

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2011



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

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

Leadership Branch

J.R. Brown, Branch Manager
859-622-6591

JamesR.Brown@ky.gov

Legal Training Section

Main Number
General E-Mail Address

859-622-3801
docjt.legal@ky.gov

Gerald Ross, Section Supervisor
859-622-2214

Gerald.Ross@ky.gov

Carissa Brown, Administrative Specialist
859-622-3801

Carissa.Brown@ky.gov

Kelley Calk, Staff Attorney
859-622-8551
Thomas Fitzgerald, Staff Attorney
859-622-8550

Kelley.Calk@ky.gov

Tom.Fitzgerald@ky.gov

Shawn Herron, Staff Attorney
859-622-8064

Shawn.Herron@ky.gov

Kevin McBride, Staff Attorney
859-622-8549

Kevin.McBride@ky.gov

Michael Schwendeman, Staff Attorney
859-622-8133

Mike.Schwendeman@ky.gov

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. 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.

2011

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. Any of these cases may be under appeal, please check with your legal advisor on the specifics of any Open Records issue. 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/>

11-ORD-001 **In re: Scott M. Webster / City of Williamsburg**
Decided January 3, 2011

Webster requested copies of recordings of a meeting (apparently surveillance video) between the Mayor and himself. The City denied the request, by telephone call, as the video had been overwritten following the seven day retention period the city used for these recordings. This was not in accord with the 30-day retention period required under Series L5364 by the Kentucky Department of Libraries and Archives (KDLA) for such items. The Decision agreed that the city could not produce a record it did not have but found the response deficient in that it was unable to produce a record because of its destruction and because the agency failed to make the necessary response in writing. The recording was destroyed,, by the city's admission, 23 days prematurely, even though it would have been destroyed by the time the request came in anyway. The OAG referred the matter to the KDLA for further action.

11-ORD-003 **In re: Robert C. Linville / Harrison County Sheriff's Office**
Decided January 7, 2011

Linville requested the photo lineup shown to a victim in a crime in which he was charged. When he received no response, he appealed. The Sheriff's Office responded that no photo lineup was used in the case, and as such, no records could be produced. Further, it responded that when the request was received, the deputy involved conferred with the prosecutor and that all witness statements had already been provided to Linville through discovery. Upon the appeal, the County Attorney advised the Sheriff's Office that Linville was still entitled to the statements and the Sheriff's Office transmitted the documents to Linville.

The Decision found the belated response to be adequate.

11-ORD-004

**In re: Juan Sanders-EI / Louisville Metro Police Department
Decided January 7, 2011**

Sanders-EI requested a number of items related to his criminal case. He argued that the agency did not reply, but the LMPD indicated that although the request was dated October 22, 2010, it was not mailed from his prison until December 2 and was postmarked on December 3. The Decision agreed his appeal, dated December 2, was premature. LMPD stated it received the request on December 8 and responded on December 10 and that response was deemed adequate by the OAG.

11-ORD-008

**In re: Kevin Wilkins / Jefferson County Property Valuation Administrator
Decided January 20, 2011**

Wilkins requested locations and values for any property owned by four named PVA employees, along with payroll records for those employees. The PVA initially attempted to formally deny the request, but were unable to contact the requestor, as the request came by fax with the contact information cut off and they were unable to determine whom to contact, and faxing back to the return number did not work. Upon appeal, the PVA agreed to produce the real estate records but denied the payroll information as it did not process that data - instead, it was done by the state personnel department. With respect to records of owned personal property, the PVA responded that the only records related to vehicles and that such information was exempt under the federally Drivers Privacy Protection Act (DPPA), 18 U.S.C. §2721, incorporated into KRS 61.878 (1)(l).

The Decision noted that the DPPA required the holding back of certain personal identification information of Transportation Cabinet employees but held that it did not apply to the PVA, which is not a part of the Transportation Cabinet, nor did it extend to withholding information as to vehicle makes and assessed values. The Decision found that such information was not the type of personal information implicated by the Act and that information about the vehicles (but not necessarily personal data about the owner) should be released.

11-ORD-024

**In re: Wayne C. Murphy / Perry County Sheriff's Department
Decided February 9, 2011**

Murphy requested arrest and jail records for the Bargers. He received no response and appealed. The Sheriff's Department responded, advising that it held no responsive records, and suggested that another agency might have made the arrest. Finding that the Department appeared to have made a good faith effort to find any records, the OAG found that its response was sufficient, albeit belated.

11-ORD-029

**Jose Magana / City of Hurstbourne
Decided February 25, 2011**

Magana requested access to records of residential code complaints received for a period from 1995 to the present. The City responded that the request was quite large and as such, that it would take some time to collect the records. They informed Magana that the records would be available within 15 days and that he would be notified when the documents were ready for pickup. Magana immediately contacted the city and told them to "stop making copies" as that is not what he requested. He went to City Hall and was permitted

to view the "stacks of records, but not the records themselves, and where he noted the absence of posted rules and regulations governing access to the city's records."

He was notified a few days later that 1,700 pages were ready for pickup and that he would owe ten cents per page. He was further told that several more thousand pages could be reviewed. He challenged the fees, arguing he had not instructed the city to copy the records. The City Manager responded that he had done the search and "chose the option of making copies following [Magana's] written instruction." Magana argued he had requested inspection and that he had instructed he be telephoned about copies of the records.

