

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2009



*Leadership is a behavior, not a position*

OPEN RECORDS  
DECISIONS



John W. Bizzack, Ph.D.  
*Commissioner*





The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

**[docjt.legal@ky.gov](mailto:docjt.legal@ky.gov)**

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.



**[DOCJT.KY.GOV](http://DOCJT.KY.GOV)**

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### **NOTE:**

General Information concerning the Department of Criminal Justice Training may be found at <http://docjt.ky.gov>. Agency publications may be found at <http://docjt.ky.gov/publications.asp>.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to [docjt.legal@ky.gov](mailto:docjt.legal@ky.gov). The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

## 2009 Opinions of the Attorney General Open Records

The following are brief summaries of Open Records Decisions made by the Office of the Kentucky Attorney General. Decisions that are appealed to the Kentucky courts are captured in the regular case law summaries provided by this agency. Unless appealed, these Decisions carry the force of law in Kentucky and are binding on public agencies. A copy of the applicable Kentucky Revised Statutes can be found at the end of the summary.

For a full copy of any of the opinions summarized below, please visit <http://ag.ky.gov/civil/orom/>

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**09-ORD-020**                      **In re: Eric G. Farris / City of Mt. Washington**  
**Decided February 3, 2009**

Farris requested, among other things, email records between specific City officials and members of the public on specific subjects. The City responded that it no longer had access to some of these records because the email service had been provided by a private entity which was apparently no longer in existence. Although Open Records law permits that as a valid response, the response caused concern for the City's records management practices, as simply contracting with a private company did not "deprive records of their public character." (The records requested would be within the 2 year window required by the Kentucky Department of Libraries and Archives for retention of such records.) Further, although it might prove difficult to sort through the emails it did retain, that difficulty did not negate the responsibility of the City to do so, and the City did not meet its statutory burden to prove that the task would be unreasonably burdensome.

**09-ORD-029**                      **In re: Jerry Leon Nunn, Jr. / Kentucky State Police**  
**Decided February 13, 2009**

Nunn requested various investigatory records, specifically dispatch logs, results from a PBT done by a Henderson County deputy sheriff, calibration tests from the PBT, tapes from two deputies' patrol vehicles. The KSP records custodian rejected most of the requests since KSP does not have the records for the Henderson County Sheriff's Office. The Decision indicated, however, that the response was deficient in that it did not provide Nunn with contact information for the Henderson County Sheriff's Office records custodian. KSP denied having any records responsive to the request, and as such, would not be expected to produce such records.

**09-ORD-030**                      **In re: Gary R. Woodbright / Kentucky State Police**  
**Decided February 13, 2009**

Woodbright requested a color copy of a photograph of a handgun involved in a specific criminal case in Barren County. (Woodbright is the subject in the case, and was seeking post-conviction collateral relief.) KSP rejected the requested since the records relating to an open investigation - given the pending litigation.

Prior Decisions had established that a conviction was not final until all post-conviction appeals had been resolved, and as such, the records continue under the exemptions provided by KRS 61.878(1)(h) and KRS 17.150(2).

**09-ORD-034                      In re: Jerry Leon Nunn, Jr. / Henderson County Sheriff's Department  
Decided February 19, 2009**

Nunn asked for essentially the same records from the Henderson County Sheriff's Department as asked for in 09-ORD-030. The Sheriff had responded that it had not received the initial request, and that the information requested was either not in the possession of the department (dispatch logs are handled by the Henderson Police Department, for example) or do not exist. The PBT results are not kept in any written form, as the results simply appear on the screen of the device, and there are no cameras in the vehicles in question. The Henderson County Sheriff's Department properly complied with Nunn's request.

**09-ORD-048                      In re: Jacqueline Castellano / Elsmere Fire Protection District  
Decided March 12, 2009**

Castellano requested certain financial records of the Elsmere FPD. In response, the EFPD's attorney responded that the records could be reviewed at the attorney's office, in Covington, rather than the office of the Fire Department. The Decision ordered that the records must be made available at appropriate public premises during regular business hours.

