The Kentucky Open Records & Open Meetings Acts:

A guide for the public and public agencies

Office of the Attorney General
Daniel Cameron, Attorney General

September 2023

This resource 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. Under KRS 15.257(1), the Office of the Attorney General distributes this written information to assist the public in understanding the Open Meetings and Open Records Acts, and public officials 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, https://ag.ky.gov/.

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Dear Kentuckians:

I am pleased to issue the 2023 Guide to the Kentucky Open Records and Open Meetings Acts (the Acts). This updated guide exists to assist citizens and public agencies in navigating the statutory requirements of the Acts.

The Office of Attorney General is responsible for overseeing compliance with the Open Records and Open Meetings Acts, and it is a responsibility I take seriously. The Acts offer Kentuckians essential access to their government and promote transparency between the government and the citizens it serves. This relationship is necessary for the continued success of our democracy.

This most recent version of the guide incorporates and explains recent statutory changes to the Acts. Should you have any questions about the information contained within these pages, do not hesitate to contact our office by visiting http://ag.ky.gov or by calling (502) 696-5300.

Sincerely,

Daniel Cameron
ATTORNEY GENERAL

TABLE OF CONTENTS

The Open Records and Open Meetings Acts:

Kentucky's laws on open records and open meetings affect every public agency. Public agencies must be prepared to deal with the array of legal questions that arise under those laws. This resource provides an analysis of the Open Records and Open Meetings Acts and is designed to assist the public in understanding the Open Records and Open Meetings Acts, and public officials in complying with the Open Records and Open Meetings Acts. This resource contains a description of the general requirements of the laws, the procedures that must be followed in implementing them, the exemptions a public agency may invoke in appropriate circumstances, and the role of the Attorney General in interpretation and enforcement. This resource will explain changes to the Open Meetings Act as a result of legislative changes made during the 2023 Regular Session of the General Assembly. Because the Attorney General's Office acts as an impartial tribunal in open records and open meetings appeals, we cannot advise the public, public agencies, and public officials on how to deal with specific factual situations arising under the Act.

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. KRS 61.871. The General Assembly has also recognized that there is an essential relationship between proper records retention and management and records access. KRS 61.8715. All public records, whether they are stored electronically or in physical form, must be open for inspection to residents of the Commonwealth unless the records are exempted by one or more of the exemptions found in the Act. All public agencies are required to make nonexempt public records available to any resident of the Commonwealth who submits a written application to inspect public records, and to provide suitable facilities for exercise of the right of inspection. A public agency may not consider the requester's identity, other than to determine whether the requester qualifies as a resident of the Commonwealth as defined under KRS 61.870(10). Nor may a public agency consider the requester's purpose in seeking access to public records, except to determine whether the records will be used for a commercial purpose.

What are public records?

The Open Records Act provides an expansive definition for public records. They are "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics." KRS 61.870(2). The Open Records Act applies to any of the foregoing types of records that are "prepared, owned, used, in possession of or retained by a public agency." KRS 61.870(2). The term "public records" includes all such records, even if the public records are not subject to inspection under one of the exemptions provided under KRS 61.878(1). Public records include:

- Emails, databases, and other electronic records.
- Records that are not maintained on the agency's premises.
- "Booking photographs and photographic record of inmate," which is defined under KRS 61.870(9) as "a photograph or image of an individual generated by law enforcement for identification purposes when the individual is booked into a detention facility as defined in KRS 520.010 or photograph and image of an inmate taken pursuant to KRS 196.099." However, KRS 61.8746 prohibits a person from using a booking photograph in a publication, or posting it on a website of booking photographs or official inmate photographs, if removal of the photograph requires payment of a fee.

Who may request to inspect public records?

Effective June 29, 2021, only "residents of the Commonwealth" may request to inspect public records. KRS 61.872(3). "Residents of the Commonwealth" include individuals residing in the Commonwealth, domestic business entities with a location in the Commonwealth, foreign business entities registered with the Kentucky Secretary of State, individuals that are employed and are working at a location in the Commonwealth, and any individual or business entity representing one of these residents. KRS 61.870(10). "News-gathering organizations," which are specifically defined in KRS 189.635(8)(b), may also request to inspect public records under the Act. *Id.*

What is a public agency?