The Decision found it clear that Magana wanted access to the records "for the purpose of inspection." He agreed to copies in lieu of inspection after "telephonic arrangement." Magana contacted the City immediately when he realized they were actually making copies. The City "labored under the erroneous belief" that it was up to the city whether to make copies and then "exacerbated the error by demanding payment for these copies." It agreed that a close reading of the request would have resulted in far fewer documents than provided by the city. The Decision found the City was in violation by refusing to give Magana access unless he paid for copies he did not request. It also agreed the City was in violation by not having adopted and posted appropriate rules and regulations relating to Open Records. Finally, the Decision ruled the delay deficient as well, as not based upon appropriate reasons - that the City Attorney would be unavailable - as it had previously been held that although legal advice is appropriate, the agency cannot delay its response for that reason. The fact that Magana was permitted to view the stacks, but not review the records, indicated that the records were available and he should have been permitted to view them.

11-ORD-035

**In re: Kathy Gilliam / Kentucky Department of Fish & Wildlife Resources
Decided March 10, 2011**

Gilliam requested a number of items related to a specific incident. The KDFWR responded, belatedly, with some of the documents but indicated the remainder of the items were being reviewed by the Legal Department and would be released when and if approved. Upon appeal, the KDFWR supplemented the response by sending additional documents but denied that the agency had some of the items requested.

The Decision reiterated that "the value of information is partly a function of time." It agreed that documents should be produced, if at all possible, by the third business day following receipt of the request, and that a simple notification that the agency will comply in the future is not sufficient. A longer time might be permitted, however, upon a specific representation of the need for it, with a "legitimate detailed explanation of the cause for the delay in providing access." Vague estimates of how long the delay will be are also insufficient. The Decision reiterated it was appropriate to process such records through a legal department, but that "care must be taken that such a policy does not interfere with the timely processing of an open records request." Further, the response was deficient in that it did not inform Gilliam that some of the records requested did not exist and to do so is an affirmative duty on the agency.

The Decision, however, found no substantive error on the KDFWR, but only the procedural errors outlined above.

11-ORD-028

**In re: Chester L. Taylor, Jr. / Monroe County Sheriff's Department
Decided March 15, 2011**

Taylor requested a number of records regarding the arrest of Dunagan. When he received no response of any kind, Taylor appealed. The Attorney General notified the Sheriff and the County Attorney, but it received no reply of any kind either. (By phone, the OAG was told by the Sheriff's Office that the materials requested were provided to the County Attorney.)

The Decision noted that public agencies "are not permitted to elect a course of inaction." The Decision ordered the production of all responsive records unless the Sheriff's Office can make a specific argument in writing justifying the withholding of the records.

11-ORD-042

**Regina G. Rummage / City of Shepherdsville
Decided March 23, 2011**

Rummage asked for information related to the identity of employees and expenditures made by the city in specific matters. The City Clerk responded, stating that due to the amount of time it would take, they would need additional time to comply. When he did not receive the information and appealed, the City Clerk responded that the city is "short-staffed and under serious budget constraints" and that "shutting down all other business operations at City Hall to answer an open records request is not serving the taxpayers of Shepherdsville's best interests." The Decision noted that some documents had been produced and that the remainder was promised, it addressed only the procedural issues.

The Decision noted that the ORA "does not contain any waiver of the mandatory requirements contained therein for public agencies due to challenging economic times." It agreed that an extension of time might be appropriate but that it was incumbent on the agency to "make proper provision for the uninterrupted processing of open records requests." It reiterated that the duty to provide such records was as much of a legal duty as "any other essential function" of the city.

The Decision held the response to be procedurally deficient.

11-ORD-050

**In re: Elizabeth Coleman / Cabinet for Health and Family Services
Decided April 1, 2011**

Coleman requested records related to information obtained during an investigation of a grievance she filed. The Decision agreed she was entitled to the records, including the investigator's notes, which related to the investigation. Further the Decision agreed her request was sufficiently specific, even though she did not detail exactly which records she wanted, and even though she used the word information where the word record might have been more appropriate.

The Decision held the records should be released to Coleman.

11-ORD-051

**In re: Tammie T. Nava / Scott County Sheriff's Office
Decided April 6, 2011**

Nava requested copies of requests for prior open records requests back to 2004, as well as copies of "S.O. [presumably Sheriff's Office] Reports" made for those same requests. The current Sheriff provided records in his office's possession, but did not produce earlier records, responding that apparently the predecessor sheriff did not keep copies of such documents.

The Decision found the response of the current Sheriff adequate, but referred the matter to the Kentucky Department of Libraries and Archives "in order to ensure that the Sheriff's Office can successfully implement a proper system of records management and retention."

The Decision strongly reinforced that the Open Records Act and the State Archives and Records Act (KRS 171.410) were to be read in cooperation and that each agency head (state and local) were responsible for maintaining a recordkeeping process that facilitated the production of requested records. The Decision stated "subversion of the intent of the Archives and Records Act ... constitutes subversion of the intent of the Open Records Act." Further, "if a public agency fails to discharge its statutorily mandated duty to establish effective controls over the creation, maintenance, and use of records, and to make known to all of its officials and employees that no records are to be destroyed except in accordance with the law, the agency subverts the intent of the Open Records Act by frustrating full access to public records."

The Decision noted that under the records retention schedule, the Sheriff's Office could have properly destroyed some of the requested material, but should have still had the items from 2007. However, since the Sheriff's Office "did not cite this authority or seem to know for a fact whether the records were lost or destroyed nor did the agency locate any of her 2007 requests," the matter was referred to the KDLA for further investigation.