**09-ORD-062                      In re: Chris Henson / Elsmere Police Department  
Decided April 7, 2009**

Henson requested a number of specific offense/incident reports from the PD, which provided them at the charge of 15 cents per page. The Decision agreed that was too much, and noted that unless an agency can substantiate that the cost to reproduce a page is more than 10 cents per page, then that was the maximum an agency could charge.

**09-ORD-063                      In re: Walter Long / Kentucky State Police  
April 14, 2009**

Long requested paperwork that he signed when he was released from prison in 1998 that required him to register as a sex offender. KSP identified two records, but denied Long access, noting that they were prepared by Probation & Parole. KRS 439.510 provided for a specific exemption from disclosure for such records. The Decision upheld the decision to not disclose the records in question.

**09-ORD-067                      In re: Joseph L. Silverburg / Jefferson County Division of Probation  
and Parole  
Decided April 24, 2009**

Silverburg requested copies of documents concerning his proposed "home placement." The Decision affirms that the records that exist fall under the parameters of KRS 439.510 and are thus exempt from disclosure.

**09-ORD-086**

**In re: Travis Bush / Highland Heights Police Department  
Decided June 8, 2009**

Bush requested copies of citations, complaints and photos relating to criminal offenses filed against him by the Highland Heights PD. The PD apparently did not respond in a timely manner, having forwarded the request to the Campbell County Commonwealth Attorney's Office. Each assumed the other was handling the request. Although the Decision noted the response was procedurally deficient, it found no bad faith. Eventually, the PD produced the only record it had responsive to the request, an investigative report, redacting only the name of the juvenile victim, for which it claimed an exemption from disclosure. The responding party simply quoted an exemption by number, with no explanation as to how that exemption applied to the record at hand. The Decision agreed that it was permissible to withhold the name of a juvenile victim when a sexual offense was committed, as was the case in the report in question, but that it is still necessary for the response to cite that exemption with specificity.

**09-ORD100**

**In re Thomas P. Vergamini / Madison County Fiscal Court and  
Madison County Emergency Management Agency  
Decided July 2, 2009**

Vergamini requested documents relating to the construction of an antenna tower in Madison County. His request was denied in part by the Fiscal Court and EMA, which argued that the request would risk public safety, which included material relating to details concerning the communications system. KRS 61.878(1)(m). They did provide about 590 pages of records relating to the construction of the tower, but refused records on the basis that some of the information requested was proprietary and confidential for the vendor and would have required their approval before release. KRS 61.878(1)(c). The Decision noted that there was no explanation given concerning the potential for competitive harm, and that was insufficient to satisfy the burden of proof on the public agency. The Decision noted that the two agencies had not provided sufficient detail that "disclosure of the records withheld threatens the public safety" with respect to the communications system. The matter was referred back for further development of the record, giving the agency the opportunity to provide more detail to support its denial.

**09-ORD-104**

**In re: The Kentucky Enquirer / City of Fort Thomas  
Decided July 14, 2009**

Hannah, a reporter with The Kentucky Enquirer, requested materials related to the death of Robert McCafferty. (The murder suspect was convicted the month before the request.) The request was denied on the basis that the convicted subject could appeal up to three years after the final judgment, and as such, the case was not yet closed. However, the subject had taken a plea and waived her right of appeal, and as such, there was no real prospect that the case would continue. Further, much of the material requested had been disclosed in trial, and two videotapes connected with the investigation had been released to a local television station. The Decision agreed that KRS 61.878(1)(l) and KRS 17.150(2) did permit investigative records to be held back until the matter was closed, and found that the City had made a sufficient case to hold back records. It did not find persuasive the argument that some of the material had been produced at trial, since the City would not necessarily know what had been part of the trial, and further, could argue that further dissemination of the information in a public forum could be harmful. However, it found the disclosure of the videotapes to be a different matter, and noted that all parties stand equal under the Open Records law. Selectively releasing records to one news agency and not another is not permitted, and as such, the videotapes should have been released.

