a written response to a request within three days, the requester may seek enforcement of the ORA with the state’s attorney general. Ky. Rev. Stat. 61.880(2)(a).

If the requester feels an agency is giving him or her the run-around, the requester may also complain to the attorney general. *See* Ky. Rev. Stat. 61.880(4); 92-ORD-35 (finding three-month delay in redacting exempt information from records was unreasonable).

While the attorney general may opine that the agency procedurally violated the ORA, i.e. by excessive delay, the attorney general cannot order the agency to release the contested records without allowing the agency to first review those records to ascertain whether an exemption applies. *See Edmonson v. Alig*, Ky. Ct. App., S.W.2d 858, 859 (1996) (holding that “disclosure as a sanction against the County Attorney is inappropriate and impermissible”).

### 4. Any other recourse to encourage a response.

A person may bring a court action to enforce the ORA. *See* Ky. Rev. Stat. 61.882(2). This may be done in lieu of an administrative appeal or after an unsuccessful administrative appeal. *See* Ky. Rev. Stat. 61.882(2).

## C. Administrative appeal.

### 1. Time limit.

There is no specific time limit in the ORA for a requester to appeal the agency’s decision. The Kentucky Supreme Court has held that the 30-day deadline applicable to administrative appeals is not applicable to open records request, though “a reviewing court could require that the request be filed within a reasonable time under the circumstances of a case.” *Dept. of Revenue v. Wyrick*, 2010 Ky. LEXIS 260 at \*6 (Ky. 2010). In *Wyrick*, the court held that a request for review made 34 days after a denial was timely. *Id.*

## 2. To whom is an appeal directed?

Administrative appeals are directed to the Kentucky Attorney General. *See* Ky. Rev. Stat. 61.880(2). The attorney general has no authority to delegate this task, even if an apparent conflict of interest exists. *See* 92-ORD-10.

### a. Individual agencies.

Each agency is required to designate an official custodian who is the initial and final authority concerning record dissemination. Ky. Rev. Stat. 61.876; Ky. Rev. Stat. 61.872(1).

### b. A state commission or ombudsman.

There is not a state commission or ombudsman.

### c. State attorney general.

If the agency denies a request, the requester may ask the attorney general to review the decision. Ky. Rev. Stat. 61.880(1)-(2). The requester should forward the attorney general a copy of the written request and a copy of the agency’s denial. Ky. Rev. Stat. 61.880(2).

Also, when the requester feels the intent of the act is “being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant” the attorney general will review the request. Ky. Rev. Stat. 61.880(4).

If either party is unsatisfied with the attorney general’s decision, the party may file an appeal with the Circuit Court within 30 days from the date of the attorney general’s decision. Ky. Rev. Stat. 61.880(5)(a). A timely appeal will be treated as if it was brought in Circuit Court pursuant to Ky. Rev. Stat. 61.882. If not timely appealed, the attorney general’s decision has the force of law. Ky. Rev. Stat. 61.880(5)(b).

## 3. Fee issues.

If a requester believes the agency is charging excessive fees, the requester may complain in writing to the attorney general. *See* Ky. Rev. Stat. 61.880(4).

## 4. Contents of appeal letter.

When appealing to the attorney general, the requester should attach a copy of the requester’s written request to the public agency and a copy of the written response that denies inspection. *See* Ky. Rev. Stat. 61.880(2)(a). Practice tip: The requester should cite the ORA, case law and previous attorney general opinions in detailing why the agency erred when it denied the request for inspection.

### a. Description of records or portions of records denied.

The complaining requester should send a copy of the written request and a copy of the written denial for inspection, if provided by the agency. Ky. Rev. Stat. 61.880(2)(a).

### b. Refuting the reasons for denial.

When appealing the agency decision, a party may assert that the denial is contrary to the provisions of ORA or that the agency’s actions constitute an attempt to circumvent the purposes of the act, including but not limited to imposition of excessive fees or the misdirection of the of the requesting party. Ky. Rev. Stat. 61.880(2)(a)(4). Practice Tip: When appealing to the attorney general, one should utilize past attorney general ORA opinions and relevant case law for support.

## 5. Waiting for a response.

The attorney general has 20 days to review the request for and denial of inspection and to issue a written decision stating whether the agency violated the ORA. *See* Ky. Rev. Stat. 61.880(2)(a). The attorney general may extend this period by an additional 30 days if he or she needs additional documentation or extensive research or has an “unmanageable increase” in appeals to review. *See* Ky. Rev. Stat. 61.880(2)

(b). The attorney general is required to send copies of his decision to the agency and the requester. *See* Ky. Rev. Stat. 61.880(2)(c).

## 6. Subsequent remedies.

A party has 30 days to appeal the attorney general's decision by filing an action in circuit court. If an appeal is not timely filed, the attorney general's opinion has the force of law and may be enforced in the circuit court where the public agency has its principal place of business or where the public record is maintained. *See* 61.880(5).

The attorney general will not entertain requests to reconsider his or her earlier decisions. *See* 94-ORD-19.

### D. Court action.

#### 1. Who may sue?

A requester may seek the attorney general's review of the agency's denial or may bypass the attorney general and file an original action in circuit court. *See* Ky. Rev. Stat. 61.882(2).

The parties to an ORA action are not limited to the requester and the agency. In *Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575 (Ky., 1994), the court permitted teachers to intervene in an open records action brought by a newspaper against a board of education. The records which the newspaper sought included disciplinary actions and grievances against the teachers. The court literally interpreted Ky. Rev. Stat. 61.882(1), which empowers circuit courts to enforce the ORA "by injunction or other appropriate order on application of any person." 873 S.W.2d at 578; *see also* 98-ORD-24 ("A party affected by an agency's decision to release records has standing to contest the decision in court under the plain meaning of Ky. Rev. Stat. 61.882 (1)").

#### 2. Priority.

Circuit courts are supposed to give priority to ORA cases: "Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date." Ky. Rev. Stat. 61.882(4).

#### 3. Pro se.

As with any court action, the litigant has the choice of proceeding *pro se*. As with most court actions, this is not advisable, inasmuch as the public agency will certainly be represented by counsel.

#### 4. Issues the court will address:

In an original action, the circuit court will examine whether the agency violated the provisions of Ky. Rev. Stat. 61.870 to 61.884 by denying access to a record. On the appeal of an attorney general's decision, the court will make the same determination on a *de novo* basis. *See* Ky. Rev. Stat. 61.882(3). The court may request to inspect the disputed records: "The court on its own motion, or on motion of either of the parties, may view the records in controversy in camera before reaching a decision." *Id.*

##### a. Denial.

Courts will deny access to records when the record does not exist or when the record is exempt from the act.

##### b. Fees for records.

An agency may charge a reasonable fee for reproduction of non-exempt public records, which will not exceed the actual costs of reproduction. *See* Ky. Rev. Stat. 61.874(4); *Woodward, Hobson & Fulton, L.L.P. v. Revenue Cabinet*, 69 S.W.3d 476, 480 (Ky App. 2002). Costs of reproduction include costs of media and any mechanical processing cost, but not costs of required staff. *Id.* A agency may not charge sales tax for reproduction of records because "providing copies of non-exempt public records is not a 'sale' of the records." *Id.*

### c. Delays.

When an agency is without reason for delaying response or delivering requested records, the attorney general has deemed that the agency has violated the Act. *See* 4-ORD-63; 98-ORD-3. However, when delay is a result of a request for a record that does not exist or an exempted record, the attorney general will find for the agency. *See* 98-ORD-76 (finding that the agency acted properly in failing to provide records because such records do not exist); 2-ORD-62 (granting a partial denial because some of the records were exempted under the act).

The attorney general will review an agency action when a requester feels that "the intent of [the act] is being subverted by [the] agency short of denial of inspection, including but not limited to the imposition of excessive fees" and delay. Ky. Rev. Stat. 61.880(4).

### d. Patterns for future access (declaratory judgment).

The ORA does not include any express provisions regarding declaratory judgments.

#### 5. Pleading format.

There is no specific format. To receive priority on the docket the pleading should alert the circuit court that the lawsuit concerns an open records case. *Cf.* 61.882(4).

#### 6. Time limit for filing suit.

The ORA does not have a specific statute of limitations for filing suit.

#### 7. What court.

An original action or an appeal of an Attorney General's decision must be filed in either the circuit court of the county where the public agency has its principal place of business or where the public record is maintained. *See* Ky. Rev. Stat. 61.882(1).

#### 8. Judicial remedies available.

The court may "by injunction or other appropriate order" enforce the provisions of the ORA. Ky. Rev. Stat. 61.882(1).

#### 9. Litigation expenses.

A court *may* award costs and attorney fees to the requester if it finds the agency willfully violated the ORA:

Any person who prevails against any agency in any action in the courts regarding a violation of Ky. Rev. Stat. 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of Ky. Rev. Stat. 61.870 to 61.884, be awarded costs, including reasonable attorney fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof.

Ky. Rev. Stat. 61.882(5).

#### 10. Fines.

In addition to costs and attorney fees for willful violations, the court may also "award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record." Ky. Rev. Stat. 61.882(5).

#### 11. Other penalties.

Any official of a public agency who willfully conceals or destroys any record with the intent to violate [the ORA] shall be guilty of a Class A misdemeanor for each separate violation.

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.

Ky. Rev. Stat. 61.991(2).

## 12. Settlement, pros and cons.

The public agency may have an incentive to settle the case in order to escape possible attorney fees and fines.

### E. Appealing initial court decisions.

#### 1. Appeal routes.

The losing party may file an appeal of right with the Kentucky Court of Appeals.