11-ORD-052

**In re: Gailen W. Bridges / Sanitation District No. 1 (SDI)
Decided April 12, 2011**

Bridges requested a number of records, including emails, on a specific case. SDI provided most of what was requested but denied certain emails, arguing that they contained preliminary discussions involved what to do on a specified matter, pursuant to KRS 61.878(1)(j). The Decision concluded that SDI's reliance on that provision was misplaced "as to e-mails which either cannot be properly characterized as recommendations or memoranda, or which are recommendations or memoranda but forfeited preliminary status to the extent adopted, 'whether explicitly or implicitly, as the basis or a part of the agency's final action.'"

Bridges argued that the e-mail exchange took place nearly two years before and as such, could not be considered preliminary. SDI noted it had released a tremendous number of emails. The Decision agreed that a document does not lose its preliminary character because of time, but that SDI failed to recognize that such documents become final if "ultimately adopted as the basis or a part of the agency's final action." Upon review, the Decision found that SDI should have disclosed redacted versions of 26 pages of emails and should have released another 59 completely - while agreeing that it properly withheld 14 pages. While not revealing the exact content, the Decision noted that those emails that provided draft text that was eventually essentially adopted should be released, as the "draft forfeited its preliminary character" at that point.

11-ORD- 057

**In re: Kathy Gilliam / Kentucky Department of Fish & Wildlife Resources
Decided April 14, 2011**

Gilliam requested various records concerning a 2009 arrest. The KDFWR provided most of the documents responsive to her request but denied her the hard copy of a NCIC record used by the officer to determine the arrested subject was a convicted felon. The KDFWR responded that the NCIC document is not available in hard copy but is a computerized database outside of its control. Further, it denied that an inventory was made of the subject's vehicle (an ATV) or that it was impounded, replying it had simply been removed and stored at a nearby private business.

The Decision agreed that the relevant federal law (28 U.S.C. §534) provides that NCIC information is not subject to inspection under the ORA. It further agreed that KDFWR could not be required to prove they did not maintain other records requested.

11-ORD-069

**In re: Nancy Coleman / Johnson County Sheriff's Office
Decided May 6, 2011**

Coleman requested cell phone and dispatch records relating to a specific deputy sheriff. The Sheriff's Office did not notify Coleman that the dispatch records were held by another agency immediately and when it did so, it did not provide the contact information for that agency. In response to Coleman's appeal, the Sheriff's Office supplemented its initial denial by stating that any responsive records could be denied because they were part of an existing criminal case against her son.

The Decision noted that the responses did not explain how the exemption applied to the requested cell phone records. The Decision noted that in order to hold the records back under KRS 61.878(1)(h), it must meet a three-part test.

First, a public agency must establish that it is a law enforcement agency or a public agency involved in administrative adjudication. Next, it must establish that the requested records were compiled in the process of detecting and investigating statutory or regulatory violations. Finally, the public agency must demonstrate that disclosure of the information would harm it by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action.

The Decision agreed that the Sheriff's Office did not make any attempt to demonstrate any harm in releasing the records and that "the fact that the investigation is ongoing is not enough, standing alone, to justify a denial." The Decision did not suggest that a case might not be made for nondisclosure of some part of the record, however. Further, the Decision agreed that failing to provide the information as to the records held by Paintsville also made the response deficient.

11-ORD-071

**In re: Samuel D. Harris / Bowling Green Police Department
Decided May 11, 2011**

Harris requested investigative records related to the case against him. The PD belatedly denied the request and he appealed. The Decision agreed that documents involved in an ongoing investigation could be denied "so long as the possibility of further judicial proceedings in the case remain a significant prospect." In this matter, the records had been provided to Harris's defense attorney in discovery. Other

than the procedural error, in not responding in a timely manner, the Decision upheld the position of the Bowling Green PD.

**11-ORD-072 In re: Chester L. Taylor, Jr. / Tompkinsville Police Department
Decided May 12, 2011**

Taylor requested copies of the duty roster and communications log for a specific date, along with specific other documents. When he received no response, he appealed. The Chief responded that the PD had not received the initial request and further that the matter in question was not handled through the Tompkinsville PD. (However, Tompkinsville apparently had the records, at least, they never denied having possession of the requested items.)

The Decision noted that was not a reason for “denying access to operational records of a public agency.” Since the PD had not provided any exceptions authorizing the nondisclosure of the requested records, the Court found the PD violated the ORA.

**11-ORD-075 In re: Anthony Sadler / Kentucky State Penitentiary
May 18, 2011**

Sadler, an inmate, requested documents. However, he lacked sufficient funds in his inmate account to pay for the requested material. The Decision agreed that this might work a hardship on Sadler but found no provisions in the ORA that waived the requirement that permitted charging a minimal fee for copies of requested documents.

**11-ORD-080 In re: Salome Frances Spenneberg, Kist / City of Carrollton
Decided May 23, 2011**

Spennenberg, Kist requested records relating to a specific address from the Mayor and the building inspector. She received no response and appealed. Upon appeal, Kist was provided with a “formal request form” to complete. The City Attorney responded that the initial request had not been made to the official records custodian and that in fact, there were no responsive records, but that Kist could inspect the records upon completion of the appropriate forms.

The Decision noted that it was incumbent on the mayor and the building inspector to notify Kist that they were not the proper party to receive the request and provide the necessary contact information or to simply forward the request to the proper party. The Decision stated “public agency inaction is not a viable option under the Open Records Act even if a request is misdirected.” With respect to the form, the Decision reiterated that the ORA does not permit insistence on the use of a particular form.

The Decision held that the city’s response had been deficient.

**11-ORD-082 In re: Robert D. Cron / Housing Authority of Morgantown
Decided May 25, 2011**

Cron made multiple requests for contracts or agreements between the Butler County Sheriff’s Department and the Housing Authority, concerning services from the Constable to patrol the area. The request was made in person and documents were provided in a timely manner. However, Cron asserted that the

Executive Director asked him the purpose for his request and that he was asked to complete a form before receiving the copies.