**09-ORD-109**                      **In re: Jaron S. Teague / Louisville Metro Police Department**  
**Decided July 21, 2009**

Teague requested information from the Louisville Metro Police Department concerning the disposition of his impounded automobile. Specifically, although the LMPD produced everything it had, and in fact, went to "extraordinary lengths" to satisfy Teague's request given that he was incarcerated at the time, it properly notified him that it did not possess certain records that he requested that they did not possess. As such, the LMPD did not violate Open Records law.

**09-ORD-110**                      **In re: Travis Bush / Park Hills Police Department**  
**Decided July 21, 2009**

Bush requested information concerning a police report and witness statement. The Department did not reply promptly, but did, eventually, respond with the record it still had, the citation itself having been properly purged and destroyed (by burning) prior to the request being made. Finding that the response was appropriate, in that it referenced "proper records management practices," the Decision found that Park Hills mitigated its violation.

**09-ORD-129**                      **In re: Brenton Wombles / Kentucky State Police**  
**Decided August 11, 2009**

Wombles requested KSP records for a complaint and investigative file concerning a former prison employee. KSP responded that although it had fielded a verbal complaint, it had taken no official action and thus had no records to produce. It properly directed the requestor to the Dept. of Corrections. The Decision noted that although, in some cases, the agency might require further action when a record would be expected to exist, in this case, that was not necessary. The Decision upheld the KSP response to the request as being proper.

**09-ORD-130**                      **In re: Ricky Fulcher / Paducah Police Department**  
**Decided August 11, 2009**

Fulcher requested records concerning information about an incident at a Paducah halfway house. Fulcher originally sent the request to the officer involved, who, because he had no records, ignored the request. Upon Fulcher's appeal to the non-response, Paducah responded that no such records existed. Note that KRS 61.872(4) requires that all employees understand the open records process, and direct such requests to the official custodian. The Decision noted that no records were created in the incident, and Paducah provided a reasonable and consistent explanation as to why the record was not created. Although Paducah's response was untimely, it properly mitigated the violation by providing a proper response to the request.

**09-ORD-133**                      **In re: William M. Terry / Kentucky State Police**  
**Decided August 18, 2009**

Terry requested a document indicating the evidence collected with respect to a particular case. KSP denied the records because the original prosecution was still pending, pursuant to KRS 61.878(1)(h). The Decision agreed that the denial was proper.

**09-ORD-140**

**In re: Aaron Sheppard / Shively Police Department  
Decided August 28, 2009**

Sheppard requested records concerning a vehicle stop made by a Shively officer, specifically, among other items, the in-car video. It was denied on the basis of KRS 61.878(1)(l) and KRS 189A.100(2), which prohibits the release of such video except for official purposes. Shively PD did provide a copy of the citation. Sheppard noted in supplemental correspondence that he wasn't charged with an offense under KRS 189A. Shively responded that it was impossible to provide an unaltered copy of the recording since editing would be necessary to remove footage unrelated to the matter. The Decision noted that since Sheppard denies having been arrested for DUI, and that any sobriety testing was conducted, KRS 189A is facially inapplicable and cannot be relied upon to deny the disclosure of the recording. The Decision also found inappropriate a delayed invocation of KRS 61.878(1)(h), because it failed to indicate how the prosecution or the police department would be harmed by the release of the videotape, and also that any necessary editing or redacting was incumbent on the department to do, as he was otherwise entitled to the recording of his stop. The Decision rejected the denial of the request.

In addition, the response to Sheppard was untimely, since the official custodian was unavailable for several days. The absence of the official custodian "does not toll the agency's response time."

