

The Open Records and Open Meetings Acts:

Kentucky's laws on open records and open meetings affect every public agency. It is important that a public agency is 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 Meetings and Open Records Acts, and public officials in complying with the Open Meetings and Open Records Acts. It 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 also provides new information related to temporary changes to the Open Records and Open Meetings Acts under the state of emergency related to the novel coronavirus. 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 situations.

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 unless the records are exempted by one or more of the sixteen 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. However, as will be explained, a public agency may require a person to declare whether the records will be used for a commercial purpose and, if so, the public agency is permitted to shift the costs of production onto the requester.

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 sixteen exemptions provided in 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.

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 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. First, a person must describe the public records. 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). The rules and regulations shall include:

- the principal office of the public agency and its regular office hours;
- the title and 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).

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 brochure also contains sample rules and regulations at page 34.

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 (*i.e.* "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 (*i.e.* "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 three 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).

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 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.
- Masking or redacting exempt information contained in an otherwise nonexempt public record is not equivalent to records creation. An agency is required to bear the costs and separate exempt information from non-exempt information and provide the requester the non-exempt portions of the records. KRS 61.878(4).

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 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. The custodian may require that the request be hand-delivered, mailed, sent via facsimile, or emailed to the agency. KRS 61.872(2). An agency that fails to establish the required method of transmission for accepting the request in its written policies required under KRS 61.876, may not impose *ad hoc* requirements.

Response to a request. The public agency must respond to the request in writing within three 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.

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 (*i.e.*, a request for the minutes of a school board meeting that was submitted to the fiscal court). 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 three days from receipt of the request. KRS 61.872(5). 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.

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). 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 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.

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. 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 5, 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. The following factors are additional factors an agency should consider:

- 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).
- A public agency's three-day response time begins to run on the first business 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, and 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 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. 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' 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.
- (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) Communications of a purely personal nature unrelated to any governmental function.