The Decision noted that the Attorney General could not resolve the factual dispute, but that if he was asked the purpose for his request, that action violated the Open Records Act. It agreed that it was unrefuted that he was asked to complete the form and agreed that action was also contrary to the provisions of the ORA. The ORA does not permit the requestor to require a certain form or format.

The Decision upheld Cron's position.

**11-ORD-084 In re: Peter F. Neidhardt / North Oldham Fire Protection District
Decided May 26, 2011**

Neidhardt requested a number of documents from the North Oldham Fire Protection District, including "audits, contracts, payroll and training records, inspection reports, and other financial and operational records" The District explained why it would take some time to produce some of the records, but did not provide any information on when it might be available. (The District stated the records were in 6,000 file folders, 20 file cabinets and 200 storage boxes.) The reply also stated that it would take an extensive period of time to copy the requested records, because the part-time administrative assistant would not have more than 30 minutes a week to do it. The District asserted that the request was intended to disrupt the functions of the department (under KRS 61.872(6), but Neidhardt noted that it was only the second request he'd ever made.

The Decision noted that although the request was voluminous, that the District's reasons for failure to comply was not permissible, as compliance with the ORA is a mandatory duty, "and is as much of a duty owed by a public agency as the provisions of any other services to the public." The District could require inspection of the records prior to duplication but it must provide timely access to the records. The Decision also noted that some of the difficulties claimed by the District could be partially attributed "to its recordkeeping practices." The Decision agreed an extension was appropriate, but that the access could not be postponed indefinitely and could not be justified by the limited available of an employee. The ORA requires that the omission of a date certain when the records could be reviewed made the response defective.

Finally, the Court reiterated that the "perceived burden [in producing the records] would not exist if the District was properly maintaining all records in accordance with applicable records retention schedules." The time period for some of the records was only three years, but the District apparently had records back 10-12 years. Because they had not been destroyed in the normal course of business, as they would have been permitted to do, the agency was required to produce the records.

The Decision required the records be produced in a timely manner.

**11-ORD-086 In re: Frank Boyett / Kentucky State Police
Decided May 31, 2011**

Boyett (of the Henderson Gleaner) requested KSP data on CCDW permits, broken out by county, or in lieu of that, a paper copy of the record layout of the database required to be kept by KSP pursuant to KRS 237.110(10). He also requested a list of all reports that can be generated by the database. In response,

KSP stated it could not filter or search the database in the way requested. Further, it denied a copy of the "data dictionary / field list" and report list, "the nonexistence of which it ultimately asserted." KSP clarified that a list of the type of searches does not exist, and argued that the data dictionary and field list was proprietary and was "blueprint of the database." Boyett noted that the response suggested that the database could only be used to produce one report and his request was intended to determine if there was a way to "coax[] more public information out of this database than is contained in the annual statistical reports described." He argued that the data dictionary is "practically generic" and in fact could probably be extrapolated from the CCDW application form.

The Decision stated that "absent proof that the records in dispute were confidentially disclosed to KSP or required to be disclosed to it, are generally recognized as confidential or proprietary, and are of such a character that disclosure would provide an unfair commercial advantage to competitors" of the software company, it held that KSP failed to support its argument for nondisclosure. A "bare allegation" that it was not sufficient to support the withholding of the record.

The Decision indicated that KSP should either provide Boyett with a screen shot of the screen containing the fields or a redacted hard copy.

11-ORD-090 In re: Floyd Laychak / Kentucky State Police
Decided: June 7, 2011

Laychak requested a copy of the CAD report and KYIBRS report for a specific call. The request was denied as the records are part of an open investigation in which Laychak was a suspect. (The Decision further noted that much of the information in the CAD is specifically excluded from release under KRS 17.150(4) and 65.752.) Laychak argued that because he was under indictment for the crime, the exceptions no longer apply and appealed. Further, KRS 61.878(1)(h) specifically authorized the withholding of the records at that time, as the case was still pending. The Decision agreed that KSP had adequately demonstrated the harm in a premature release of the records and its potential for jeopardizing the prosecution.

11-ORD-096 James Coy / Office of the Attorney General
Decided June 16, 2011

Coy requested a copy of a Medicaid Fraud and Abuse Control Unit record on his son, Jason Coy. A response was timely sent, providing information on available records (and fees should they be copied) and citation to statutory exemptions that justified the nondisclosure of certain of the records. Coy argued that he was entitled to the entire record. The MFCU argued that it was the recipient of records from several agencies and that some of these records were held by pursuant to state law, such as KRS 209.140 and 205.175(2) and federal provisions under HIPAA, 45 C.F.R. 164.512.

The Decision did note, however, that public agencies that are also "covered entities" under HIPAA must disclose protected health information to the extent that disclosure is required under Kentucky law. In this situation, the Decision agreed that the medical information on subjects against whom complaints were leveled and/or who were investigated was properly redacted from the file produced to Coy, on the basis of KRS 61.878(1)(a), not HIPAA.

The Decision upheld the limited disclosure of the records.

11-ORD-102

**The Todd County Standard / Todd County Dispatch
Decided July 1, 2011**

Craig (Todd County Standard) requested logs and tapes from Todd County Dispatch related to a specific call. Todd County Dispatch denied the record, arguing that the records would harm KSP's investigation of the homicide that precipitated the call. The Todd County Standard appealed, arguing that the suspect had already been arrested, indicted and had confessed to the crime. Upon further correspondence, Todd County Dispatch argued that KSP had informed the agency that the matter is still an open murder investigation and disclosure might harm the investigation. The Decision noted that a "law enforcement agency's assertion that premature disclosure of records will impede its investigation is one part of a three part analysis." As such, it was proper for Todd County to deny the request.