The Open Records Act only applies to "public agencies" as defined in KRS 61.870(1). Public agencies 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 and expend 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.

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. KRS 61.872(1).

Time for inspection. Each public agency must permit inspection of nonexempt public records during the agency's regular office hours. KRS 61.872(3)(a). 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 if the requester has "precisely described" the requested records and the records are readily available. KRS 61.872(3)(b). The agency may require advance payment of copying fees and the cost of mailing. KRS 61.872(3(b).

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 or her actual personal custody and control." KRS 61.870(5).

Rules and regulations. Each public agency must adopt rules and regulations in conformity with the requirements of the Open Records Act. KRS 61.876. The rules must conform to the requirements of the Act and be displayed by the agency in a prominent location that is accessible to the public. KRS 61.876(2). Effective June 29, 2021, in addition to posting the rules and regulations in a prominent location, each public agency must publish its rules and regulations on its website. The rules and regulations must include:

- the principal office of the public agency and its regular office hours;
- the title, mailing address, and email address of the official custodian of records;
- the fees charged for copies;
- the procedures to be followed in requesting public records, including whether the public records custodian requires an application and the method of delivery under KRS 61.872(2); and
- a copy of the statewide standard form for requesting public records that has been developed and published by the Attorney General.

The uniform rules and regulations adopted by the Finance and Administration Cabinet, which are found at 200 KAR 1:020, may be adapted for each agency's use. This guide also contains sample rules and regulations at page 36.

Agencies should consider these additional factors:

- 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 may be imposed.
- The temporary measures under the pandemic related state of emergency which permitted a public agency to deny in-person inspection of records have expired.

What is the procedure for inspecting a public record?

Request to inspect records. A request to inspect records must be made to the public agency's official custodian of records. The Attorney General has published a standardized form that every public agency is required to accept, which is included below at page 30.[1] However, public agencies may not deny a request because it was not submitted using the standard form. KRS 61.872(2)(b). Instead, the custodian may require that the request be in writing, signed by the requester, with his or her name printed legibly on it, describing the records to be inspected. KRS 61.872(2). An electronic signature is sufficient to meet this requirement. KRS 369.107. A request may be hand-delivered, mailed, sent via facsimile, or emailed to the agency's records custodian at the mailing address, facsimile address, or email address published in the agency's rules and regulations. KRS 61.872(2)(a). The custodian may require the requester to provide a statement in the written application in which the requester explains how he or she qualifies as a resident of the Commonwealth under KRS 61.870(10).

Response to a request. Effective June 29, 2021, the public agency must respond to the request in writing within five business days from the date it was received. If the request is denied, the response must include a statement of the specific exemption that authorizes the agency to withhold the record, and a brief explanation of how the exemption applies to the record withheld. KRS 61.880(1). The response must be issued by the official custodian or under his or her authority. 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 ensure a timely response.

Application to wrong agency. If the public agency that receives the request does not have custody or control of the requested records, the agency must notify the requester and furnish the name and location of the official custodian of the appropriate agency's public records (*e.g.*, if a fiscal court receives a request for the minutes of a school board meeting then it should respond to the request by providing contact information for the official records custodian of the appropriate school board). KRS 61.872(4).

Record not available. If the requested record 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 five days from receipt of the request. KRS 61.872(5). If the record cannot be produced within five 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.

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[1] Consistent with KRS 61.876(4), the Attorney General has promulgated this form by administrative regulation.

For requests that implicate an exceptionally large number of records for which an agency may require additional time to retrieve and review, a public agency may release responsive records as they are gathered and reviewed while simultaneously processing the remaining responsive records. In an appeal, such conduct may serve as evidence of the public agency's good faith efforts in providing records as quickly as possible. *See* KRS 61.880(4) (authorizing an appeal where "a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection"). Regardless, all responsive records must be released by the date provided in the public agency's response initial response to the request.