**09-ORD-143**

**In re: Kentucky New Era / Trigg County Emergency Services  
Decided September 8, 2009**

Hunter, a Kentucky New Era reporter, requested the emergency dispatch log related to an "alleged murder." Trigg E-911 originally mischaracterized the records as KSP records, but the Decision concluded that it was appropriate to deny the records under KRS 61.878(1)(h), as records of an open investigation "at the request of a law enforcement agency with jurisdiction in the underlying criminal matter." The Decision noted that the records were provided to the Attorney General, which reviewed the records and agreed that the supplemental material provided to the agency supported the request to hold back the record.

However, the Decision also noted that "although it was entirely permissible, indeed prudent, for Trigg County Emergency Services to ascertain KSP's position on release of the records" it could not characterize the records as belonging to KSP. It was, however, appropriate for Trigg County to invoke the exclusion on KSP's behalf, and properly supported it with detailed information from KSP as to the potential harm of premature disclosure.

**09-ORD-144**

**In re: Mike Stephens / McCreary County Sheriff  
Decided September 9, 2009**

Stephens requested "various records relating to record services" - specifically records relating to the wrecker rotation list created by the Sheriff's Office, and other matters concerning such services. He was contacted by phone the next day and promised the records within a week. Having received nothing for approximately 3 weeks, he appealed. Later correspondence indicated that he received a few items, but did not consider the response complete. The Decision notes that the Sheriff did not assert he did not have certain of the records that were requested, and not produced, it was presumed the records exist and are in the Sheriff's possession and control." As such, the Decision ruled that the Sheriff's Office was in violation.

09-ORD-145

In re: Mike Stephens / Office of the McCreary County  
Judge/Executive and McCreary County 911 Emergency Dispatch  
Center  
Decided September 9, 2009

Stephens requested various documents concerning the provision of wrecker services in the county, from both the McCreary County Judge-Executive and the 911 dispatch center. He received a few items and appealed. The Decision noted that the county was not obligated to provide records which do not exist, but emphasized that the agency must state "in clear and direct terms" that in fact specifically requested items do not exist, and if appropriate, detail the process the agency undertook to find such records. (And, of course, if the records do exist, the response was also deficient.) The Decision also noted that one of the requested items would have required the public agency to create a list, and that is not an appropriate request under the Open Records law, but also that it is incumbent upon the agency to provide the documents that would prove the source of such information.

09-ORD-149

In re: Lexington Herald-Leader / Cabinet for Health and Family  
Services  
Decided September 11, 2009

Estep, a Lexington Herald-Leader reporter, requested documents relating to two individuals in Wayne County, from the Cabinet. The Cabinet responded that there were no authorizations or court orders requiring the disclosure, and thus releasing the documents would violate the right to privacy of the individuals in question. One of the individuals was a child fatality, and the newspaper argued that no such right to privacy (other than under HIPAA) existed when the subject was deceased. The Decision noted that KRS 61.878(1)(l) allowed for denial when another statute makes a record confidential, as KRS 194A.060 and KRS 620.050(5) purports to do for certain records of the Cabinet. The Decision found that such disclosures were permissive, at the discretion of the Cabinet, and that it was proper in this case for the Cabinet to deny the records.

09-ORD-150

In re: Bill Lippert / Pulaski County Judge Executive  
Decided September 11, 2009

Lippert requested certain items from the personnel file of the dog warden. The County Judge timely responded that certain of the records did not exist, and refused to disclose the requested job evaluation. The Decision noted that to withhold a job evaluation, the agency must look at the extent to which its disclosure would shed light on the operation of the public agency involved. But ruled that although the denial lacked the requisite specificity, that the withholding of the job evaluation in question was permitted under the law. The Decision questioned the response that simply referred Lippert to the Attorney General's Open Records handbook without specifying the section or explaining how it applied to the record in question. Further, the responder did not provide any information as to certain of the records requested, and the County failed in its responsibility to direct the requestor as to where such records might be found, if not in the custody of the public agency itself.