#### 2. Time limits for filing appeals.

The notice of appeal must be filed within 30 days of the circuit court's decision. *See* Ky. R. Civ. P. 73.02.

#### 3. Contact of interested amici.

*Amicus curiae* may not file briefs in the Kentucky appellate courts unless they first obtain an order from the courts permitting the filing of these briefs. *See* Ky. R. Civ. P. 76.12(7). The authors of this outline welcome any questions or requests for help with the ORA.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

### F. Addressing government suits against disclosure.

The court will utilize the ORA and applicable case law to determine if the government's refusal to disclose is justified.

## Open Meetings

### I. STATUTE -- BASIC APPLICATION.

#### A. Who may attend?

Under the Open Meetings of Public Agencies Act ("OMA") any person may attend the meeting of a public agency: "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. . . ." Ky. Rev. Stat. 61.810(1).

The public agency may not impose any conditions on attendance, and may not prohibit media coverage:

No condition other than those required for the maintenance of order shall apply to the attendance of any member of the public at any meeting of a public agency. No person can be required to identify himself in order to attend any such meeting. All agencies shall provide meeting room conditions which insofar as is feasible allow effective public observation of the public meetings. All agencies shall permit news media coverage, including but not limited to recording and broadcasting.

Ky. Rev. Stat. 61.840.

A city may not, for example, require people attending a public meeting to identify whether they are residents of the city. 98-OMD-44. *See also* 92-146 ("As a general rule a public meeting of a public body is either opened to everyone under the Open Meetings Act or closed to everyone under a statutorily recognized exception to the Open Meetings Act. There is no principle of selective admission set forth in the Open Meetings Act").

Although anyone may attend a public meeting, the OMA does not guarantee a person the right to address the public agency during the meeting. *See* 95-OMD-99; *see also* 94-OMD-87 (city doesn't violate OMA by not providing room for everyone at a particular meeting when the facility normally accommodates all those wishing to attend).

Moving a meeting for the convenience, safety or comfort of the public is proper and does not violate the Act. Once the meeting reconvenes, the new site becomes the meeting site. "All proceedings and actions relative to the meeting should then [take] place at that location." The agency does not have to move back to the original site in order to take action. 97-OMD-84.

#### B. What governments are subject to the law?

State, county and local or municipal bodies are covered by the OMA, as well as the governing bodies of public universities and schools:

"Public agency" means:

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

(e), (g) or (h) of this subsection, a member or employee of a “public agency,” a state or local officer, or any combination thereof;

(g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created and controlled by a “public agency” as defined in paragraph (a), (b), (c), (d), (e), (f) or (h) of this subsection; and

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

Ky. Rev. Stat. 61.805(2); *see also* 95-OMD-71 (“our open meetings law is intended to provide public access to meetings of decision-making bodies, and is not intended to provide public access to the day-to-day administrative work of a public agency”).

### 1. State.

The OMA applies to a multitude of state agencies. *See* Ky. Rev. Stat. 61.810(1).

### 2. County.

The OMA applies to “every county and city governing body, council, school district board, special district board and municipal corporation.” Ky. Rev. Stat. 61.805(2)(c). “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” is also subject to the OMA. Ky. Rev. Stat. 61.805(2)(e).

### 3. Local or municipal.

Generally speaking in terms of local government, the OMD applies to local government and municipalities pursuant to Ky. Rev. Stat. 61.805(c) and (e).

## C. What bodies are covered by the law?

### 1. Executive branch agencies.

#### a. What officials are covered?

A “member” of a public agency is covered by the OMA: “Member’ means a member of the governing body of the public agency and does not include employees or licensees of the agency.” Ky. Rev. Stat. 61.805(4).

#### b. Are certain executive functions covered?

“State and local cabinet meetings and executive meetings” are exceptions to open meetings. Ky. Rev. Stat. 61.810(1)(h).

#### c. Are only certain agencies subject to the act?

“Deliberations for decisions” before the Kentucky Parole Board are excluded. Ky. Rev. Stat. 61.810(1)(a).

### 2. Legislative bodies.

“Every state or local legislative board, commission and committee” is covered. Ky. Rev. Stat. 61.805(2).

The General Assembly is a public agency for purposes of the Open Meetings Act. *See* 93-OMD-63 and 94-OMD-23. “Committees of the General Assembly, however, other than standing committees,” are exempt from the OMA. Ky. Rev. Stat. 61.810(1)(i).

### 3. Courts.

Not covered. *See* Ky. Rev. Stat. 61.805(2). Also excluded are “[d]eliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments.” Ky. Rev. Stat. 61.810(1)(j).

### 4. Nongovernmental bodies receiving public funds or benefits.

Receipt of public funds by private entities does not convert those entities into public agencies for purposes of the OMA. *See* Ky. Rev.

Stat. 61.805. Curiously, receipt of public funds by private entities *may* convert the entities into public agencies for purposes of the OMA. *See* 61.870(1)(h) (defining a “public agency” as “[a]ny 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”).

### 5. Nongovernmental groups whose members include governmental officials.

Nongovernmental groups are included if “the majority of its governing body” is appointed by a public agency and/or a state or local officers. Ky. Rev. Stat. 61.805(2)(f). *See Courier-Journal v. University of Louisville Foundation*, 596 S.W.2d 374 (Ky. Ct. App., 1979).

An informal group consisting of governmental officials is not a public agency. 94-OMD-148. Though the group discusses cooperation among public agencies, the group “has no formal authorization, no formal membership, and no formal agenda or minutes. It does not take any formal action and it makes no formal recommendations.” *Id.*

### 6. Multi-state or regional bodies.

Multistate or regional bodies are included in the OMA. *See* Ky. Rev. Stat. 61.805(2)(g),(h).

### 7. Advisory boards and commissions, quasi-governmental entities.

A public agency includes “[a]ny board, commission, committee, subcommittee, ad hoc committee, advisory committee, council or agency . . . established, created and controlled by a ‘public agency.’” Ky. Rev. Stat. 61.805(2)(g).

An advisory committee, which was appointed by the county judge-executive, is a public agency because the judge-executive is a member of a public agency. 95-OMD-124; *see also Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884 (Ky., 1987) (including ad hoc committees and advisory bodies as public agencies subject to OMA).

In 95-OMD-71, the attorney general opined that the “Prestonsburg Community College Leadership Team” is not a public agency because it “exists at the sole discretion of the President of the college, and its composition, role and use are defined by the President.” If the college’s board of trustees, rather than the president, had appointed the group the attorney general would have held differently. This is because the board, and not the president, is a “public agency” subject to Ky. Rev. Stat. 61.805(2)(g). *Id.*

### 8. Other bodies to which governmental or public functions are delegated.

Private bodies exercising governmental functions are covered by the OMA. *See* Ky. Rev. Stat. 61.805(2)(g); *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884 (Ky., 1987).

### 9. Appointed as well as elected bodies.

Both appointed and elected bodies are covered. *See* Ky. Rev. Stat. 61.805(2).

## D. What constitutes a meeting subject to the law.

A meeting is defined 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.” Ky. Rev. Stat. 61.805(1).

“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 and the agency. Public business is the discussion of the various alternatives to a given issue about which the Board has the option to take action.” *Yeoman v. Commonwealth of Kentucky, Health Policy Board*, 983 S.W.2d 459, 474 (Ky., 1998).

Unconfirmed nominees of a Health Policy Board are not covered by the Act. *Yeoman*, 983 S.W.2d at 474.

### 1. Number that must be present.

#### a. Must a minimum number be present to constitute a “meeting”?

A meeting is not public unless a quorum of the public agency is present: “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 . . .” Ky. Rev. Stat. 61.810(1).

Even a quorum may not constitute a meeting where the gathering was not called by the public agency but instead takes place at a convention or social event. *See* 95-OMD-136 (though quorum of city council members attended convention, this did not constitute public meeting; council members were not authorized to take action affecting city or to discuss matters affecting city).

#### b. What effect does absence of a quorum have?

The OMA is not applicable where less than a quorum of members are present. In *Bourbon County Board of Adjustment v. Currans*, 873 S.W.2d 836 (Ky. Ct. App., 1994), the court held that the OMA did not apply to a meeting of board members “[b]ecause of the absence of a quorum of board members.” *Id.* at 839; *see also* 93-OMD-63 (“if a quorum was not present the meeting in question was not a public meeting under the Open Meetings Act”).

A public agency may not avoid the OMA by holding a series of meetings with less than a quorum of members at the meetings:

Any series of less than quorum meetings, where the members attending one (1) 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, 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 discussions is to educate the members on specific issues.

Ky. Rev. Stat. 61.810(2); *see also* 94-OMD-106 (finding fiscal court violated OMA by holding series of one-on-one meetings between corporate representative and fiscal court members).

### 2. Nature of business subject to the law.

The OMA covers meetings of public agencies, “whether regular or special and informational or casual gatherings,” Ky. Rev. Stat. 61.805(1), “at which any public business is discussed or at which any action is taken by the agency.” Ky. Rev. Stat. 61.810(1).

“Action taken” is defined 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.” Ky. Rev. Stat. 61.805(3); *see also* 94-OMD-127 (city council’s vote to hire architecture firm constituted “action taken” and name of firm must be released to public, even though other steps were left to make contract final).