Unreasonably 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. KRS 61.872(6). The agency's reliance on this provision must be supported by clear and convincing evidence, which means it carries a high burden of proof. The Attorney General considers several factors in evaluating an agency's reliance on KRS 61.872(6), including the number of records implicated by the request, the period of time covered by the request, the physical location of the records, whether such records are in physical or electronic form, and whether such records contain information that federal or state law requires to be redacted.

Copies of records. A resident of the Commonwealth 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 request, if the agency maintains the records in both formats. KRS 61.874(2)(a). 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. Moreover, if an agency elects to convert an electronic record to paper format to facilitate redaction of information that is exempt from inspection, the agency may not charge a copying fee because the costs of redaction may not be passed on to the requester. *See, e.g., Commonwealth, Dep't of Ky. State Police v. Courier Journal,* 601 S.W.3d 501, 506 (Ky. App. 2020)

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 page has been deemed a reasonable fee for records in paper format. *See, e.g.,* 200 KAR 1:020 § 3.

However, some public agencies are authorized by law to charge a higher fee. *See, e.g.*, KRS 64.019(2) (county clerks). The fee should be stated in the agency's rules and regulations.

Commercial use. The Open Records Act authorizes public agencies to impose a higher copying fee for requests made for a commercial purpose. KRS 61.874(4). This higher fee may include the costs associated with staff time spent processing the request, which ordinarily cannot be charged. KRS 61.874(4)(c). Commercial purpose is defined as "any use by which the user expects a profit either through commission, salary, or fee," but excludes print or electronic media and attorneys representing parties in litigation. KRS 61.870(4). The agency may require any requester to certify whether the records will be used for a commercial purpose prior to producing the records. KRS 61.874(4)(b). As explained on page 6, commercial use of booking photographs or official inmate photographs is prohibited where the commercial user publishes or posts the photographs and requires payment of a fee for removal of the photographs from the publication or website.

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. KRS 61.874(6). The fees cannot exceed the cost of physical connection to the system and the reasonable cost of computer time access charges.

Special types of requests and additional considerations

Requests for information and compiling information or creating documents. Under the Act, a public agency is not obligated to provide information in response to a request for information (*e.g.* "How much are the city's employees paid?"). A public agency is not required to compile information or to create a record that does not already exist in response to an open records request. However, a public agency must honor a request for existing public records containing the information sought (*e.g.* "Please produce copies of the city's payroll records for May."), unless the requested records are exempt. Even if a public agency receives a request for information, the agency must respond in writing within five business days stating that the Act does not require agencies to compile information or create a record.

Requests for producing records in a special format. If a public agency is asked to produce a record in a format other than the format in which it maintains the record, 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. KRS 61.874(3).

Requests that seek "any-and-all" records related to a broad topic. Under KRS 61.872(2)(a), the requester who wishes to inspect records in-person at the

agency's suitable facilities must "describe[]" the public records to be inspected. If the requester seeks to obtain copies of records by mail or email, however, he or she must "particularly describe" the records. KRS 61.872(3)(b). As explained above, an agency may deny a request to inspect records that places an unreasonable burden on the agency. The Attorney General has previously found that requests seeking "any-and-all" records about a particular subject may place an unreasonable burden on the agency, depending on the breadth of the topic and the temporal scope of the request. For example, a request that seeks "any-and-all" records related to a subject that were created over the course of a year is less burdensome than a request for the same records created over the course of several years, or a request for such records that were created at any point in the agency's history. Whether any particular request places an unreasonable burden on an agency is a fact-intensive question. To avoid such disputes, a better crafted request will describe specific records to be inspected, as opposed to subject matters of interest. A better request will also specify the period of time in which requested records may have been created.

The following are additional factors an agency should consider:

- Public agencies may not condition access to public records on the use of a specific form. Although a public agency must accept the Attorney General's standardized form used to request to inspect public records, it may not deny a request on the basis that the request is not submitted on the standardized form.