09-ORD-156

In re: Travis Wayne Bush / Kentucky State Police  
Decided September 25, 2009

Bush, an inmate at Kentucky State Reformatory, requested blood test results for another individual from KSP. KSP responded untimely (six days later) denying the information as an invasion of that subject's personal privacy. The Decision noted that there was no authority for a "blanket rule that toxicology reports may be withheld" when a charge is dismissed, and in this case, apparently the subject was charged with an offense. The Decision stated that when the subject was arrested she had less of an expectation of privacy, and that the public interest in such a report was more compelling than her privacy right. The Decision stated that KSP could disclose the report.

**09-ORD-163                      In re: David Allen Ward / Lincoln County Jail  
Decided September 30, 2009**

Ward (an inmate) requested specified addresses from the Jail, which did not apparently initially respond. (The Jail was unable to determine what happened to the several requests Ward made for the information.) The Decision noted that the agency was not required to provide "information," although it was obligated to make records available that might satisfy the request. Ward's status as an inmate would have likely foreclosed his ability to make an on-site inspection, however.

**09-ORD-164                      In re: Clarence T. Hurst / Whitley County 911 Dispatch  
Decided: October 7, 2009**

Hurst requested copies of 911 recordings connected to an incident. Whitley County 911 denied the records, claiming that such recordings are exempt from Open Records requests and could only be obtained with a subpoena. Whitley County failed to provide any facts that would support nondisclosure of part or all of the record requested in this situation - such as the "nature and context of the privacy interest of the 911 caller" or details that would "meaningfully advance the public's right to know how [the 911 dispatch agency] responded...." The Decision indicated that Whitley County's position that all 911 recordings are exempt was incorrect, and that its failure to provide the record violated Open Records law.

Whitley County also violated Open Records law when it failed to respond to the initial request for approximately a month, and its response was deficient in that it did not state the specific exemption it claimed and a "brief explanation of how the exception applies to the record withheld."

**09-ORD-167                      In re: Kevin Brumley / Nelson County Judge/Executive  
Decided October 8, 2009**

Brumley requested a copy of a deputy sheriff's vacation and sick leave records, time cards and other official documents related to such leave. The County Judge - Executive denied the records, claiming a personal privacy exemption for the deputy's sick and vacation leave requests, and referred the requestor to the Sheriff's Office for some of the other records, as the County Judge's Office only handled payroll for the Sheriff's Office. The Decision found any privacy interest on the deputy's part to be minimal, and would not undermine his effectiveness as a deputy sheriff or place him in peril. The Decision agreed that any specific medical information could be redacted. Further, the Decision noted that initially, the County Judge-Executive notified Brumley that his office did not have the record, and only upon further correspondence did he state that the records would be in the custody of the Sheriff's Office. To the extent known, the recipient of such a request must inform the requestor of the location of records, and failure to provide the information constituted a violation of Open Records law.

**09-ORD-187**

**In re: Rae Anna T. Kirby / Butler County Sheriff's Department  
Decided November 2, 2009**

Kirby requested documentation concerning the appointment of a named individual as a Butler County special deputy, as well as documentation as to any matters to which that individual was assigned, such as responding to 911 calls or roadblocks. The agency properly responded that it had no documentation with respect to the appointment, and noted that it was not the custodian for 911 call records and directed her to "another agency." The Decision noted that response was insufficient, and that Kirby should have been provided with the name and location of the official custodian for those types of records.

**09-ORD- 197**

**Mark W. Leach / Kentucky State Police  
Decided November 24, 2009**

Leach requested CAD records / activity logs for named EMS responders in Pike County, from KSP. KSP responded that it could not fulfill the record because it would require KSP to create information, but Leach responded that it had gotten such information before. To satisfy the request, KSP would need to query the database for each provider or provide the entire database. The Decision concluded that the "uncontradicted evidence that a query, filter, or sort exists that is capable of extracting information from [the] CAD system relating to named service providers" exists made it mandatory that KSP provide the information in the manner requested.