The location of a meeting is irrelevant to whether the meeting should be open to the public. A fiscal court luncheon meeting at a country club and a meeting on a boat at which public business was discussed were held illegal. *Fiscal Court v. Courier-Journal*, 554 S.W.2d 72, 73 (Ky., 1977). *Cf.* 95-OMD-136 (“A quorum of the members of a public agency may attend a professional or social event, such as a convention, without violating the Open Meetings Act [although the event or meeting must be one] organized by someone other than the public agency”).

#### a. “Information gathering” and “fact-finding” sessions.

The OMA covers “informational or casual gatherings.” Ky. Rev. Stat. 61.805(1).

A casual gathering by fiscal court commissioners for informational purposes is an open meeting for which proper notice should have been given. 94-OMD-50.

The OMA does not prohibit a county attorney from individually contacting fiscal court members to seek their input on an ordinance he was preparing: “This was merely part of the process involved in the formulation of the proposed ordinance . . . . No final decisions or commitments were made by anyone . . . .” 93-OMD-20.

#### b. Deliberations toward decisions.

Deliberations are covered by the OMA unless excluded under Ky. Rev. Stat. 61.810.

### 3. Electronic meetings.

#### a. Conference calls and video/Internet conferencing.

In OAG 92-151, the Kentucky Attorney General stated that a public agency may not conduct a meeting, which is required by law to be open to the public by a telephone conference call.

The OMA was amended in 1994 to permit video teleconferencing. *See* Ky. Rev. Stat. 61.826. The same procedures with regard to notice, participation, distribution of materials, and other matters apply to meetings via video teleconference.

#### b. E-mail.

The OMA does not address e-mail messages and does not permit meetings to be conducted by e-mail messages. But if public officials private meetings about public matters via e-mail, their actions may violate Ky. Rev. Stat. 61.810(2), which prohibits using “a series of less than quorum meetings” to avoid the requirements of the OMA. *Id.*; *see also* 09-OMD 093.

#### c. Text messages.

The OMA does not address text messages and does not permit meetings to be conducted by text message. *See* Ky. Rev. Stat. 61.810(2).

#### d. Instant messaging.

The OMA does not address instant messaging and does not permit meetings to be conducted by instant message. *See* Ky. Rev. Stat. 61.810(2).

#### e. Social media and online discussion boards.

The OMA does not address social media or online discussion boards and does not permit meetings to be conducted by social media or discussion board. *See* Ky. Rev. Stat. 61.810(2).

## E. Categories of meetings subject to the law.

### 1. Regular meetings.

#### a. Definition.

A “regular” meeting is one held on a regularly scheduled basis. *See* Ky. Rev. Stat. 61.820.

#### b. Notice.

Public agencies are required to make available to the public the schedules of their regular meetings:

All meetings of all public agencies of this state, and any committees or subcommittees thereof, shall be held at specified times and places which are convenient to the public, and 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 that public agency. The schedule of regular meetings shall be made available to the public.

Ky. Rev. Stat. 61.820; *see also* 95-OMD-106 (finding that 9 a.m. school board meeting is convenient for public even though it is inconvenient for teacher).

**(1). Time limit for giving notice.**

No specific provision.

**(2). To whom notice is given.**

No specific provision.

**(3). Where posted.**

The agency may publicize the schedule as it sees fit. *See* 82-412.

**(4). Public agenda items required.**

The public agency is not required to distribute an agenda. *See* 78-499.

**(5). Other information required in notice.**

No specific provision.

**(6). Penalties and remedies for failure to give adequate notice.**

A court may void any action taken by a public agency if it fails to substantially comply with the requirement that it make its schedule of regular meetings available to the public: “Any rule, resolution, regulation, ordinance or other formal action of a public agency without substantial compliance with the requirements of Ky. Rev. Stat. . . . 61.820 . . . shall be voidable by a court of competent jurisdiction.” Ky. Rev. Stat. 61.848(5).

**c. Minutes.**

A public agency must record actions taken at its meetings and make those minutes available at the end of its next meeting:

The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body.

Ky. Rev. Stat. 61.835; *see also* 91-196 (holding that a public body cannot vote by secret ballot, and it must be recorded in the minutes how each member voted).

**(1). Information required.**

The minutes must reflect the “votes and actions” at meetings. Ky. Rev. Stat. 61.835.

**(2). Are minutes public record?**

Minutes are public records. *See* Ky. Rev. Stat. 61.835.

**2. Special or emergency meetings.****a. Definition.**

The OMA does not define a “special” meeting. The Attorney General has defined a special meeting as being “[a]ny meeting which deviates from the regular schedule of meetings.” 92-OMD-1473. “If the public agency holds a meeting in addition to, outside of or in place of the regular schedule of meetings that meeting is a special meeting . . .” 92-OMD-1677.

There is no existing case law or attorney general open meetings decision discussing circumstances which were “sufficiently grave to warrant a decision to call an emergency meeting . . . Ky. Rev. Stat. 61.823(5) [which provides for alternative requirements for special meetings in the case of an emergency] may be invoked by public agencies on only the rarest of occasions, and then only when emergency conditions prevail.” 00-OMD-80.

“Examples of an emergency under this definition would include, but not be limited to, occurrences such as a natural catastrophe or civil unrest. However, a determination of what constitutes an emergency is intrinsically situational, requiring a case-specific analysis directed at ascertaining whether circumstances are sufficiently serious, unex-

pected, and in need of immediate action to justify a suspension of the normal rules of proceeding.” 00-OMD-80 .

Even a regularly scheduled meeting may be a special meeting if it is rescheduled for a different time. *See* 92-OMD-1473; 92-OMD-1677; *see also* *Coppage v. Ohio Co. Bd. of Educ.*, 860 S.W.2d 779, 784 (Ky. Ct. App., 1992) (treating rescheduled board meeting as special meeting).

A regularly scheduled meeting may become a special meeting, for which notice is required, if it is rescheduled for a different date, but then rescheduled for its original date. *See* 92-OMD-1473; 92-OMD-1677.

A regularly scheduled meeting which is held, adjourned, and then continued the next day does not thereby become a special meeting. 93-OMD-123 (“A meeting pursuant to an adjournment of a regular meeting is itself a regular meeting.”).

**b. Notice requirements.****(1). Time limit for giving notice.**

A public agency is required to give public notice of its special meetings as soon as possible, and shall deliver notice of the meeting to its members as well as to registered media at least 24 hours before the meeting. A public agency may send notice via e-mail to members and media organizations that have previously filed a written request with the agency indicating that they prefer to receive notifications by e-mail. The agency must also post notice at least 24 hours before the meeting:

(4)(a) 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.

(b) A public agency may satisfy the requirements of paragraph (a) of this subsection by transmitting the written notice by electronic mail to public agency members and media organizations that have filed a written request with the public agency indicating their preference to receive electronic mail notification in lieu of notice by personal delivery, facsimile machine, or mail. The written request shall include the electronic mail address or addresses of the agency member or media organization.

(c) 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.

Ky. Rev. Stat. 61.823.

If an emergency prevents the public agency from giving 24-hours notice, the agency must make an effort at contacting its members and media agencies. The agency must also state on the record why it could not provide 24-hours notice:

(5) In the case of an emergency which prevents compliance with subsections (3) and (4) of this section, this subsection shall govern a public agency’s conduct of a special meeting. The special meeting shall be called pursuant to subsection (2) of this section. 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 pursuant to subsection (4)(a) of this section, 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 subsections (3) and (4) of this section. 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.

Ky. Rev. Stat. 61.823.

“There is no such thing as a proper advance notice of a special meeting to be called at some future time.” 94-OMD-50.

The Floyd County Board of Education’s attempt to reach a board member by telephone to notify him of a special meeting did not satisfy the notice requirement under Ky. Rev. Stat. 61.823(4)(a). 97-OMD-90.

**(2). To whom notice is given.**

Notice must be given to every member of the public agency as well as each media organization that has filed a written request. Ky. Rev. Stat. 61.823(4)(a).

There is no longer any requirement that the media must be based in Kentucky or that locality in order to file a written request for obtaining notice. *See* 92-OMD-1203.

**(3). Where posted.**

Notice of the special meeting must be posted in the place where the special meeting is to take place and at the headquarters of the agency. Ky. Rev. Stat. 61.823(4)(b).

**(4). Public agenda items required.**

Unlike notices of a regular meeting, the notice of a special meeting must contain the agenda for the meeting. Discussion and action are limited to that agenda. Ky. Rev. Stat. 61.823(3).

The Louisville Board of Aldermen violated the OMA when the agenda for a special meeting listed only the discussion of a contract but the Aldermen went into closed session to discuss litigation. *See* 94-OMD-78; *accord* 95-OMD-149.

**(5). Other information required in notice.**

The notice must include the date, time, place and agenda of the special meeting. Ky. Rev. Stat. 61.823(3). *See also* 00-OMD-80; 98-OMD-74, 96-OMD-216 and 94-OMD-119.

**(6). Penalties and remedies for failure to give adequate notice.**

A court may void any action taken by a public agency if it fails to substantially comply with the notice requirements for special meetings. *See* Ky. Rev. Stat. 61.848(5).

**c. Minutes.**

**(1). Information required.**

Every action taken must be recorded. Ky. Rev. Stat. 61.835. If the special meeting was called without 24 hours notice, the minutes must also contain the chair person’s explanation of “the emergency circumstances” that prevented such notice. Ky. Rev. Stat. 61.823(5).

**(2). Are minutes a public record?**

Minutes of special meetings are public records. *See* Ky. Rev. Stat. 61.835.

**3. Closed meetings or executive sessions.**

**a. Definition.**

The OMA does not specifically define the term “closed meetings” or “executive sessions.” Instead, it specifies when public meetings are not open to the public. *See* Ky. Rev. Stat. 61.810.