- A public agency's duty to respond within five business days begins to run on the first business day after the request is received. Thus, Tuesday would be the first business day after a request that is received on Monday, and the agency's response would be due the following Monday, unless that Monday is a holiday, in which case the agency's response would be due the next day.

- 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 are greater than ten cents per page. *Friend v. Rees*, 696 S.W.2d 325 (Ky. App. 1985)

- No fee may be imposed for inspecting public records in-person at an agency's suitable facilities. The fee is only associated with the costs for copying or staff time in the case of a commercial-use request.

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. Under KRS 61.878(1), the following records may be exempt:

(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 pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business's or industry's interest in locating in, relocating within or expanding within the Commonwealth.

(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 investigating statutory or regulatory violations 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 exemption applies).

(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) Public records that are prohibited from disclosure by federal law or regulation or state law.

(l) Public records that are prohibited from disclosure by Kentucky statutes.

(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.

(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.

(o) Records of a procurement process under KRS Chapter 45A or Chapter 56. This exemption shall not apply after a contract is awarded; or the procurement process is canceled without award of a contract and there is a determination that the contract will not be resolicited.

(p) Client and case files maintained by the Department of Public Advocacy or any person or entity contracting with the Department of Public Advocacy for the provision of legal representation under KRS Chapter 31.

(q) Photographs or videos that depict the death, killing, rape, or sexual assault of a person.

(r) Records confidentially maintained by a law enforcement agency in accordance with a wellness program, including an early intervention system, as described in KRS 15.409

(s) Communications of a purely personal nature unrelated to any governmental function.

Under KRS 61.880(1), a public agency denying a request to inspect records under one of the above exemptions is required to specifically cite the applicable exemption and provide a brief explanation as to how the exemption applies to the specific records. If a request seeks different categories of records, and different exemptions apply to different categories, the public agency must explain how each exemption applies to each category. For example, a public agency response that simply states, "Your request has been denied under the privacy exemption in KRS 61.878(1)(a) and the records are preliminary under KRS 61.878(1)(i) and (j)," without more, would be inadequate. The public agency must specify how a person's privacy interests are implicated, or why the record is preliminary.

Additional factors to consider when a public agency denies a request as exempt under KRS 61.878(1)

- If an agency relies on the exemption in KRS 61.878(1)(k) or (l), which exempt records required to be confidential under federal or state law, the agency must also cite the specific federal or state law requiring that the record remain confidential.

- Personally identifiable information that is routinely maintained in public records, such as Social Security Numbers, phone numbers, residential addresses, and "other forms of personal information" may be categorically redacted under the personal privacy exemption. KRS 61.878(1)(a); *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 89 (Ky. 2013). Otherwise, a public agency relying on KRS 61.878(1)(a) must explain how the personal privacy interest at stake outweighs the public interest in ensuring that the government is carrying out its duties. *See Zink v. Commonwealth, Dept. of Worker's Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994). A person whose privacy interest in the record is at stake may bring an action in circuit court to seek an injunction prohibiting the release of the information. *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575 (Ky. 1994).

- 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. KRS 61.878(3).

- 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." KRS 61.878(5).

- A public agency cannot withhold a public record that contains both exempt and nonexempt information, but must mask or redact the exempt portion of the record and release the nonexempt portion of the record. KRS 61.878(4). As technology advances and agencies upgrade their records management systems, they are advised to consider their duty to separate exempt from nonexempt material when responding to open records requests. Foresight may save the agency considerable time in responding to open records requests.

- Although the litigation records of Commonwealth's attorneys, county attorneys, and attorneys for the Department of Public Advocacy are permanently exempt from public inspection, these public service 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. KRS 61.880(2). The Attorney General will also accept appeals by email submitted to OAGAppeals@ky.gov, so long as the email contains a copy of the requester's original request, and the agency's response to the request if one was provided. The same process may be used by those appealing the failure of a public agency to respond to a request. In such cases, the requester must explain that the agency's response was not included because of the agency's failure to respond to the request. Unless the requester is an inmate confined in a jail or correctional facility, KRS 197.025(3), the requester may bypass the Attorney General's Office and file an appeal in circuit court. KRS 61.882(2).