**09-ORD-199**

**Wayne C. Murphy / Russell Police Department  
Decided November 30, 2009**

Murphy requested all witness statements for a particular robbery investigation, as well as surveillance video related to the crime. Russell responded that it believed Murphy already had the material requested. (Apparently the material was believed to be in the hands of Murphy's attorney, as well as in the hands of the Innocence Project.) Murphy disagreed that all of the material had, in fact, been already produced. Upon appeal, Russell stated that it did not have certain of the records, and that some of the requested requests were in the hands of the Commonwealth's Attorney.

The Decision noted that it was not appropriate to deny records simply because they had been produced. However, the Decision agreed that it was not the role of the Attorney General to mediate disputes over the existence of certain records.

**09-ORD-201**

**In re: Kentucky New Era / City of Hopkinsville  
Decided December 3, 2009**

Hunter (Kentucky New Era) requested inspection of unredacted copies of arrest citations for an 8 month period, from the Hopkinsville Police Department, as well as any reports (including KYIBRS reports) for the same time period that did not result in arrests but did report threats made toward individuals or groups. Hopkinsville denied the request as it related to open investigations, as it related to juveniles, and also redacted certain personal information such as DOB, home address, etc.

The Decision agreed that open investigative records may be held back, but only when there was a "showing of particularized harm from premature disclosure of those records." Further, that protection did not extend to uniform citations or KYIBRS reports, simply because the investigation was open. In addition,

the Decision disagreed that all records regarding juveniles must be held back pursuant to KRS 610.320, or that a record could be exempted simply because it contained a juvenile's name. The underlying purpose of protecting juvenile offenders "is not furthered by the nondisclosure of records identifying juvenile victims or witnesses ...." (However, if the agency can show a specific adverse impact on the juvenile, it might be permissible to redact the information, most notably as regards victims of sexual offenses.) Finally, the Decision noted that a "policy of blanket redaction" with respect to specific information was not permitted, "absent a particularized showing of a heightened privacy interest outweighing the public's interest in disclosure."

**09-ORD-205**                      **In re: Kentucky New Era / Kentucky State Police**  
**Decided December 8, 2009**

Hunter (Kentucky New Era) requested a report concerning the finding of a dead body in a parking lot in Mayfield. KSP denied the report, stating that the investigation was open. Hunter argued that the initial incident report (as opposed to investigative files) were not exempt and that, in fact, much of the information had already been released.

After correspondence, the Decision focused on the release of the Uniform Offense Report (UOR-1), recognizing that the different "nomenclature describing the initiating documents utilized by the Commonwealth's various law enforcement agencies" causes confusion. However, it noted that prior decisions had clarified that the UOR is the functional equivalent of the incident report. Although portions of that document might be redacted, the document itself should be released. Since KSP had not alleged with any degree of specificity the harm that might result from the release, the Decision concluded that the UOR-1 should be released.

**09-ORD-209**                      **In re: Norman T. Mason and Ralph Priddy / Graves County Jail**  
**Decided December 10, 2009**

Mason and Priddy requested copies of incident reports relating to a fall sustained by Mason in the jail. (Notably, he did not ask for medical records, although had, apparently, given Priddy - apparently his lawyer - a release to access medical records.) The incident report in question is required to be created, since he did sustain injuries serious enough to require medical care. The Jail denied the records, stating that "anything medical falls under HIPAA" and that the request was not notarized. However, the Decision noted that even if the jail is a covered entity under HIPAA, that HIPAA does not act as an impediment in this request, since Mason was asking for his own records. (The Opinion did not address the issue of a non-notarized statement.) The Decision concluded that the Jail improperly withheld the report.

**09-ORD-211**                      **In re: Michael Sheliga / Knott County Sheriff's Department**  
**Decided December 14, 2009**

Sheliga asked for any statute legally requiring a citizen to provide their name, a list of all Sheriff's Office employees and video or other recordings of the justice center entrance at a particular time. Complicating this case, Sheliga had already filed an action in court, which put the Attorney General's ability to rule on the matter in question, but the Court decided to render an opinion. The Decision noted that part of the request was moot, as the Sheriff had provided a list of all employees. Further, since the Sheriff was not obligated to provide general information, the Decision noted that it was not error to refuse to do so. With respect to the video, however, the Sheriff's office apparently declined the request "merely because a related criminal

action is currently pending against Mr. Sheliga; ongoing litigation, standing alone, does not suspend the duties of the Department under the Open Records Act." Unless the agency could place the request under one of the exceptions, it was obligated to treat Sheliga as any other requestor.