The Decision upheld the denial of the record.

11-ORD-105

**Jon L. Fleischaker / Kentucky State Police
Decided July 8, 2011**

Brock requested copies of all pictures in the possession of KSP regarding the Beverly Hills Supper Club Fire in 1977. Apparently, some records responsive to the request had been copied and provided to a retiring employee, and at some point earlier, the employee (Freels) had admitted he had a number of color photos taken at the scene. (In response to the request in question, KSP had only provided black and white photos for review.) Brock (through Fleischaker) appealed.

The Decision noted that all parties agreed that in effect, public records were being held by a private individual, on its behalf – as the department had argued that the copies were made in the event the originals were damaged or destroyed. As such, the Decision held that the records were public records to which Brock "must be afforded access." The Decision concluded that KSP "is obligated to retrieve them from Mr. Freels to facilitate public access to the records on agency premises." The Decision also criticized KSP's "common practice" of "storing backup copies of public records offsite, in this case with a retired employee, ... raises serious records management issues..." The matter was referred to the Kentucky Department for Libraries and Archives and noted that "additional steps may be required to recover public records residing in nonpublic hands."

11-ORD-106

**WLKY-TV / Jefferson County Public Schools
Decided July 11, 2011**

WLKY requested a copy of a school bus recording which captured an assault of the bus driver by parents. JCPS claimed the videotape to be an education record which was confidential under the Family Educational Rights Privacy Act (FERPA), 20 U.S.C. 1232g and KRS 160.720. WLKY responded that it was not seeking the identity of the students shown in the tape. JCPS, in further correspondence, argued that videotapes of student activities had been previously held to be education records.¹ It further argued that the videotape was shielded by KRS 61.878(1)(h) as part of an ongoing investigation. (However, the Decision found no indication that any law enforcement or prosecution authority had asked that the tape be withheld.)

¹ Medley v. Board of Education of Shelby County, 168 S.W.3d 398 (Ky. App. 2004).

The Decision noted that some jurisdictions had ruled on bus surveillance tapes, specifically, and found them not to be education records, but instead, a means of “maintaining security and safety on the school buses” while at least one other had agreed that it was a school education record as it was used for student discipline. The federal agency responsible for FERPA had ruled informally that a parent is only entitled to view such a tape if only their child was shown on the tape.

The Decision noted, however, that no court had addressed the application of FERPA and KFERPA “to the videotape of an altercation between two adults on a school bus.” As such, the Decision concluded that since the incident “does not focus on students, or student activities” it could not be withheld in its entirety as an education record. Instead, it ruled it was a public record that documented an incident of substantial public interest. It noted that the identity of the students involved could be preserved by blurring or redacting and that the videotape should otherwise be disclosed.

**11-ORD-108 In re: Michelle Greene / City of Hazard
Decided July 15, 2011**

Greene requested documents related to the investigation of a fatal accident including those generated by a private contractor. The response indicated some records might be exempted under attorney work product or other privileges. The Decision agreed that some of the records might, upon sufficient representation, be withheld, but the City had not yet made any such argument. The Decision stated, however, that photographs must be disclosed unless the City could justify withhold, noting that they clearly did not fall under the exemption for notes, correspondence, etc. The City argued that the private contractor, while hired by the city, was working under the direction of the attorneys defending the city in the underlying accident litigation. The Court agreed that some of the records might be withheld under the litigation exemptions in KRE 503 and CR 26.02, but noted those statutes did not apply to the photographs (apparently of the accident scene). The Decision agreed that the ORA should not be used as a substitute for discovery, but that litigation “did not suspend the duties of a public agency.”

Further, the Decision recognized that the Kentucky Supreme Court, had ruled that attorney-client privilege (KRE 503) did not apply to “all communications between an attorney and a client” – but only to those communications that truly were intended to be confidential.² The Decision agreed that the photographs, at least, did not meet that requirement and suggested that other records requested may not meet it either.

**11-ORD-124 In re: Beth French / City of Corydon
Decided August 11, 2011**

French requested all complaints on city employee and contract laborers for a period of six months. When she received no response, she appealed. The City, through Mayor Thurby, indicated he had turned over the records to legal counsel and blamed the non-response on the termination of the City Clerk. He also argued that the request, coming in the middle of staffing changes and an audit, was an unreasonable burden.

The Decision noted that the City failed to issue an appropriate written response in three days to French’s request. It noted that the need to train new employees or an ongoing audit was not evidence of an unreasonable burden or “intent to disrupt essential functions.” The City provided no evidence of “time or

² Cabinet for Health and Family Services v. Scorsone, 251 S.W.3d 328 (Ky. 2008)

manpower” required to fulfill earlier requests from the same person, “much less proof of an inordinate amount of time and manpower.” The Decision concluded the ORA had been violated.

**11-ORD-127 In re: WLKY-TV / Cabinet for Health and Family Services
Decided August 16, 2011**

Alcock (WLKY-TV) requested investigative records relating to Dr. Judy Green from the CHFS, with respect to complaints of Medicare/Medicaid fraud. The CHFS denied the request, explaining that the request was not specific enough for the agency to identify the records being sought. The Cabinet identified an earlier Decision in support of its assertion which, the Decision noted, had been largely superseded by later relevant decisions.

The Decision noted that Alcock could not be expected to “request blindly, yet with particularity, documents ... he had never seen.” His “request was limited to a single named individual and to records still in existence under the applicable records retention schedule.” The Decision ruled that the CHFS was obligated to make a good faith search for all records responsive to the request.