The Attorney General may request additional documentation from the agency, and may, in certain circumstances, also request a copy of the records in dispute. KRS 61.880(2)(c). The Attorney General will not, however, disclose those records.

The Attorney General will review the appeal and issue a decision stating whether the agency violated the Open Records Act. The Attorney General's role is limited to reviewing the actions taken by the public agency when it responded to the request. The Attorney General cannot declare that public records do in fact exist when a public agency claims that they do not, even if a statute indicates that such

records should exist. *See generally Univ. of Ky. v. Hatemi*, 636 S.W.3d 857 (Ky. App. 2021). Rather, if a requester disputes an agency's claim that responsive records do not exist, the requester must put forth *prima facie* evidence of the existence of the records. *See id.* A requester can make such a *prima facie* case by citing to provisions of law that require the public agency to create the requested record, or by providing other evidence that the requested record should exist. If the requester makes such a *prima facie* case, the Attorney General's role is limited to examining the adequacy of the public agency's search for responsive records. *See id.*

A public agency carries the burden of proof in sustaining its actions under the Act. KRS 61.880(2)(c). On the day the Attorney General issues the decision, the Attorney General will email a copy to the agency and either email or mail a copy to the person who requested the disputed records depending on whether the requester provided an email address. The decision will be issued within twenty business days. However, this deadline may be extended an additional thirty business days under KRS 61.880(2)(b). 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. KRS 61.880(5). The Attorney General shall be notified of any circuit court action, but shall 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. KRS 61.880(5)(b). If the requester prevails against an agency in circuit court, he or she may be awarded costs, including reasonable attorney fees, if the court finds that the records were willfully withheld. KRS 61.882(5). The court may also award the requester up to $25 for each day that the requester was denied the right to inspect the records. Under KRS 61.991, a public agency official may face criminal penalties for willfully concealing or destroying 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.

Additional factors regarding the Attorney General's role

- 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. KRS 61.880(2)(a).

- Upon receipt of an open records appeal, the Attorney General will issue notification of the appeal and provide a copy of the appeal to the public agency against which the appeal was filed. The Attorney General will issue such notice by email to the official custodian of records for the respondent agency, or to the attorney representing such agency if the identity of that attorney is known to the Attorney General. The agency may respond in writing to the Attorney General by emailing its response to OAGAppeals@ky.gov. 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, and because the Attorney General's review is a statutory proceeding under which no authority has been granted to the Attorney General to reconsider an open records decision, the Attorney General will not reconsider any open records decision under any circumstances. 40 KAR 1:030 § 4.

- 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," which may include appeals based on the imposition of excessive fees or a public agency's excessive delay in responding to a request.

- If the requested records are released to the requester after his or her appeal is filed, but before an open records decision is rendered, the Attorney General will not decide whether the previously claimed exceptions authorized the public agency to deny the request. 40 KAR 1:030 § 6. However, the Attorney General may still render a decision finding that the public agency subverted the intent of the Act if its conduct resulted in a violation of KRS 61.880(4).

- Because the public agency has the burden of proof to sustain its response under the Act, 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." Although an agency may be able to meet its burden of proof on appeal, an initial response to the requester that fails to discharge the agency's duty is still grounds for finding a violation of the Open Records Act.

- 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 will not answer ancillary questions of law unrelated to the provisions of KRS 61.870 to KRS 61.884.

- The Attorney General cannot enforce a decision by imposing penalties, nor may the Attorney General compel an agency to provide the requested records to the requester.

- The Legislative Research Commission is the official custodian for records belonging to the General Assembly, including all bills and amendments introduced, legislative journals, roll call votes, final reports of committees, financial records, and other similar records. The Attorney General lacks jurisdiction to adjudicate the Legislative Research Commission's denial of a request to inspect legislative records. Instead, the Legislative Research Commission reviews such decisions.