**09-ORD-212**                      **In re: Associated Press / Kentucky State Police**  
**Decided December 15, 2009**

Biesk (Associated Press) requested copies of all 911 calls related to the discovery of a body in the Daniel Boone National Forest, and copies of any incident reports or "similarly titled documents" in the matter. KSP denied the record, stating that the case was still under investigation. Biesk appealed, arguing there was a public safety interest in releasing the information quickly. KSP also stated that they do not create an "initial offense report" -but only had a dispatch log and investigative report. The Decision noted that it had previously determined that the UOR-1 is the functional equivalent of the requested document, and that it could only be withheld if the KSP could demonstrate with specificity the harm that would result from releasing it. The Decision noted that although it might be appropriate to redact certain information, that it had not made a case for withholding the entire document.

With respect to the 911 calls, the Decision noted that no showing of potential harm in the release of such documents had been made beyond the assertion that they were part of an open investigation. Without such a showing as to how the exception to disclosure applied, KSP was obligated to release the recording.

**09-ORD-217**                      **In re: Rebecca Bailey / Oldham County Jailer**  
**Decided December 17, 2009**

Baily requested various records (8) related to her employment by the Oldham County Jail. She was notified in a timely manner that records were available for review, but did not note that portions were denied because no responsive records existed. When she arrived to review the records, she was given a "final" agency response that did deny the existence of certain records. Although belated, the Decision agreed the response ultimately satisfied the Open Records Act. However, the Jailer was in procedural default because he failed to notify her that he was not the custodian of certain requested records, and that he did not state where responsive records might be located. (Bailey also objected to being required to a review with the Jailer and two deputies in the room, but the Decision did not assign error to that action.)

# KENTUCKY

## Open Records

### 61.870 Definitions for KRS 61.872 to 61.884

As used in KRS 61.872 to 61.884, unless the context requires otherwise:

(1) "Public agency" means:

(a) Every state or local government officer;

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

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

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

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

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

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

(h) Any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;

(i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c),

(d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;

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

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

(2) "Public record" means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. "Public record" shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded by state or local authority;

(3) (a) "Software" means the program code which makes a computer system function, but does not include that portion of the program code which contains public records exempted from inspection as provided by KRS 61.878 or specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system.

(b) "Software" consists of the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs, but does not include that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency;

(4) (a) "Commercial purpose" means the direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee.

(b) "Commercial purpose" shall not include:

1. Publication or related use of a public record by a newspaper or periodical;
2. Use of a public record by a radio or television station in its news or other informational programs; or
3. Use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties;

(5) "Official custodian" means the chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control;

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

(7) "Media" means the physical material in or on which records may be stored or represented, and which may include, but is not limited to paper, microform, disks,

diskettes, optical disks, magnetic tapes, and cards; and

(8) "Mechanical processing" means any operation or other procedure which is transacted on a machine, and which may include, but is not limited to a copier, computer, recorder or tape processor, or other automated device.

**61.871 Policy of KRS 61.870 to 61.884; strict construction of exceptions of KRS 61.878**

The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

**61.8715 Legislative findings**

The General Assembly finds an essential relationship between the intent of this chapter and that of KRS 171.410 to 171.740, dealing with the management of public records, and of KRS 11.501 to 11.517, 45.253, 171.420, 186A.040, 186A.285, and 194B.102, dealing with the coordination of strategic planning for computerized information systems in state government; and that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. The General Assembly further recognizes that while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in this chapter, some being exempt under KRS 61.878.

**61.872 Right to inspection; limitation**

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

(2) Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency.