**11-ORD-135 In re: Elizabeth Coleman / Cabinet for Health and Family Services
Decided September 6, 2011**

Coleman (an employee of CHFS) requested records related to her June grievance. She was notified that it would take longer than three days (by about a week) to fulfill her request for the documents. Having heard nothing for yet another week, Coleman appealed. She received a copy of the responsive document along with a letter indicating the document had actually been produced earlier, which Coleman denied having received.

The Decision noted that the initial response violated the ORA, as it failed to provide a “detailed explanation of the cause for delay.” (It noted that if, in fact, CHFS had mailed the single document it claims, that “confirms the lack of candor” in its response.) The Decision noted the response contained “boilerplate language that was in no way correlated to her particular request.” Further, the item that was produced suggested the existence of other documents, including notes and investigative documents, and the Decision trusted that the final action of the CHFS “was not taken in a paperless vacuum.” It noted that a public employee had a broad right to records, particularly with respect to an investigation the employee herself initiated. The Decision found that the CHFS violated the ORA by failing to disclose all records related to her grievance and ordered that it immediately make all records available to her for her inspection.

**11-ORD-137 In re: James Sparks / Greenup County Sheriff’s Office
Decided September 6, 2011**

Sparks requested all witness statements taken during an investigation in which Sparks was ultimately convicted. When he received no response, he appealed. At that point, the Greenup County Attorney responded that the Sheriff’s Office had no records responsive to the request. However, the Sheriff’s response, which also covered a related request for another item, indicated that the records were provided previously to Sparks’s defense attorney. (Apparently it did not specifically state that the Sheriff’s Office did not also have the records requested.) Upon appeal, however, the Sheriff’s Office stated it did not have documents responsive to the request in its possession. The Decision noted its initial non-response was inadequate in that it did not indicate affirmatively that it did not have the records, nor did it indicate at that

time as to the agency that held the records requested. (If it had the records, however, despite the fact the material was provided to the trial attorney, it was inappropriate not to again release the records to the requestor.)

**11-ORD-139 In re: Kristi Schank / Louisville Metro Emergency Medical Services
Decided September 8, 2011**

Schank requested ID photos from Louisville Metro EMS of five LMEMS workers suspended on a specific date. In the context of a larger Open Records request, LMEMS refused to disclose the photos, arguing they were protected under the privacy interests of KRS 61.878(1)(a). An earlier decision, 08-ORD-014, had agreed that “public employees have a cognizable privacy interest in their photos.”

The Decision noted that a photo does nothing to indicate how a public agency is serving the “broad public interest” or “executing its statutory functions.” The Decision upheld the denial of the requested photos.

**11-ORD-141 In re: Ilker Onen / Kentucky State Police
Decided September 8, 2011**

Onen (on behalf of the Department of Public Advocacy) requested all documents relating to the 1983 homicide of Heilman, in Henry County. KSP denied the request, stating that the investigation was still open. Onen argued that Parramore Sanborn had already been convicted in the case, although an appeal was pending in the U.S. Supreme Court. (KSP’s response noted the possibility of another criminal trial should the conviction be overturned.)

The Decision agreed that KSP met its requirement by properly asserting that the investigative file could be needed in another trial and ruled that KRS 17.150(2)(d) allowed for the records to be withheld.

**11-ORD-144 In re: William E. Sharp / Kentucky State Police
Decided September 14, 2011**

Sharp requested copies of documents “pertaining to the ability of law enforcement officers to obtain records from cell phone companies that reveal the past or present travels of cell phone users.” He specifically requested eight categories of records. KSP refused to produce some of the records, arguing that the retrieval of those records “would impose an unreasonable burden” and would violate the privacy of some of the individuals who had been called by targets of previous investigations. KSP noted that it would be necessary to pull every case file from every post and branch to determine if there were any responsive records, because the records would be treated just like any other evidence in a criminal case and KSP had no tracking system to find that particular type of case. (Specifically, they could not tell which cases had search warrants or subpoenas related to cell phone location data, and in the relevant time period, they had opened approximately 52,000 cases.)

The Decision agreed that KSP offered “clear and convincing evidence that the time and manpower required to fulfill Mr. Sharp’s request is not a function of inefficiencies in its record keeping system but is, instead, a function of the expansive scope of his request.” The Decision agreed that if Sharp was willing to conduct an “onsite inspection” of the cases closed in that time frame, KSP could respond to that request, and could also respond to a request for a specific case file. However, the request, as it stands, was an unreasonable burden on KSP.

11-ORD-146

**In re: The Kentucky Enquirer / Boone County Sheriff and Boone County
Public Safety Communications Center
Decided September 16, 2011**

Kelly (The Kentucky Enquirer) requested records from both agencies regarding a homicide. Although the Sheriff's Office originally denied a request, stating that the records did not exist, it later released the incident report of the crime after redacting only appropriate personal information. As such, the appeal focused only on the denial of the 911 recording and log entry relating to the crime. The PSCC denied the full record, arguing that the call contained "primary evidence establishing critical elements of the offense that are central to the Sheriff's investigation." (Apparently information was redacted and that copy was provided.)

The Decision agreed that the PSCC's response and its desire to hold back certain information known only to the persons who had actually been at the scene was adequate justification for refusing the complete record. (The Decision indicated that the OAG had made an in camera review of the complete recording and the unredacted log.)

