Your Duty Under the Law

The Kentucky Open Records and Open Meetings Acts

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

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

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The Open Records and Open Meetings Acts:

Your duty under the law

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

The Open Records Act

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

What are public records?

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

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

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

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

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

What are the general requirements of the Open Records Act?

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

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

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

Rules and regulations. Each public agency must adopt rules and regulations which conform to the Open Records Act. The rules and regulations must be

displayed by the agency in a prominent location which is accessible to the public. The rules and regulations must include:

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

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

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

- *A requester must be permitted to conduct on-site inspection of records if he or she expresses a desire to do so, even if the public agency prefers to honor his or her request by delivery of copies through the mail.*
- *Public agencies must permit on-site inspection during regular office hours and no other restriction on hours of access can be imposed.*
- *Public agencies may require a requester to conduct an on-site inspection, before receiving copies, if the requester resides or has his or her principal place of business in the county where the records are located and/or if he or she fails to precisely describe the records.*
- *The absence of the public agency's official records custodian does not extend the agency's response time; the agency should designate an acting custodian to insure a timely response.*
- *Masking exempt information contained in an otherwise nonexempt public record is not equivalent to records creation; the agency must discharge this statutory duty and bear associated costs.*
- *A request for information ("How much are the city's employees paid?") need not be honored; a request for existing public records containing the information sought ("Please produce copies of the city's payroll records.") must be honored unless the requested records are exempt.*

What is the procedure for inspecting a public record?

Request to inspect records. The request should be made to the official custodian of the public agency's records. The custodian may require that the request be in writing, signed by the requester, with his name printed legibly on

it, describing the records to be inspected. The request may be hand-delivered, mailed, or sent via facsimile to the agency.

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

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

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

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

Copies of records. A requester has the right to obtain copies of all nonexempt public records upon payment of a reasonable fee, including postage where appropriate. The agency may require prepayment for copies of records. Nonexempt public records must be made available for copying in either standard electronic or standard paper format, depending on the requester's wishes, if the agency maintains the records in both formats. If the agency maintains the records in paper format only, it must make the records available in paper format. Agencies are not required to convert paper format records to electronic format.

The agency may prescribe a reasonable fee for making copies of nonexempt public records. The fee must not exceed the agency's actual costs of copying the record, including the cost of the medium on which it is copied and the cost of mechanically reproducing it, but not including staff costs. In general, ten cents per copy has been deemed a reasonable fee for records in paper format. The Open Records Act authorizes public agencies to impose a higher copying fee for requests made for a commercial purpose. "Commercial purpose" is defined as any use by which the user expects a profit but excludes newspaper or

periodical publications, radio or television broadcasts, or use by attorneys representing parties in litigation.

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

- *Public agencies may use a preprinted request form but cannot require use of the form or demand more information on the form than the statute allows (requester's name printed legibly, signature, description of records).*
- *Public agencies are not required to honor emailed open records request but should develop a standard response notifying the requester to submit his or her request by U.S. Mail, fax, or in person and immediately issue the standard response.*
- *A public agency's three day response time begins to run the day after the request is received.*
- *Denials based on an unreasonable burden to the agency or a belief that requests are intended to disrupt its essential functions must be supported by clear and convincing evidence; for example, the number of records requested, the estimated amount of time and expense to the agency to fulfill the request, the duplicative nature of the requests.*
- *An agency may impose copying fees greater than ten cents per page only if a specific statute authorizes the agency to do so or the agency can prove that its actual copying costs, not including staff costs, are greater than ten cents per page.*
- *No fee can be imposed for inspecting public records.*

What records are exempt from public inspection?

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

(a) records containing information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy;

(b) records confidentially disclosed to an agency and compiled and maintained for scientific research;

(c) records confidentially disclosed to an agency or required by the agency to be disclosed to it which are generally recognized as confidential or proprietary and which if disclosed would permit an unfair commercial advantage to

competitors, including records which are compiled and maintained in conjunction with an application for or the administration of a loan or grant; the application for or the administration of assessments, incentives, inducements, or tax credits; or the regulation of a commercial enterprise;

(d) records that relate to the prospective location of a business or industry which has not previously disclosed that it is interested in locating, relocating, or expanding in Kentucky;

(e) records developed by an agency in conjunction with the regulation or supervision of financial institutions which reveal the agency's internal examining or audit criteria;

(f) real estate appraisals, engineering or feasibility estimates, and evaluations made by or for a public agency, in the course of acquiring property, until all of the property has been acquired;

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

(h) records of law enforcement agencies or agencies involved in administrative adjudication if disclosure of the records would harm the agency by premature release (such records may be inspected after enforcement action is completed or a decision is made to take no action, unless they were compiled and maintained by a county or Commonwealth's attorney or unless another exception applies);

(i) and (j) preliminary documents including drafts, notes, correspondence with private individuals, recommendations, and memoranda in which opinions are expressed or policies formulated;

(k) and (l) public records that are prohibited from disclosure by state or federal law;

(m) records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act, as defined in the exemption, and limited to eight precisely described categories of records; and

(n) records having historic, literary, artistic, or commemorative value that are accepted by the archivist of a public university, museum, or government depository from a donor or depositor other than a public agency if nondisclosure is requested in writing by the donor or depositor.