(3) A person may inspect the public records:

(a) During the regular office hours of the public agency; or

(b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

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

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

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

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

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

(2) (a) Nonexempt public records used for noncommercial purposes shall be available

for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. Agencies are not required to convert hard copy format records to electronic formats.

(b) The minimum standard format in paper form shall be defined as not less than 8 1/2 inches x 11 inches in at least one (1) color on white paper, or for electronic format, in a flat file electronic American Standard Code for Information Interchange (ASCII) format. If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request.

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.

(4) (a) Unless an enactment of the General Assembly prohibits the disclosure of public

records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

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

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

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

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

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

(c) Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television

station shall not be held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for that commercial use.

(6) Online access to public records in electronic form, as provided under this section, may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements. Fees shall not exceed:

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

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

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

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

(1) Three (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated;

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

(3) Any other penalty established by law.

**61.876 Agency to adopt rules and regulations**

(1) Each public agency shall adopt rules and regulations in conformity with the provisions of KRS 61.870 to 61.884 to provide full access to public records, to protect public records from damage and disorganization, to prevent excessive disruption of its essential functions, to provide assistance and information upon request and to insure efficient and timely action in response to application for inspection, and such rules and regulations shall include, but shall not be limited to:

(a) The principal office of the public agency and its regular office hours;

(b) The title and address of the official custodian of the public agency's records;

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

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

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

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

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

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

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

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

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

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

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

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

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

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

3. The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or

publication of which is directed by another statute;

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

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

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

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

(h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public

records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884;

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

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

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

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

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

(3) No exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him. The records shall include, but not be limited to, work plans, job performance, demotions,

evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores, and preliminary and other supporting documentation. A public agency employee, including university employees, applicant, or eligible shall not have the right to inspect or to copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency.

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

(5) The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function.

#### **61.880 Denial of inspection; role of Attorney General**

(1) If a person enforces KRS 61.870 to 61.884 pursuant to this section, he shall begin enforcement under this subsection before proceeding to enforcement under subsection (2) of this section. Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response

shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

(2) (a) If a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection. If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request. The Attorney General shall review the request and denial and issue within twenty (20) days, excepting Saturdays, Sundays and legal holidays, a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884.

(b) In unusual circumstances, the Attorney General may extend the twenty (20) day time limit by sending written notice to the complaining party and a copy to the denying agency, setting forth the reasons for the extension, and the day on which a decision is expected to be issued, which shall not exceed an additional thirty (30) work days, excepting Saturdays, Sundays, and legal holidays. As used in this section, "unusual circumstances" means, but only to the extent reasonably necessary to the proper resolution of an appeal:

1. The need to obtain additional documentation from the agency or a copy of the records involved;
2. The need to conduct extensive research on issues of first impression; or
3. An unmanageable increase in the number of appeals received by the Attorney General.

(c) On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney

General may also request a copy of the records involved but they shall not be disclosed.

(3) Each agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding the enforcement of KRS 61.870 to 61.884. The Attorney General shall not, however, be named as a party in any Circuit Court actions regarding the enforcement of KRS 61.870 to 61.884, nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings.

(4) If a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

(5) (a) A party shall have thirty (30) days from the day that the Attorney General renders his decision to appeal the decision. An appeal within the thirty (30) day time limit shall be treated as if it were an action brought under KRS 61.882.

(b) If an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.

**61.882 Jurisdiction of Circuit Court in action seeking right of inspection; burden of proof; costs; attorney fees**

(1) The Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained shall

have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person.

(2) A person alleging a violation of the provisions of KRS 61.870 to 61.884 shall not have to exhaust his remedies under KRS 61.880 before filing suit in a Circuit Court.

(3) In an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the court shall determine the matter de novo. In an original action or an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the burden of proof shall be on the public agency. The court on its own motion, or on motion of either of the parties, may view the records in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

(4) Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.

(5) Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public

record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

**61.884 Person's access to record relating to him**

Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.