11-ORD-149

**In re: James Sparks / Greenup County Sheriff's Department
Decided September 20, 2011**

Sparks asked for a copy of a surveillance tape pertaining to a robbery in South Shore. The response from the Sheriff's Department was that the video had already been disclosed to his attorney. The Sheriff later suggested he get a copy from the prosecutor or the courts. Sparks appealed. Sheriff Cooper agreed he'd told Sparks the materials were available from his own attorney and that all records relating to his prosecution were in the possession of the Circuit Court Clerk and/or the prosecutor. The Decision noted that as there is "no specific exception" that allows one public agency to fail to produce records simply because they may be obtained from another agency, "even if the requested records might more appropriately or more easily be obtained from that other public agency." (The Decision also noted that neither of the other agencies "was legally obligated to disclose the requested" item – although the sheriff is "legally obligated to disclose it if he has a copy.")

The Decision required that the Sheriff's Department violated Open Records by failing to disclose the surveillance tape, having not raised any other viable objections to doing so.

11-ORD-156

**In re: Kenny Goben / Louisville Metro Department of Corrections
Decided October 4, 2011**

Goben requested copies of surveillance video taken in the LMDC Sallyport and the Grill between specific dates and times that would show him being processed into the jail. He had made an almost identical request earlier. LMDC responded that he had no video responsive to the request and the Decision noted that it could not produce what it did not have and ruled in favor of LMDC. However, the matter was referred to the KDLA because the appropriate Records Retention Schedule, L5166, requires that such items be retained for at least two years; LMDC admitted that it only retained such records for a year. In addition, LMDC had stated that the video in question was "irretrievably corrupted" and it failed to notify KDLA of that fact, by using a records destruction certificate. Further, the reason for the corruption appeared to have been preventable had adequate safeguards, such as a surge protector, backups and off-site storage, "been employed to lessen its vulnerability."

**11-ORD-165 In re: William A. Yeagle / Department of Kentucky State Police
Decided October 13, 2011**

Yeagle requested copies of witness statements in connection with a murder for which he was convicted. Because further litigation was possible in his case, KSP denied the request under KRS 17.150(2) and 61.878(1)(h). The Decision agreed that his case was not yet final for purposes of the ORA and found in favor of KSP's position.

**11-ORD-166 In re: Larry Bailey / Whitley County Clerk
Decided October 13, 2011**

Bailey requested to use his handheld scanner or non-flash camera to reproduce records in the deed room. He was not allowed to do so, with the Clerk advising him that the fee (50¢ a page) was to support the Clerk's Office. The Decision noted that absent an indication that his doing so would somehow damage the records, the Clerk subverted the intent of the act in refusing his request. Even if doing so would someone damage the records, the Decision further noted that the Clerk was attempting to impose excessive copying fees. The Decision noted that there was little law on the matter, but that Kentucky's law must be interpreted in a manner most favorable to the public interest. The Decision agreed that his proposed method would likely be less damaging than conventional copying methods which require the book to be disassembled or the book held against the glass of a copier or scanner. The Decision found in Bailey's favor.

**11-ORD-168 In re: Frank Boyett / Kentucky State Police
Decided October 19, 2011**

Boyett (The Henderson Gleaner) requested copies of tables in the CCDW/LEOSA database in ASCII format. KSP initially responded that the database was designed to be incapable of doing anything more than the annual statistical report and that the records contained therein were confidential pursuant to KRS 237.110. The Decision agreed that it was clear statutory intent that the data be kept confidential from all but law enforcement agencies. The Decision agreed that the data requested could not be released absent a court order and found in favor of KSP's position.

**11-ORD-171 In re: Herbert Deskins, Jr. / Kentucky State Police
Decided October 24, 2011**

Deskins (an attorney) requested a copy of the CAD report concerning his client's arrest. KSP refused the request, noting that the investigation was still open. His client had been indicted, at that point, and the case was pending in Pike Circuit Court. The Decision agreed that it was properly denied, although presumably, the information would be available at some point through discovery.

**11-ORD-172 In re: Kim F. Quick / Kentucky State Police
Decided October 27, 2011**

Quick (an attorney) requested the results of alcohol/toxicology tests done on Loy, following a wreck that resulted in Barnes' death. (Quick was representing the Barnes' estate.) KSP denied the request, noting that the alcohol testing was complete but that the toxicology requests were not. Further KSP noted that the matter was still an open investigation under the Campbellsville Police Department (and also the Taylor

County Sheriff's Office) and were properly held back under KRS 61.878(1)(h). The Decision upheld KSP's position.

**11-ORD-180 In re: John M. Smith/ Greenup County Sheriff's Department
Decided November 3, 2011**

Smith requested to view evidence log sheets from two specific cases. He received no response and appealed to the Attorney General. Neither the Sheriff nor the County Attorney responded to the notice of appeal. Because of the inaction, the Decision ruled that the Sheriff's Department must provide Smith with copies of existing records responsive to the request unless the Department can articulate a valid reason not to do so. Until the Sheriff's Office does so, it remains in violation of the ORA.

**11-ORD-182 In re: Judy Ponder / Oldham County Planning & Development Services
Decided November 3, 2011**

Ponder requested records concerning a particular zoning case. The belated written response invited Ponder to do an on-site inspection of all records relating to the property in question, rather than initially providing her with copies. The Decision agreed that the ORA contemplated on-site inspection by requestors who live in the county in question, or who have their principal place of business there and they could be asked to make a site visit to avoid the unnecessary copying of records. Given the "broad scope" of her request, the Decision did not find it to be error to request that she come in person to review the records, since she lived in the county.