**b. Notice requirements.**

**(1). Time limit for giving notice.**

Notice, when required, must be given in the regular open meeting prior to going into closed session. Ky. Rev. Stat. 61.815(1)(a); *see also* 95-OMD-92 (finding OMA violated when public agency did not give notice of closed meeting in the room where the open and public meeting was to be held).

The public agency is required to give notice of a closed meeting *only* if the closed meeting concerns: (1) Deliberations on the future acquisition or sale of real property by a public agency; or (2) Discussions or hearings which might lead to the appointment, discipline or dismissal of an individual employee or member (but not students). Ky. Rev. Stat. 61.815(2).

If a closed session concerns other matters that are exempted from public attendance, under Ky. Rev. Stat. 61.810(1) the agency is not required to give notice. Ky. Rev. Stat. 61.815(2); *see also* *Jefferson County Board of Educ. v. Courier-Journal*, Ky. Ct. App., 551 S.W.2d 25 (1977) (holding notice not required for executive session at which board conferred with its attorneys concerning proposed or pending litigation).

A regularly scheduled closed meeting “avoids the clear implication of Ky. Rev. Stat. 61.810 and 61.815 that a private gathering of members of a public agency such as a school board should be the exception.” *Jefferson County Bd. of Educ. v. Courier-Journal*, 551 S.W.2d 25, 28 (Ky. Ct. App., 1977). Likewise, one-time notice for periodic closed sessions is improper. *See id.*

**(2). To whom notice is given.**

When notice is required, it is given to those attending the open meeting. Ky. Rev. Stat. 61.815(1)(a).

**(3). Where posted.**

There is no requirement that notice be posted.

**(4). Public agenda items required.**

Notice, when required, “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 Ky. Rev. Stat. 61.810 authorizing the closed session.” Ky. Rev. Stat. 61.815(1)(b).

No matters may be discussed at a closed session “other than those publicly announced prior to convening the closed session.” Ky. Rev. Stat. 61.815(1)(d).

“There must be specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting. The specific reason given for a closed session must be the only topic of discussion while the Board convenes in such a secret session.” *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 924 (Ky., 1997); *see Fiscal Court v. Courier Journal and Louisville Times Co.*, 554 S.W.2d 72 (Ky., 1977); *Jefferson County Board of Education v. The Courier-Journal*, 551 S.W.2d 25 (Ky. Ct. App., 1977).

“Discussions between Board Members concerning matters not identified in the open meeting with proper notice are a violation of the Open Meetings Act and constitute illegal conduct. Thus, any action taken as a result of the secret discussions are voidable by this court.” *Id*; *see Beckham v. City of Bowling Green*, 743 S.W.2d 858 (Ky. Ct. App., 1987).

**(5). Other information required in notice.**

A notice which merely stated that the closed session was for discussions concerning “property and negotiations” failed to comply with the notice requirement. The notice failed to reveal whether the property was real or personal, whether the Board proposed to purchase or sell the property, and whether the publicity would affect its value. *Jefferson County Bd. of Educ. v. Courier-Journal*, 551 S.W.2d 25 (Ky. Ct.

App., 1977); *see also Reed v. City of Richmond*, 582 S.W.2d 651 (Ky. Ct. App., 1979).

**(6). Penalties and remedies for failure to give adequate notice.**

A court may void any action taken by a public agency if it fails to substantially comply with the notice requirements for closed meetings. *See* Ky. Rev. Stat. 61.848(5).

**c. Minutes.**

**(1). Information required.**

The OMA directs that the minutes of “action taken at every meeting of any such public agency . . . shall be promptly recorded.” Ky. Rev. Stat. 81.835. The Attorney General has opined that “the proceedings of the closed session should not be entered in the minutes except to show that the closed session was held and if a formal action was taken in the closed session.” 94-OMD-110.

**(2). Are minutes a public record?**

The OMA directs that the minutes of action taken at “every meeting . . . shall be open to public inspection.” Ky. Rev. Stat. 81.835. The Attorney General has opined that “minutes of a properly conducted executive or closed session of a meeting of a public agency need not be made available for public inspection or even recorded to the extent that doing so would defeat the purpose of conducting the closed session.” 94-OMD-110. Minutes of an *improperly* conducted closed session “must be made available for inspection.” *See* 92-ORD-1346.

**d. Requirement to meet in public before closing meeting.**

A public agency is only required to meet in public prior to closing the meeting if it is going into closed session to conduct: (1) Deliberations on the future acquisition or sale of real property by a public agency; or (2) Discussions or hearings which might lead to the appointment, discipline or dismissal of an individual employee or member (but not students). Ky. Rev. Stat. 61.815.

**e. Requirement to state statutory authority for closing meetings before closure.**

A public agency is only required to publicly state the statutory authority for closing the meeting if it is going into closed session to conduct: (1) Deliberations on the future acquisition or sale of real property by a public agency; or (2) Discussions or hearings which might lead to the appointment, discipline or dismissal of an individual employee or member (but not students). Ky. Rev. Stat. 61.815.

**f. Tape recording requirements.**

None. If, however, a public agency expends its own funds to purchase tapes and directs the clerk to record its meetings, those tapes are public records subject to public inspection. 92-1058.

**F. Recording/broadcast of meetings.**

**1. Sound recordings allowed.**

Sound records are allowed: “All agencies shall permit news media coverage, including but not limited to recording and broadcasting.” Ky. Rev. Stat. 61.840.

Although Ky. Rev. Stat. 61.840 only gives the media the right to tape record a public meeting, the Attorney General has sensibly concluded that a private citizen “should be permitted to tape record a public meeting so long as that person and his or her taping equipment do not interfere with the orderly conduct of the public meeting.” 96-OMD-143.

**2. Photographic recordings allowed.**

Photographic recordings are allowed. *See* Ky. Rev. Stat. 61.840.

**G. Are there sanctions for noncompliance?**

The agency is to pay “any person who prevails . . . costs, including reasonable attorneys fees, incurred in connection with the legal action” when the agency willfully violates the OMA Ky. Rev. Stat. 61.848(6). Moreover, the court may also award the person up to \$100 for every instance in which the court finds a violation.

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open meetings statute.**

**1. Character of exemptions.**

**a. General or specific.**

Specific.

**b. Mandatory or discretionary closure.**

Ky. Rev. Stat. 61.810 exempts certain categories of meetings from the requirement that they be open, but does not explicitly require that those meetings be closed. The attorney general has stated that the exemptions are discretionary. *See* 82-275.

**2. Description of each exemption.**

*Ky. Rev. Stat. 61.810(1)(a)*: “Deliberations for decisions of the Kentucky parole board;”

Although the deliberations of the parole board are exempt, the victims’ hearing may be open unless a participant requests otherwise, and the board’s interview of the prisoner may also be public. *See* 92-146.

*Ky. Rev. Stat. 61.810(1)(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;”

A public hospital could meet in closed session to discuss sale of assets to a private purchaser because “a public discussion of the proposed purchase would likely affect the sale price of the facilities.” 93-OMD-56.

The Lexington-Fayette Urban County Government violated the OMA when it met in closed session to discuss its dispute with the state concerning the “Ben Snyder Block.” 95-OMD-57. Even if the discussion concerned a sale or acquisition of property, a public discussion “would have no effect on prices of the property” which had previously been agreed upon. *Id.*

*Ky. Rev. Stat. 61.810(1)(c)*: “Discussions of proposed or pending litigation against or on behalf of the public agency;”

“The statute expressly provides that the litigation in question need not be currently pending and may be merely threatened. However, the exception should not be construed to apply ‘any time the public agency has its attorney present’ or where the possibility of litigation is still remote.” *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 923-24 (Ky., 1997) (*quoting Jefferson County Board of Education v. The Courier-Journal*, 551 S.W.2d 25 (Ky. Ct. App., 1977)).

Nonetheless, a public agency may not go into closed session to discuss litigation to which it is not a party, even though this litigation involves identical issues to litigation proposed or pending against that public agency. *See* 93-OMD-119.

“While a public agency may meet in a closed session to discuss proposed or pending litigation, including topics such as litigation tactics and strategy, a final decision as to whether to litigate a particular situation cannot be made in a closed session.” 97-OMD-96.

An example of a meeting which did not qualify for this exception is found in *Floyd County Board of Education v. Ratliff*, *supra*. The Supreme Court held that a school board’s act of going into executive session to reconsider the reorganization plan of the school district did not constitute “discussions of proposed or pending litigation against or on

behalf of the public agency.” *Ratliff*, 955 S.W.2d at 923-24.

The attorney-client privilege alone does not satisfy the requirements of this exception. 97-1.

*Ky. Rev. Stat. 61.810(1)(d)*: “Grand jury and petit jury sessions;”

*Ky. Rev. Stat. 61.810(1)(e)*: “Collective bargaining negotiations between public employers and their employees or their representatives;”

*Ky. Rev. Stat. 61.810(1)(f)*: “Discussions or hearings which might lead to the appointment, discipline or dismissal of an individual employee, member or student without restricting that employee’s, member’s or student’s right to a public hearing if requested. This exception shall not be interpreted to permit discussion of general personnel matters in secret;”

Under this exception, the agency must disclose whether it will be discussing the possible appointment, discipline or dismissal of personnel of that particular agency during the closed session; it cannot simply make a general reference to the exception. 97-OMD-124. *See also* 97-OMD-10 (“The public is entitled to know the general nature of the discussion which would be that it involves either a possible appointment, a possible dismissal, or a possible disciplinary matter relative to a specific unnamed person or persons.”).