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. KRS 61.800. 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 occur in meetings open to the public, unless an exemption applies. KRS 61.810(1). Members of the public may attend any public meeting and a public agency may not require an individual to identify himself or herself to attend a public meeting. KRS 61.840.

What is a public meeting and what is a public agency?

The Open Meetings Act applies to all meetings held by state and local government agencies. Under KRS 61.805(2), 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 or state or local officer;
- any boards, commissions, committees, subcommittees, advisory committees, or ad hoc committees, which are established, created, and controlled by a public agency; and
- interagency bodies of two or more public agencies.

Subject to fourteen exemptions, 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. KRS 61.805(1); KRS 61.810(1).

Additional factors to consider regarding what constitutes a "public agency"

- 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" or bodies that 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 (*e.g.*, a 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.

What is public business?

The Open Meetings Act does not apply every time a quorum of a public agency gathers in the same place. The Open Meetings Act applies when a quorum of public agency members discuss public business or when an agency takes action. KRS 61.810(1). As explained by the Kentucky Supreme Court, "Public business is not simply any discussion between two officials of the agency. Public business is the discussion of the various alternatives to a given issue about which the [agency] has the option to take action." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998).

Under this standard, the Attorney General has consistently held that discussions concerning meeting administration, such as when and where a special meeting will take place, or what will appear on the agenda, are not "discussions of the various alternatives to a given issue," and such discussions are not subject to the requirements of the Open Meetings Act so long as the discussion remains administrative and not substantive. On the other hand, the Attorney General has found that taking the official oath of office constitutes "public business" subject to the requirements of the Open Meetings Act. *See, e.g.*, 23-OMD-053 (citing earlier decisions). A public agency is not excused from the prohibition of discussing public

business outside of a meeting open to the public simply because no action was taken following the discussion.

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 that are convenient to the public. KRS 61.820(1). However, a public agency may, in its discretion, conduct a meeting virtually using "video-teleconferencing" technology. KRS 61.826. In the event that a public agency chooses to conduct a video-teleconferenced meeting where no two members will attend from the same physical location, the public agency may decline to provide a physical location where the public may attend. However, the notice of such meetings shall contain information that explains how members of the public and press can access the meeting virtually. If an agency chooses to conduct a regular, in-person meeting, then the agency must evaluate space requirements, seating capacity, and acoustics in considering locations for public meetings 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. KRS 61.820(2).

Minutes of meetings. Public agencies must keep minutes of action taken at every meeting that 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. KRS 61.835. Calling a meeting to order, and a vote to adjourn, are "actions taken" within the meaning of KRS 61.835. Therefore, even if a meeting is called only to discuss public business, and no final action is taken, the minutes should reflect a call to order and adjournment.

Public attendance at meetings. To the extent possible, meeting room conditions should allow for effective public observation of the meetings if the public agency chooses to conduct a regular, in-person meeting. No person attending the meeting can be required to identify himself or herself 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. KRS 61.840. Although the public has the right to attend public meetings, the Open Meetings Act does not require a public agency to permit public comments or public participation during the meeting. 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 may not conflict with the Open Meetings Act. *But see* KRS 160.270(2) (requiring school boards to provide at least 15 minutes of time for public comments at every regular meeting).

News media coverage. Public agencies must permit news media coverage, including recording and broadcasting. KRS 61.840.

Requirements for holding special meetings. All meetings that are not regularly scheduled meetings are special meetings, and are subject to the following requirements under KRS 61.823:

Who may call a special meeting? The presiding officer or a majority of the members of the public agency may call a special meeting. KRS 61.823(2).

What are the notice and contents of notice requirements? 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. KRS 61.823(3).

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 that files a written request to receive notice of special meetings. Notice must be provided at least twenty-four hours before the special meeting. KRS 61.823(4)(a).

Written notice of special meetings may be transmitted by email 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 email address of the agency member or media organization. KRS 61.823(4)(b).

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 must be posted at least twenty-four hours before the special meeting. KRS 61.823(4)(c).