- *The exemptions are "a shield and not a shackle" and an agency may elect to release records that are otherwise exempt except for records made confidential by federal or state law; an agency should also exercise caution before releasing records protected by the privacy exemption.*
- *A public agency employee is entitled to inspect any record that "relates" to him or her, even if the record is otherwise exempt, unless the requested record is part of an ongoing criminal or administrative investigation by the agency, the requested record is an examination, or the requested record is a record made confidential by federal or state law.*
- *Public agencies are encouraged to share otherwise exempt public records with other public agencies if the sharing of the records serves a "legitimate governmental need."*
- *A public agency cannot withhold a public record which contains both exempt and nonexempt information, but must mask the exempt portion of the record and release the nonexempt portion of the record.*
- *Although Commonwealth's and county attorneys' litigation records are permanently exempt from public inspection, Commonwealth's and county attorneys are not relieved of their duty to respond to an open records request for those records, and cannot deny access to other nonexempt records of their offices (for example, contracts, payroll records, time sheets, travel vouchers).*

What is the role of the Attorney General?

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

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

The Attorney General will review the appeal and issue a decision stating whether the agency violated the Open Records Act. The burden of proof rests with the agency to sustain its action. On the day he issues his decision, the

Attorney General will mail a copy to the agency and a copy to the person who requested the disputed records. The decision will be issued in twenty days, excluding Saturdays, Sundays, and legal holidays. In unusual circumstances, this deadline may be extended an additional thirty days, excluding Saturdays, Sundays, and legal holidays.

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

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

- *The Attorney General will not consider an appeal that does not include a copy of the written request and the written denial, if the agency issued a denial.*
- *Upon receipt of an open records appeal, the Attorney General will issue notification of the appeal, and a copy of the appeal, to the public agency against which the appeal was filed, and the agency may respond in writing to the Attorney General; the agency must send a copy of its response to the individual who filed the appeal.*
- *Because the Open Records Act provides for judicial review of the issues raised in an appeal, the Attorney General will not reconsider an open records decision.*
- *The Attorney General will not consider an appeal if the requested documents are released to the requester after his or her appeal is filed but before an open records decision is rendered.*
- *The Attorney General will consider an appeal based on the allegation that the public agency "subverted the intent of the Act short of denial of inspection;" this includes appeals based on the imposition of excessive copying fees.*
- *Since 1992, open records decisions have been designated ORDs rather than OAGs because they are legally binding on the parties if not appealed.*
- *The designation "Not to be Published" that appears in ORDs issued from 1992 to 1999 does not mean that the ORD cannot be cited as*

precedent or made public; such ORDs carry the same weight as ORDs designated "To be Published."

- *Because the public agency has the burden of proof to support its actions, the courts have directed that the agency "provide particular and detailed information in response to a request for documents," and not just a "brief explanation;" the agency should also take the opportunity to try to meet its burden of proof in preparing its supplemental response to the notification of appeal.*
- *The Attorney General's role in open records appeals is to issue a decision stating whether the public agency violated the Open Records Act; the Attorney General cannot enforce his decision by imposing penalties.*
- *A public agency that is dissatisfied with an ORD must appeal the decision within thirty days; if the public agency fails to appeal the decision, the decision has the force and effect of law, the agency is legally bound by the decision, and the circuit court must enforce it.*

The Open Meetings Act

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

What is a public meeting?

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

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

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

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

What are the general requirements of the Open Meetings Act?

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

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

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

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

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

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

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

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

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

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

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

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

What subjects may be discussed in a closed session?

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

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

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

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

What is the role of the Attorney General?

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

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

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

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

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

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

Sample Forms

Sample open records response

Jane Q. Citizen
100 Maple Avenue
Anytown, Kentucky

Dear Ms. Citizen:

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

1. All contracts that the city has with Home Wrecker Service;

2. All invoices that the city has received from Home Wrecker Service;

3. All complaints received by the city that relate to Home Wrecker Service's performance of duties under its contract with the city.

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

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

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

Sincerely,

John Q. Public
City Clerk

Sample open meetings response

John Q. Citizen
Commonwealth Avenue
Anytown, Kentucky

Dear Mr. Citizen:

In your recent letter to the city you stated that the city council, at its meeting held on September 6, 2005, went into an executive or closed session to discuss general personnel matters.

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

The office of director of the streets and parks department is currently vacant and two persons have applied for the position. The matters discussed by the council during the closed session on June 30, 1994, involved the council's evaluations of the two applicants for that office and such matters may be discussed at a closed session.

Sincerely,

Jane Q. Public
Mayor

Sample open records rules and regulations

NOTICE

ADMINISTRATIVE REGULATIONS GOVERNING

INSPECTION OF THE PUBLIC RECORDS OF THE

_____

(Name of State Administrative Agency)

_____

(Office, Bureau, Division, etc.)

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

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

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

This the _____ day of _____, 19___.

_____

(Agency Head or Designated Representative)

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

An annotated *Open Records and Open Meetings Outline*, containing a summary of the Open Records and Open Meetings Acts and how the Acts have been interpreted by the courts and the Attorney General, may be accessed on our website at http://ag.ky.gov/civil/orom/ and is also available upon request. This outline provides information regarding the application of the Acts to particular situations.

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

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

1. "Kentucky Open Meetings Open Records Laws: Statutes and Q&A"
   http://www.lrc.ky.gov/Lrcpubs/OpenMtgsRecords.pdf

2. Local Records Retention Schedules
   http://www.kdla.ky.gov/recmanagement/localschedule.htm

3. State Records Retention Schedules
   http://www.kdla.ky.gov/recmanagement/stateschedule.htm

4. "Managing Government Records: An Introduction to Kentucky's Public Records Management Law"
   http://www.kdla.ky.gov/resources/managinggovrecords.htm

5. Full text of the Open Meetings and Records Acts
   http://www.lrc.ky.gov/KRS/061-00/CHAPTER.HTM