This exemption does not allow a general discussion concerning a school reorganization plan when it involves multiple employees. *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 924 (Ky., 1997).

A discussion between a planning and zoning commission and a current employee as to a new contract falls under this exemption. *See* 94-OMD-63.

A school board violated the OMA when it went into closed session to discuss the creation of a new position: “Creating a new position must be done in an open and public session while discussions as to the specific person or persons who may be selected for appointment to that position may be conducted in closed sessions.” 94-OMD-106. *See also* 97-OMD-80 (A university’s Board of Regents violated the Act when it went into closed session to discuss appointing individuals to a presidential search committee because it did not involve the appointment of employees, members or students.).

However, *Ky. Rev. Stat. 156.557* allows preliminary discussions relating to the evaluation of a public school superintendent to be conducted in closed session if those discussions prior to the summative evaluation and are undertaken by the Board of Education or between the Board and the superintendent. *Ky. Rev. Stat. 156.557(4)(d)*. The final summative evaluation of the superintendent must be discussed and adopted in an open meeting of the Board and reflected in the minutes. *Ky. Rev. Stat. 156.557(4)(b)*.

*Ky. Rev. Stat. 61.810(1)(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;”

Once a business has “publicly announced . . . that it is locating in the area, the city cannot invoke *Ky. Rev. Stat. 61.810(1)(g)* to close a meeting pertaining to discussions concerning that firm locating in the area.” 94-OMD-119.

*Ky. Rev. Stat. 61.810(1)(h)*: “State and local cabinet meetings and executive cabinet meetings;”

*Ky. Rev. Stat. 61.810(1)(i)*: “Committees of the General Assembly other than standing committees;”

The House Democratic Caucus is not a committee of the General Assembly and is therefore subject to the OMA. *See* 94-OMD-23.

*Ky. Rev. Stat. 61.810(1)(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;”

A county fiscal court is not a quasi-judicial body exempt from the OMA. *Ridenour v. Jessamine County Fiscal Court*, 842 S.W.2d 532 (Ky. Ct. App., 1992).

*Ky. Rev. Stat. 61.810(1)(k)*: “Meetings which federal or state law specifically require to be conducted in privacy;”

Pursuant to this exception and the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, a University’s Financial Aid Professional Judgment Committee may go into closed session to discuss financial aid appeals, 98-OMD-142, and a Housing Appeals Committee at Eastern Kentucky University is authorized to go into closed session to discuss student housing appeals. 97-OMD-139.

*Ky. Rev. Stat. 61.810(1)(l)*: “Meetings which the Constitution provides shall be held in secret.”

#### **B. Any other statutory requirements for closed or open meetings.**

Various other statutes concerning specific entities make those entities’ meetings confidential.

#### **C. Court mandated opening, closing.**

There are no court-made exemptions or requirements that certain categories of meeting be open.

### **III. MEETING CATEGORIES -- OPEN OR CLOSED.**

#### **A. Adjudications by administrative bodies.**

Deliberations of judicial and quasi-judicial bodies “regarding individual adjudications or appointments” are generally excluded from the provisions of the OMA. *See Ky. Rev. Stat. 61.810(1)(j)*. Just because an administrative body occasionally holds hearings on certain matters, does not make it exempt from the OMA as a quasi-judicial body. *Stinson v. State Bd. of Accountancy*, 625 S.W.2d 589 (Ky. Ct. App., 1981).

Disciplinary hearings of students, employees or members of a public agency are excluded from the OMA unless the individuals being disciplined request a public hearing. *Ky. Rev. Stat. 61.810(1)(f)*.

##### **1. Deliberations closed, but not fact-finding.**

Even if fact-finding session is open, deliberations may be closed. *See Ky. Rev. Stat. 61.810*; *Stinson v. State Bd. of Accountancy*, 625 S.W.2d 589, 592 (Ky. Ct. App., 1981).

##### **2. Only certain adjudications closed, i.e. under certain statutes.**

If the “person involved, his representatives” or other third parties are present, the adjudication is not automatically closed. Meetings of planning commissions, zoning commissions and boards of adjustment are open. *See Ky. Rev. Stat. 61.810(1)(j)*.

#### **B. Budget sessions.**

Open.

#### **C. Business and industry relations.**

Discussions with businesses regarding a specific proposal for the siting, retention, expansion or upgrading of the business may be closed if publicity would jeopardize the proposal. *See Ky. Rev. Stat. 61.870(1)(g)*.

#### **D. Federal programs.**

Closed only if required by federal law. *See Ky. Rev. Stat. 61.810(1)(k)*.

#### **E. Financial data of public bodies.**

Open.

## **F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

Presumptively open, but there is a possibility a meeting at which such documents were reviewed could be closed since public review of the documents is restricted by Ky. Rev. Stat. 61.878(1)(c) of the ORA. See also Ky. Rev. Stat. 61.870(1)(g) (permitting closure of discussions concerning business sitting and retention).

## **G. Gifts, trusts and honorary degrees.**

Presumptively open.

## **H. Grand jury testimony by public employees.**

Grand and petit jury sessions may be closed. See Ky. Rev. Stat. 61.810(1)(d).

## **I. Licensing examinations.**

Presumptively open, but may be closed to prevent disclosure of test questions or other examination data if the same exam is to be given again. Such records are exempt from disclosure under Ky. Rev. Stat. 61.878(1)(g) of the ORA.

## **J. Litigation; pending litigation or other attorney-client privileges.**

“Discussions of proposed or pending litigation against or on behalf of the public agency” may be closed. Ky. Rev. Stat. 61.810(1)(c); accord *Fiscal Court v. Courier-Journal and Louisville Times Co.*, 554 S.W.2d 72 (Ky., 1977).

More than a remote possibility of litigation is necessary to trigger the cited exception to open meetings. 91-141.

The statute expressly provides, however, that the litigation in question need not be currently pending and may be merely threatened. *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 923-24 (Ky., 1997).

The attorney-client privilege alone does not satisfy the requirements of this exception. 97-1.

## **K. Negotiations and collective bargaining of public employees.**

### **1. Any sessions regarding collective bargaining.**

“Collective bargaining negotiations between public employers and their employees or their representatives” may be closed. Ky. Rev. Stat. 61.810(1)(e).

Ky. Rev. Stat. 61.810(e) does not embrace everything tangential to the topic of collective bargaining negotiations. Reports or status briefings on labor negotiations are not intended to be included under that exception. When a public agency is formulating its demands or position preparatory to collective bargaining negotiations, by deliberation or instruction of its advocates, this type of session does fall under Ky. Rev. Stat. 61.810(1)(e). See *Jefferson County Bd. of Educ. v. Courier-Journal*, 551 S.W.2d 25 (Ky. Ct. App., 1977).

### **2. Only those between the public employees and the public body.**

May be closed. See Ky. Rev. Stat. 61.810(1)(e).

## **L. Parole board meetings, or meetings involving parole board decisions.**

“Deliberations for decisions of the Kentucky Parole Board” may be closed. Ky. Rev. Stat. 61.810(1)(a). There are two other phases to parole release hearings. The victim’s hearing may be closed at the discretion of the victim. Ky. Rev. Stat. 439.340(7). The interview and discussion with the prisoner must be a public session. 92-142.

## **M. Patients; discussions on individual patients.**

No provision, except to the extent such discussions would be confidential under federal or other state law.

## **N. Personnel matters.**

General personnel matters are not the proper subject of closed sessions. See *Jefferson County Bd. of Educ. v. Courier-Journal*, 551 S.W.2d (Ky. Ct. App., 1977). However, discussions concerning the “appointment, discipline or dismissal of an individual employee, member or student” may be closed. See Ky. Rev. Stat. 61.810(1)(f).

There is no distinction between the word “appointment” and “election” under Ky. Rev. Stat. 61.810(1)(f), hence, the University of Louisville Foundation Inc. could properly close a meeting to consider election of member to the position of Chairman of the Board of Trustees, since all members of the Board of Trustees were also members of the governing board of the foundation. *Courier-Journal v. University of Louisville*, 596 S.W.2d 374 (Ky. Ct. App., 1979).

Telephone votes of a fiscal court that promoted and set the salary of a county employee are void under the open meetings law. *Fiscal Court v. Courier-Journal & Louisville Times Co.*, 554 S.W.2d 72 (Ky. Ct. App., 1977); but cf. Ky. Rev. Stat. 61.826 (1994) (permitting video teleconferencing of meetings).

### **1. Interviews for public employment.**

May be closed. See Ky. Rev. Stat. 61.810(1)(f).

A public agency must meet in an open session to discuss the qualifications of and/or negotiation strategy related to the agency’s hiring of contractors. 05-OMD-148

Pursuant to Ky. Rev. Stat. 61.815, an agency must comply with the steps necessary to have an emergency closed session when discussing hiring practices. 05-OMD-148. The attorney general has found that the Louisville Arena Task Force was not exempt from the OMA when having a meeting to discuss the hiring of a new consultant to “aid the Task Force in the siting of a new arena in Louisville.” *Id.*

### **2. Disciplinary matters, performance or ethics of public employees.**

May be closed by agency or opened at employee’s request. See Ky. Rev. Stat. 61.810(1)(f).

The vote by a board of education to demote a school principal did not need to be held in public. *Miller v. Board of Educ.*, 610 S.W.2d 935 (Ky. Ct. App., 1980).

### **3. Dismissal; considering dismissal of public employees.**

May be closed by agency or opened at employee’s request. See Ky. Rev. Stat. 61.810(1)(f).