**11-ORD-185 In re: William E. Sharp / Lexington / Fayette Urban County Government Division of Police
Decided November 4, 2011**

Sharp requested information pertaining to "the ability of law enforcement officers to obtain records from cell phone companies that reveal the past or present travels of cell phone users" for a period of over two years. The LFUCG responded that they had three documents which they would forward upon his payment of appropriate fees. It further noted that it had other records possibly responsive but that it would take a manual search of the documents which would be time-consuming. Sharp appealed and the LFUCG responded that it does not index the records in such a way that would readily produce the requested information, and would also require a search of literally millions of emails produced during the time frame. The Decision agreed that his requests were vast in scope and that it would be unduly burdensome. (On a side note, however, the Decision cautioned the agency that it "would be well advised to provide specific proof of an unreasonable burden in denying future requests" when it wished to avail itself of the protection.)

**11-ORD-190 In re: The Messenger / Hopkins County-Madisonville Public Library Board
Decided November 14, 2011**

Bryan (Madisonville Messenger) requested a job description for the library director, along with recent job performance evaluations and reprimands/disciplinary matters. The Board refused to provide performance evaluations and disciplinary actions taken against employees, arguing they were exempt under KRS 61.878(1)(a). Applying the case-by-case analysis on privacy required under Cape Publications v. City of

Louisville,³ the Decision concluded that portions of the evaluation must be disclosed but that truly personal information could be redacted. It noted that the evaluation should shed light on the operation of the agency in question, and as such, was subject to open record review. The Decision noted that “citizens are entitled to know that public employees are qualified for the positions they hold” and upheld the position of The Messenger.

**11-ORD-195 In re: Eric Cunningham / Kentucky State Police
November 21, 2011**

Cunningham requested inspection of the lab report for a specific case. It was denied on the basis of being an open investigation in Lee County. KSP noted that he should use discovery to obtain the document in due course. The Decision found in KSP’s favor.

**11-ORD-202 In re: The Paducah Sun / Office of the Western Kentucky Regional Medical Examiner
Decided November 30, 2011**

Reed (The Paducah Sun) requested autopsy reports for three individuals. The Medical Examiner denied the reports under KRS 17.150(2) and 61.878(1)(h). The Decision agreed that the circumstances justified the denial of the request as the cases were still open with KSP and the county coroners in question and upheld KSP’s position.

**11-ORD-210 In re: Courier-Journal / Department of Criminal Justice Training
Decided December 9, 2011**

Lord (The Courier-Journal) requested documents related to the enrollment of David Whitlock, a Jefferson County Constable, in DOCJT classes. The DOCJT produced the records of courses he attended but did not release test or examination results on the basis of KRS 61.878(1)(a). The Decision indicated that in the interest of the public, in this case, it was necessary to release the records when the person in question holds, or is seeking, an elective office. This was particularly important in that Whitlock enrolled in classes related to his work and intended to better qualify him to discharge his duties, as such, the public is entitled to know if he was successful in those classes. The Decision noted that the incident in which Whitlock had recently become involved only highlighted that it was important to know whether he’d been successful in related classes. The Decision ruled that the records should be released.

**11-ORD-212 In re: The LaRue County Herald News / LaRue County Judge/Executive and LaRue
County Jailer
Decided December 16, 2011**

Ireland (The LaRue County Herald News) requested copies of records related to the settlement of a recent lawsuit against the Detention Center. The County Judge-Executive and the Jailer both indicated that they had no records related to the case. However, ultimately, the agreement surfaced and the Decision indicated that settlement agreements are public records subject to disclosure. However, because the LaRue Circuit Court had ordered the agreement to be confidential, it was necessary that the issue be resolved by the court. It agreed that the Court held in Lexington-Fayette Urban County Government v.

³ 191 S.W.3d 10 (Ky. App. 2006).

Lexington-Herald Leader Company,⁴ that a public agency could not circumvent the ORA by agreeing to keep a settlement confidential although personal data could be redacted. However, in this case, the parties indicated they did not have a copy of the agreement, which was apparently in the hands of the county's insurance carrier. The Decision, however, resolved that since the court had ordered the settlement to be confidential, only the court could open the record.

**11-ORD-217 In re: Sam Aguiar / Lexington-Fayette Urban County Government, Department of Public Safety
Decided December 21, 2011**

Aguiar requested copies of the 911 tapes, etc., with respect to an incident occurring at a particular location, on May 31, 2010. He followed up with a request related to a particular incident that occurred on March 21, 2009, and a few days later, asked for the EMS/fire run report. The 911 recording was denied on the basis of Aguiar not being the person who made the call, but LFUCG agreed to provide a transcript.

Aguiar did not challenge this response until September, 2011, at which point the 911 recording had been destroyed pursuant to the usual destruction schedule for such items. Aguiar (an attorney representing a client injured in the incident) requested a court order compelling the production of the unredacted transcript and audio, but the Decision ultimately noted that no unredacted copy of the recording existed and as such, it could not be produced. It noted, in addition, that Aguiar's delay contributed to the problem and as such, the issue was moot.

**11-ORD-218 In re: The Courier-Journal / Lake Dreamland Fire Department
Decided December 27, 2011**

Halladay (The Courier-Journal) requested certain documents, including rosters and purchase orders. She initially made the request informally by email, asking particularly about the firefighters who also worked for other departments. The Chief gave her the number but asserted that the names and other departments were irrelevant. She stated that the email was an open records request but would send a more formal letter if he preferred, but he responded that the records she requested would not be released. Two mailed requests went unanswered and she appealed. The Decision did not find the response adequate as it did not cite to any exception or other legal authority for withholding the information requested. It found the failure to respond to the requests particularly egregious, and found the lack of response both substantively and procedurally deficient. The Decision found in Halladay's favor.

⁴ 941 S.W.2d 469 (Ky. 1997).

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.