

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2011



Leadership is a behavior, not a position

OPEN RECORDS
DECISIONS
2011 – FIRST HALF



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.



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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. 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. 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 hold, 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 Louisville Metro Police Department (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 .

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 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. Further, he was told that several thousand more 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, it found 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 about a request is appropriate, that 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 do 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, he 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 justified 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. Under the law, 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 its 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, if "ultimately adopted as the basis or a part of the agency's final action" are in fact final documents. 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. 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. It also 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 Harris 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, but by another agency. (However, the records themselves existed and were apparently in the possession of the Tompkinsville PD.)

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 in which to do it. The District also 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 availability of a particular 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, they were 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, that KSP failed to support its argument for nondisclosure. A "bare allegation" that it was the case 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.

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.