Where a disciplinary hearing has been scheduled, the city acted improperly when it refused to grant the employee’s request that the hearing be open and public. *Reed v. City of Richmond*, 582 S.W.2d 651 (Ky. Ct. App., 1979).

A public agency has no obligation under the OMA to notify an employee that it might go into closed session to discuss his possible dismissal: “The Open Meetings Act does not give municipal employees the right to notice and a hearing in a termination proceeding.” 94-OMD-122; accord 95-OMD-93.

## **O. Real estate negotiations.**

“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,” may be closed. Ky. Rev. Stat. 61.810(1)(b).

## **P. Security, national and/or state, of buildings, personnel or other.**

No provision, except to the extent such discussions would be confidential under federal or other state law.

## Q. Students; discussions on individual students.

May be closed if discussion may lead to discipline of student. *See* Ky. Rev. Stat. 61.810(1)(f).

## IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

### A. When to challenge.

#### 1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

There is no expedited procedure available.

#### 2. When barred from attending.

Practice Tip: When barred from attending an agency's public meeting, one should protest orally or in written form. Note that the OMA only contemplates written complaints submitted after the fact.

A public agency violates the OMA when it fails to make a good faith effort to handle overflow crowds. 97-OMD-28.

#### 3. To set aside decision.

Enforcement provisions are found in Ky. Rev. Stat. 61.846 and 61.848. "Any rule, resolution, regulation, ordinance or other formal action of a public agency without substantial compliance with the requirements of Ky. Rev. Stat. 61.810, 61.815, 61.820, and Ky. Rev. Stat. 61.823 shall be voidable by a court of competent jurisdiction." Ky. Rev. Stat. 61.848(5).

#### 4. For ruling on future meetings.

A court cannot enjoin in general terms violations of the OMA. *Fiscal Court v. Courier-Journal*, 554 S.W.2d 72 (Ky., 1977).

### B. How to start.

#### 1. Where to ask for ruling.

The OMA provides for enforcement by allowing for appeal to the attorney general concerning an agency decision to close a meeting or enforcement by judicial action. Ky. Rev. Stat. 61.846(2). A complaining party should "forward to the attorney general a copy of the written complaint and a copy of the written denial within sixty (60) days from receipt by that party of the written denial." *Id.* The attorney general will review the submitted materials and issue a decision within 10 business days. *Id.* The decision will state whether the agency violated the OMA. *Id.*

#### a. Administrative forum.

##### (1). Agency procedure for challenge.

If a person elects administrative enforcement, that person must submit a written complaint to the presiding officer of the public agency stating the circumstances which constitute an alleged violation of the OMA and what the public agency should do to remedy the alleged violation. Ky. Rev. Stat. 61.846(1); *see* 93-OMD-61 ("failure to direct the letter to the presiding officer is a mere technicality which will not prohibit the invoking of the Open Meetings Act").

The public agency must determine within three business days whether to remedy the alleged violation. Within this same time period, the agency must notify in writing the person of its decision. Ky. Rev. Stat. 61.846(1). The agency's denial, in whole or part, "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." *Id.*; *see also* 92-OMD-1840 (demanding city's response to complaint list the specific statutes authorizing the closed meeting).

##### (2). Commission or independent agency.

If the public agency refuses to remedy the alleged violation, the complaining party may ask the attorney general to review the agency's decision. Ky. Rev. Stat. 61.846(2).

### b. State attorney general.

To obtain the attorney general's review of the agency's decision, the complaining party must forward a copy of the party's written complaint and a copy of the written denial to the attorney general within 60 days after the denial was received. Ky. Rev. Stat. 61.846(2). If the agency refuses to provide a written denial, the party shall provide a copy of the written complaint within 60 days from the date the written complaint was submitted to the presiding officer of the public agency. *Id.*

If the party does not file an appeal within 60 days, the attorney general will refuse to hear the appeal. *See* 96-OMD-11 ("this office has no jurisdiction or authority to entertain the appeal and address the issues presented as it was not received within the required statutory time frame").

The complaining party may also appeal to the attorney general if the public agency agrees to remedy an alleged violation but the complaining party believes the agency's efforts are inadequate. Ky. Rev. Stat. 61.846(3)(a).

Within 10 business days after receiving the written complaint and denial, if any, the attorney general shall issue a written decision "which states whether the agency violated the provisions of Ky. Rev. Stat. 61.805 to 61.850. 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." Ky. Rev. Stat. 61.846(2).

### c. Court.

The complaining party or the agency has 30 days after the attorney general renders his or her decision to appeal the decision. Ky. Rev. Stat. 61.846(4)(a). If not appealed, 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 where the alleged violation occurred." Ky. Rev. Stat. 61.846(4)(b).

As detailed below, a party has the option of bypassing the attorney general and bringing an original action in circuit court. A party may not, however, simultaneously seek the attorney general's review of a complaint while pursuing an action in circuit court. In such a case, the attorney general will refuse to issue an opinion. *See* 93-OMD-81 ("a person cannot seek relief from this office under Ky. Rev. Stat. 61.846 when the same and additional questions are currently pending before a circuit court").

#### 2. Applicable time limits.

There is no specific statutory deadline for submitting the written complaint to the presiding officer of the public agency. *See* Ky. Rev. Stat. 61.846(1). Once the public agency responds, the complaining party must request review by the Attorney General within 60 days of the public agency's denial. Ky. Rev. Stat. 61.846(2). After the attorney general issues a decision, either party has 30 days to appeal the decision by filing an action in circuit court.

#### 3. Contents of request for ruling.

If the complaining party is seeking the attorney general's review, the party must provide copies of the party's written request to the agency and the agency's written denial, if any, to the party. Ky. Rev. Stat. 61.846(2). It is advisable for the party to also provide the attorney general with a written statement, supported by legal citations if available, as to how the public agency violated the OMA.

If the public agency has agreed to remedy an alleged violation, but the efforts have been inadequate, the complaining party is required to submit the request, the denial, and a "written statement of how the public agency has failed to remedy the alleged violation." Ky. Rev. Stat. 61.846(3)(b). Again, it is advisable for the written statement to be supported by legal citations if available.

#### 4. How long should you wait for a response?

By statute, the attorney general has 10 days to issue an opinion after receiving copies of the complaint and denial. Ky. Rev. Stat. 61.846(2). However, decisions are rarely rendered within 10 days. It should be noted that the ORA provides the attorney general with a 20 day response time, plus a 30 day extension if necessary. *See* Ky. Rev. Stat. 61.880(2)(a)-(b).

#### 5. Are subsequent or concurrent measures (formal or informal) available?

A party may appeal the decision of the attorney general by bringing a judicial action within 30 days of the attorney general's opinion. Ky. Rev. Stat. 61.846(4)(a).

### C. Court review of administrative decision.

#### 1. Who may sue?

After receiving the written response from the public agency to his or her written complaint of an alleged violation of the OMA, a complaining party may bypass the attorney general and proceed straight to judicial action. Ky. Rev. Stat. 61.848(2). The action is brought in the circuit court of the county where the public agency has its principal place of business or where the alleged violation occurred. Ky. Rev. Stat. 61.848(1). The complaining party must file suit within 60 days from his receipt of the written denial from the public agency. Ky. Rev. Stat. 61.848(2).

Either the complaining party or the public agency may appeal the decision of the attorney general by filing an action in circuit court. Ky. Rev. Stat. 61.848(4)(a).

The Kentucky Supreme Court has interpreted the ORA to permit interested parties to intervene in ORA actions. *See Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575 (Ky., 1994). It is probable the court would permit the same with OMA lawsuits.

#### 2. Will the court give priority to the pleading?

The court is instructed to give the action priority: "Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date." Ky. Rev. Stat. 61.848(4).

#### 3. Pro se possibility, advisability.

The option is available for a litigant but not advisable, due to the complexities of the OMA.

#### 4. What issues will the court address?

The court will conduct a *de novo* review and determine whether the agency substantially complied with the OMA, and if not, whether the "rule, resolution, regulation, ordinance or other formal action of a public agency" should be voided. Ky. Rev. Stat. 61.848(3),(5).

##### a. Open the meeting.

Generally, a court order instructing the agency to open its meeting is not available unless the party is aware the meeting will be closed far in advance of the meeting.

##### b. Invalidate the decision.

If the agency did not substantially comply with the OMA, any actions taken at the agency's meeting may be voided by the court. *See* Ky. Rev. Stat. 61.848(5).

##### c. Order future meetings open.

The court may enforce agency compliance with the OMA "by injunction or other appropriate order." Ky. Rev. Stat. 61.848(1).

#### 5. Pleading format.

There is no specific format; however, to receive priority on the docket the pleading should alert the circuit court that the lawsuit concerns an open meetings case. *Cf.* Ky. Rev. Stat. 61.848(4).

#### 6. Time limit for filing suit.

If the suit is an appeal of an attorney general opinion, it must be filed within 30 days of the attorney general's opinion. *See* Ky. Rev. Stat. 61.846(4)(a). If the complaining party has bypassed the attorney general, the party must file suit within 60 days of receipt of the public agency's written denial. *See* Ky. Rev. Stat. 61.846(2).

#### 7. What court.

An appeal or an original action must be filed in the circuit court of the county where the public agency has its principal place of business or where the alleged violation occurred. Ky. Rev. Stat. 61.848(1); Ky. Rev. Stat. 61.846(4)(a).