In the case of an emergency that 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 that have filed a written request to be notified, and the public of the emergency meeting. KRS 61.823(5). At the beginning of the emergency meeting, the person chairing the meeting must describe for the record the emergency that prevented compliance with the notice provisions, and these comments should be recorded in the minutes. Discussions and actions at the emergency meeting must be limited to the emergency for which the meeting was called.

What are video teleconferences? Subject to the provisions of KRS 61.826, an agency's meetings may be conducted by video teleconference. A video teleconference is a "meeting occurring in two (2) or more locations where individuals can see and

hear each other by means of video and audio equipment." KRS 61.805(5). Notice of a video teleconference shall clearly state the meeting will be conducted via video teleconference and it shall "provide specific information on how any member of the public or media organization may view the meeting electronically." KRS 61.826(2)(c). As stated previously, an agency that chooses to conduct a video-teleconferenced meeting where no two members will attend from the same physical location may decline to provide a physical location where the public may attend. However, if two or more members will attend the video-conference meeting from the same physical location, then the notice of such video-teleconferenced meeting must precisely identify a primary location where all members can be seen and heard, and where the public may attend. KRS 61.826(2)(d). Any interruption in the video or audio broadcast shall result in immediate suspension of the meeting until the broadcast is restored. KRS 61.826(4). Meetings cannot be conducted via telephone conference, because under KRS 61.826, all members must be both seen and heard.

Additional factors to consider when conducting meetings

- 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 government 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." *Knox Cnty. v. Hammons*, 129 S.W.3d 839 (Ky. 2004). However, the Attorney General has found a public agency violates the Open Meetings Act when it conducts a meeting outside of the geographic borders of its jurisdiction, *e.g.*, a school board in eastern Kentucky meeting at a conference in Louisville.

- Agencies are not required to take minutes in closed sessions.

- If the public agency directs that an audio or video recording of its meeting be made, and the recording is created with agency equipment at agency expense, the recording of the meeting is a public record upon creation and must be made available for inspection within five business days of receiving an open records request.

- A member of the public, as well as the media, must be permitted to record a meeting so long as it does not disrupt the meeting.

- The notice of a special meeting must include an agenda that contains specific agenda topics, and 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 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 provision authorizing the closed session. KRS 61.815(1)(a). 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. KRS 61.815(1)(b) and (c). The agency is prohibited from discussing matters unrelated to the purpose for entering closed session while in closed session. KRS 61.815(1)(d). 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;

(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;

(m) Portions of meetings devoted to a discussion of a specific public record exempted from disclosure under KRS 61.878(1)(m); and

(n) Meetings of any selection committee, evaluation committee, or other similar group established under KRS Chapter 45A or 56 or other state or local law, to select a successful bidder for award of a state or local contract.

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 "for the purpose of avoiding the requirements" of the Act. KRS 61.810(2). Therefore, an agency violates KRS 61.810(2) when it intentionally seeks to subvert 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.

Additional considerations for entering closed session

- 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." However, these notice requirements are relaxed when a public agency is discussing certain matters that are enumerated in KRS 61.815(2). For example, a public agency entering closed session to discuss potential or pending litigation is not required to provide notice in an open meeting that such litigation will be discussed. KRS 61.815(2); *see also Cunningham v. Whalen*, 373 S.W.3d 438, 441 n. 12 (Ky. 2012).

- 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.

What is the role of the Attorney General?

If a person believes that a public agency has violated the Open Meetings Act, he or she shall first submit a written complaint to the presiding officer of the agency. The complaint must state the circumstances of the violation and what the agency should do to correct it. KRS 61.846(1).

Within three business days of receipt of the complaint, the public agency shall decide whether to correct the violation and notify the complaining party of its decision in writing. KRS 61.846(1). If the agency believes that no violation has occurred and rejects the proposed remedy, then its written response must cite 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 60 days of receipt of the agency's response. KRS 61.846(2). The appeal shall 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. KRS 61.846(2). 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. KRS 61.848. 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. KRS 61.848(4)(b).