#### 8. Judicial remedies available.

The circuit court may enforce the Act by injunction or other appropriate order. Ky. Rev. Stat. 61.848(1). This includes voiding actions of the public agency that were taken at the illegal meeting. Ky. Rev. Stat. 61.848(5).

Where a court voids action of a public agency for failure to comply with the OMA (and not upon the merits of the action), the public agency may elect to reconsider the matter at a properly held meeting. *Reed v. City of Richmond*, Ky. Ct. App., 582 S.W.2d 651 (1979).

A court is not required to void an action, even if there was no substantial compliance with the OMA. In *Stinson v. State Board of Accountancy*, 625 S.W.2d 589 (Ky. Ct. App., 1981), the court chose not to void an action because the plaintiff raised no objection at the time and demonstrated no prejudice as a result of the action.

#### 9. Availability of court costs and attorneys' fees.

If the court finds the agency willfully violated the OMA, the court may, in its discretion, award "costs, including reasonable attorneys' fees, incurred in connection with the legal action." Ky. Rev. Stat. 61.848(6).

#### 10. Fines.

The court in its discretion may award an amount not to exceed \$100 to the complaining party for each instance in which the court finds a violation. Ky. Rev. Stat. 61.848(6). Such award will be assessed against the agency responsible for the violation. *Id.*

#### 11. Other penalties.

"Any person who knowingly attends a meeting of any public agency covered by [the OMA] of which he is a member, not held in accordance with the provisions of [the OMA] shall be punished by a fine of not more than one hundred dollars (\$100)." Ky. Rev. Stat. 61.991(1).

### D. Appealing initial court decisions.

#### 1. Appeal routes.

An appeal of right is available in the Kentucky Court of Appeals.

#### 2. Time limits for filing appeals.

The notice of appeal must be filed within 30 days of the circuit court's decision. *See* Ky. R. Civ. P. 73.02.

#### 3. Contact of interested amici.

*Amicus curiae* may not file briefs in the Kentucky appellate courts unless they first obtain an order from the courts permitting the filing of these briefs. *See* Ky. R. Civ. P. 76.12(7). The authors of this outline welcome any questions or requests for help with the OMA.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

## V. ASSERTING A RIGHT TO COMMENT.

### A. Is there a right to participate in public meetings?

There is no right to participate in a public meeting. *See* 98-OMD-44 (“The Open Meetings Act does not grant [members of the public] the right to participate in the meeting and address . . . members of the public agency” (*citing* 95-OMD-99, p. 2)).

### B. Must a commenter give notice of intentions to comment?

No provision.

### C. Can a public body limit comment?

No provision.

### D. How can a participant assert rights to comment?

There is no right to comment.

### E. Are there sanctions for unapproved comment?

No provision.

## Statute

### Open Records

#### Title VIII. Offices and Officers

Chapter 61. General Provisions as to Offices and Officers; Social Security for Public Employees; Employees Retirement System (Refs & Annos)

#### 61.870 Definitions for Ky. Rev. Stat. 61.872 to 61.884

As used in Ky. Rev. Stat. 61.872 to 61.884, unless the context requires otherwise:

(1) “Public agency” means:

(a) Every state or local government officer;

(b) Every state or local government department, division, bureau, board, commission, and authority;

(c) Every state or local legislative board, commission, committee, and officer;

(d) Every county and city governing body, council, school district board, special district board, and municipal corporation;

(e) Every state or local court or judicial agency;

(f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

(g) Any body created by state or local authority in any branch of government;

(h) 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;

(i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;

(j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and

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

(2) “Public record” means 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 this section that are not related to functions, activities, programs, or operations funded by state or local authority;

(3)

(a) “Software” means 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 Ky. Rev. Stat. 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.

(b) “Software” consists of the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs, but does not include 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;

(4)

(a) “Commercial purpose” means 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.

(b) “Commercial purpose” shall not include:

1. Publication or related use of a public record by a newspaper or periodical;

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

3. 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;

(5) “Official custodian” means the 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;

(6) “Custodian” means the official custodian or any authorized person having personal custody and control of public records;

(7) “Media” means 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; and

(8) “Mechanical processing” means 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.

*61.871 Policy of Ky. Rev. Stat. 61.870 to 61.884; strict construction of exceptions of Ky. Rev. Stat. 61.878*

The General Assembly finds and declares that the basic policy of Ky. Rev. Stat. 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 Ky. Rev. Stat. 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.

#### *61.8715 Legislative findings*

The General Assembly finds an essential relationship between the intent of this chapter and that of Ky. Rev. Stat. 171.410 to 171.740, dealing with the management of public records, and of Ky. Rev. Stat. 42.720 to 42.742, 45.253, 171.420, 186A.040, 186A.285, and 194A.146, dealing with the coordination of strategic planning for computerized information systems in state government; and that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. The General Assembly further recognizes that while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in this chapter, some being exempt under Ky. Rev. Stat. 61.878.

#### *61.872 Right to inspection; limitation*

(1) All public records shall be open for inspection by any person, except as otherwise provided by Ky. Rev. Stat. 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right. No person shall remove original copies of public records from the offices of any public agency without the written permission of the official custodian of the record.

(2) 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.

(3) 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.

(4) If the person to whom the application is directed does not have custody or control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency’s public records.

(5) If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

(6) If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

*61.874 Abstracts, memoranda, copies; agency may prescribe fee; use of nonexempt public records for commercial purposes; online access*

(1) Upon inspection, the applicant shall have the right to make abstracts of the public records and memoranda thereof, and to obtain copies of all public records not exempted by the terms of Ky. Rev. Stat. 61.878. When copies are requested, the custodian may require a written request and advance payment of the prescribed fee, including postage where appropriate. If the applicant desires copies of public records other than written records, the custodian of the records shall duplicate the records or permit the applicant to duplicate the records; however, the custodian shall ensure that such duplication will not damage or alter the original records.

(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.

(b) The minimum standard format in paper form shall be defined as not less than 8 1/2 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 non-standardized request.

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. 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.

(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.

(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.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following:

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

2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

(5) It shall be unlawful for a person to obtain a copy of any part of a public record for a:

(a) Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to subsection (4)(b) of this section; or

(b) Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or

(c) 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.

(6) Online access to public records in electronic form, as provided under this section, 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:

(a) The cost of physical connection to the system and reasonable cost of computer time access charges; and

(b) If the records are requested for a commercial purpose, a reasonable fee based on the factors set forth in subsection (4) of this section.

#### *61.8745 Damages recoverable by public agency for person's misuse of public records*

A person who violates subsections (2) to (6) of Ky. Rev. Stat. 61.874 shall be liable to the public agency from which the public records were obtained for damages in the amount of:

(1) 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;

(2) Costs and reasonable attorney's fees; and

(3) Any other penalty established by law.

#### *61.876 Agency to adopt rules and regulations*

(1) Each public agency shall adopt rules and regulations in conformity with the provisions of Ky. Rev. Stat. 61.870 to 61.884 to provide full access to public records, to protect public records from damage and disorganization, to prevent excessive disruption of its essential functions, to provide assistance and information upon request and to insure efficient and timely action in response to application for inspection, and such rules and regulations shall include, but shall not be 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 Ky. Rev. Stat. 61.874 or other statute, charged for copies;

(d) The procedures to be followed in requesting public records.

(2) Each public agency shall display a copy of its rules and regulations pertaining to public records in a prominent location accessible to the public.

(3) The Finance and Administration Cabinet may promulgate uniform rules and regulations for all state administrative agencies.

#### *61.878 Certain public records exempted from inspection except on order of court; restriction of state employees to inspect personnel files prohibited*

(1) The following public records are excluded from the application of Ky. Rev. Stat. 61.870 to 61.884 and shall be 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:

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

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

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

2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

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

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

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

d. For the grant or review of a license to do business.

(3) The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;

(d) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;

(e) Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;

(f) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;

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

(h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of Ky. Rev. Stat. 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 at-

torneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of Ky. Rev. Stat. 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by Ky. Rev. Stat. 61.870 to 61.884;

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;

(k) All public records or information the disclosure of which is prohibited by federal law or regulation;

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly;

(m)

1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to:

- a. Criticality lists resulting from consequence assessments;
- b. Vulnerability assessments;
- c. Antiterrorism protective measures and plans;
- d. Counterterrorism measures and plans;
- e. Security and response needs assessments;

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

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

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

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

- a. Intimidate or coerce a public agency or all or part of the civilian population;
- b. Disrupt a system identified in subparagraph 1.f. of this paragraph; or
- c. Cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency.

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

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

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

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

(2) No exemption in this section shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person.

(3) 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.

(4) If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.

(5) The provisions of this section shall 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.

Legislative Research Commission Note (3-16-05): The Office of the Kentucky Attorney General requested that amendments in 2005 Ky. Acts ch. 45, sec. 6, and ch. 93, sec. 3, to the arrangement of the paragraphs of subsection (1) of this section be changed. The change was requested "in the interest of preventing confusion to the public and public agencies" and was made by the Statute Reviser under the authority of Ky. Rev. Stat. 7.136.

Legislative Research Commission Note (3-16-05): This section was amended by 2005 Ky. Acts chs. 45 and 93, which do not appear to be in conflict and have been codified together.

#### *61.880 Denial of inspection; role of Attorney General*

(1) If a person enforces Ky. Rev. Stat. 61.870 to 61.884 pursuant to this section, he shall begin enforcement under this subsection before proceeding to enforcement under subsection (2) of this section. Each public agency, upon any request for records made under Ky. Rev. Stat. 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

(2)

(a) 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 deny and issue within twenty (20) days, excepting Saturdays, Sundays and legal holidays, a written decision stating whether the agency violated provisions of Ky. Rev. Stat. 61.870 to 61.884.