If the complaining party prevails against an agency in circuit court, he or she may be awarded costs, including attorney fees, if the court finds that the violation was willful. KRS 61.848(6). The court may also award the complaining party up to $100 for each violation. Additionally, the court may void the action taken by the agency if such action was taken during a meeting that failed to substantially comply with certain requirements of the Act. KRS 61.848(5).

Additional factors concerning appeals to the Attorney General

- A complainant must appeal a public agency's denial of, or failure to respond to, his or her open meetings complaint within 60 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, except under KRS 197.025(3) for those confined in a correctional facility.

- Upon receipt of an 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 agency may also email its response on appeal to OAGAppeals@ky.gov.

- The Attorney General will not consider an appeal that does not include a copy of the written complaint and a copy of the agency's response, if the agency issued a response.

- Because the Open Meetings Act provides for judicial review of the issues raised in an appeal, and because the Attorney General's review is a statutory proceeding under which no authority has been granted to the Attorney General to reconsider an open meetings decision, the Attorney General will not reconsider any open meetings decision under any circumstances. 40 KAR 1:030 § 4.

- 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.

Legislative changes to the Acts following the 2023 Regular Session of the General Assembly

During the 2023 Regular Session of the General Assembly, the legislature made two changes to the Open Records Act—one direct and one indirect. The direct change amended KRS 61.878(1)(r) to exempt from inspection "[r]ecords confidentially maintained by a law enforcement agency in accordance with a wellness program, including an early intervention system, as described in KRS 15.409." *See* 2023 Ky. Acts. Ch. 168 § 2 (2023 HB 207). The previous exemption under KRS 61.878(1)(r), involving "[c]ommunications of a purely personal nature unrelated to any governmental function," is now codified under KRS 61.878(1)(s).

The indirect change does not amend the Open Records Act *per se*, but does create a new exemption protecting a privacy interest in certain records. Specifically, 2023 Ky. Acts ch. 127 § 2 (2023 SB 62) creates new sections of KRS Chapter 61 related to "personal information" contained in records in the custody and control of nonprofit organizations. *See* KRS 61.791 to KRS 61.799. Under KRS 61.793(1)(a), a public agency shall not require a nonprofit organization to provide the public agency with "personal information" as the term is defined in KRS 61.791(3). Nor shall a public agency release or publicize such "personal information" if it comes into the agency's possession. KRS 61.793(1)(b). Such information is not subject to inspection under the Open Records Act. KRS 61.793(2).

The General Assembly did not amend the Open Meetings Act during the 2023 Regular Session.

Form OAG-01, June 2021

Request to Inspect Public Records

Pursuant to the Kentucky Open Records Act ("the Act"), KRS 61.870 *et seq.*, the undersigned requests to inspect the public records which are described below.

Requester's contact information.

Name:

Mailing Address:

E-mail Address (if applicable):

Records to be inspected:

Statement regarding the use of public records. KRS 61.870(4) defines "commercial purpose" as "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." However, "commercial purpose" does not include the publication or related use of the public record by a newspaper or periodical, by a radio or television station in its news or informational program, or by use in the prosecution or defense of litigation by the parties to such an action or their attorney.

This request is (choose one):

[ ] NOT for a commercial purpose; or
[ ] FOR a commercial purpose.

Statement regarding residency. I further state that I am a resident of Kentucky because I am (please check one):

[ ] An individual residing in the Commonwealth; or
[ ] A domestic business entity with a location in the Commonwealth; or
[ ] A foreign business entity registered with the Kentucky Secretary of State; or
[ ] An individual that is employed and works at a location within the Commonwealth; or
[ ] An individual or business entity that owns real property within the Commonwealth; or
[ ] An individual or business entity that has been authorized to act on behalf of an individual or business entity listed above; or
[ ] A news-gathering organization as defined in KRS 189.635(8)(b)1a. to e.

Signature: Date:

Pursuant to KRS 61.876(4), the Office of Attorney General has promulgated by administrative regulation this form. *See* 40 KAR 1:040.