(b) 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. As used in this section, "unusual circumstances" means, but only to the extent reasonably necessary to the proper resolution of an appeal:

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; or
3. An unmanageable increase in the number of appeals received by the Attorney General.

(c) 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. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.

(3) Each agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding the enforcement of Ky. Rev. Stat. 61.870 to 61.884. The Attorney General shall not, however, be named as a party in any Circuit Court actions regarding the enforcement of Ky. Rev. Stat. 61.870 to 61.884, nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings.

(4) If a person feels the intent of Ky. Rev. Stat. 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

(5)

(a) 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 Ky. Rev. Stat. 61.882.

(b) 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.

*61.882 Jurisdiction of Circuit Court in action seeking right of inspection; burden of proof; costs; attorney fees*

(1) 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 Ky. Rev. Stat. 61.870 to 61.884, by injunction or other appropriate order on application of any person.

(2) A person alleging a violation of the provisions of Ky. Rev. Stat. 61.870 to 61.884 shall not have to exhaust his remedies under Ky. Rev. Stat. 61.880 before filing suit in a Circuit Court.

(3) In an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to Ky. Rev. Stat. 61.880(5)(a), the court shall determine the matter de novo. In an original action or an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to Ky. Rev. Stat. 61.880(5)(a), the burden of proof shall be on the public agency. The court on its own motion, or on motion of either of the parties, may view the records in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

(4) Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.

(5) Any person who prevails against any agency in any action in the courts regarding a violation of Ky. Rev. Stat. 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of Ky. Rev. Stat. 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

*61.884 Person's access to record relating to him*

Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of Ky. Rev. Stat. 61.878.

## Open Meetings

### *Title VIII. Offices and Officers*

*Chapter 61. General Provisions as to Offices and Officers; Social Security for Public Employees; Employees Retirement System*

#### *Open Meetings of Public Agencies*

##### *61.800 Legislative statement of policy*

The General Assembly finds and declares that the basic policy of Ky. Rev. Stat. 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 Ky. Rev. Stat. 61.810 or otherwise provided for by law shall be strictly construed.

##### *61.805 Definitions for Ky. Rev. Stat. 61.805 to 61.850*

As used in Ky. Rev. Stat. 61.805 to 61.850, unless the context otherwise requires:

(1) "Meeting" means 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;

(2) "Public agency" means:

(a) Every state or local government board, commission, and authority;

(b) Every state or local legislative board, commission, and committee;

(c) Every county and city governing body, council, school district board, special district board, and municipal corporation;

(d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

(e) Any body created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act in the legislative or executive branch of government;

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

(g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and controlled by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection; and

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

(3) "Action taken" means 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; and

(4) "Member" means a member of the governing body of the public agency and does not include employees or licensees of the agency.

(5) "Video teleconference" means 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.

##### *61.810 Exceptions to open meetings*

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

(2) Any series of less than quorum meetings, where the members attending one (1) 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, 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 discussions is to educate the members on specific issues.

Legislative Research Commission Note (3-16-05): The Office of the Kentucky Attorney General requested that amendments in 2005 Ky. Acts ch. 93, sec. 1, to the arrangement of the paragraphs of subsection (1) of this section be changed. The change was requested "in the interest of preventing confusion to the public and public agencies" and was made by the Statute Reviser under the authority of Ky. Rev. Stat. 7.136.

#### *61.815 Requirements for conducting closed sessions*

(1) Except as provided in subsection (2) of this section, the following requirements shall be met as a condition for conducting closed sessions authorized by Ky. Rev. Stat. 61.810:

- (a) 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 Ky. Rev. Stat. 61.810 authorizing the closed session;
- (b) Closed sessions may be held only after a motion is made and carried by a majority vote in open, public session;
- (c) No final action may be taken at a closed session; and
- (d) No matters may be discussed at a closed session other than those publicly announced prior to convening the closed session.

(2) Public agencies and activities of public agencies identified in paragraphs (a), (c), (d), (e), (f), but only so far as (f) relates to students, (g), (h), (i), (j), (k),

(l), and (m) of subsection (1) of Ky. Rev. Stat. 61.810 shall be excluded from the requirements of subsection (1) of this section.

#### *61.820 Schedule of regular meetings to be made available*

All meetings of all public agencies of this state, and any committees or subcommittees thereof, shall be held at specified times and places which are convenient to the public, and 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 that public agency. The schedule of regular meetings shall be made available to the public.

#### *61.823 Special meetings; emergency meetings*

(1) Except as provided in subsection (5) of this section, special meetings shall be held in accordance with the provisions of subsections (2), (3), and (4) of this section.

(2) The presiding officer or a majority of the members of the public agency may call a special meeting.

(3) 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.

(4)

(a) 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.

(b) A public agency may satisfy the requirements of paragraph (a) of this subsection by transmitting the written notice by electronic mail to public agency members and media organizations that have filed a written request with the public agency indicating their preference to receive electronic mail notification in lieu of notice by personal delivery, facsimile machine, or mail. The written request shall include the electronic mail address or addresses of the agency member or media organization.

(c) 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.

(5) In the case of an emergency which prevents compliance with subsections (3) and (4) of this section, this subsection shall govern a public agency's conduct of a special meeting. The special meeting shall be called pursuant to subsection (2) of this section. 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 pursuant to subsection (4)(a) of this section, 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 subsections (3) and (4) of this section. 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.

#### *61.825 Requirements for holding special meetings—Repealed*

#### *61.826 Video teleconferencing of meetings*

(1) A public agency may conduct any meeting, other than a closed session, through video teleconference.

(2) Notice of a video teleconference shall comply with the requirements of Ky. Rev. Stat. 61.820 or 61.823 as appropriate. In addition, the notice of a video teleconference shall:

- (a) Clearly state that the meeting will be a video teleconference; and

(b) Precisely identify the video teleconference locations as well as which, if any, location is primary.

(3) The same procedures with regard to participation, distribution of materials, and other matters shall apply in all video teleconference locations.

(4) 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.

#### *61.830 Action voidable for noncompliance—Repealed*

#### *61.835 Minutes to be recorded; open to public*

The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body.

#### *61.840 Conditions for attendance*

No condition other than those required for the maintenance of order shall apply to the attendance of any member of the public at any meeting of a public agency. No person may be required to identify himself in order to attend any such meeting. All agencies shall provide meeting room conditions which insofar as is feasible allow effective public observation of the public meetings. All agencies shall permit news media coverage, including but not limited to recording and broadcasting.

#### *61.845 Enforcement—Repealed*

#### *61.846 Enforcement by administrative procedure; appeal*

(1) If a person enforces Ky. Rev. Stat. 61.805 to 61.850 pursuant to this section, he shall begin enforcement under this subsection before proceeding to enforcement under subsection (2) of this section. The person shall submit a written complaint to the presiding officer of the public agency suspected of the violation of Ky. Rev. Stat. 61.805 to 61.850. The complaint shall state the circumstances which constitute an alleged violation of Ky. Rev. Stat. 61.805 to 61.850 and shall state what the public agency should do to remedy the alleged violation. 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. 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. 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.

(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 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. 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 Ky. Rev. Stat. 61.805 to 61.850. 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.

(3)

(a) If a public agency agrees to remedy an alleged violation pursuant to subsection (1) of this section, and the person who submitted the written

complaint pursuant to subsection (1) of this section believes that the agency's efforts in this regard are inadequate, the person may complain to the Attorney General.

(b) The person shall provide to the Attorney General:

1. The complaint submitted to the public agency;

2. The public agency's response; and

3. A written statement of how the public agency has failed to remedy the alleged violation.

(c) The adjudicatory process set forth in subsection (2) of this section shall govern as if the public agency had denied the original complaint.

(4)

(a) 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 Ky. Rev. Stat. 61.848.

(b) If an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision, as to whether the agency violated the provisions of Ky. Rev. Stat. 61.805 to 61.850, 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.

(5) A public agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding enforcement of Ky. Rev. Stat. 61.805 to 61.850.

#### *61.848 Enforcement by judicial action; de novo determination in appeal of Attorney General's decision; voidability of action not substantially complying; awards in willful violation actions*

(1) 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 Ky. Rev. Stat. 61.805 to 61.850, as they pertain to that public agency, by injunction or other appropriate order on application of any person.

(2) A person alleging a violation of the provisions of Ky. Rev. Stat. 61.805 to 61.850 shall not have to exhaust his remedies under Ky. Rev. Stat. 61.846 before filing suit in a Circuit Court. However, he shall file suit within sixty (60) days from his receipt of the written denial referred to in subsections (1) and (2) of Ky. Rev. Stat. 61.846 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.

(3) In an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to subsection (4)(a) of Ky. Rev. Stat. 61.846, the court shall determine the matter de novo.

(4) Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.

(5) Any rule, resolution, regulation, ordinance, or other formal action of a public agency without substantial compliance with the requirements of Ky. Rev. Stat. 61.810, 61.815, 61.820, and Ky. Rev. Stat. 61.823 shall be voidable by a court of competent jurisdiction.

(6) Any person who prevails against any agency in any action in the courts regarding a violation of Ky. Rev. Stat. 61.805 to 61.850, where the violation is found to be willful, 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.

#### *61.850 Construction*

Ky. Rev. Stat. 61.805 to 61.850 shall not be construed as repealing any of the laws of the Commonwealth relating to meetings but shall be held and construed as ancillary and supplemental thereto.

