2015
Decisions 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. It is possible that one or more of these Decisions are being appealed; these cases will be reflected in the Quarterly Case Law Updates of this agency.

Note that some Decisions do not directly involve a public safety agency, but are included due to the principles discussed and their likely applicability in the future to such agencies.

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

15-ORD-018 In re: Lawrence Trageser / Spencer County Clerk
Decided February 3, 2015

Trageser requested documents or records reflecting video recording done within the agency on a specific date. The Clerk responded that satisfying the request would require the creation of an electronic document (flash drive). The Clerk also indicated that they do not maintain such electronic documents of video surveillance. Trageser responded with photographs of security cameras as proof that such surveillance was performed and provided evidence that the Clerk had received approval from the Fiscal Court to purchase a recorder for the cameras. Trageser also pointed to the Records Retention Schedule, L5364, that such recordings must be maintained for 30 days. (He also noted that the Fiscal Court, which fee pools with the Clerk, provides such DVD copies for $1.)

The Clerk responded that the recorder had been removed at an earlier time for unrelated reasons and that the Clerk assumed that video was being preserved to a hard drive. However, upon inquiry the vendor had indicated that the DVR did not have a hard drive and thus no record was created.

The Decision noted that a public agency cannot provide records it does not have, but that denial of a record must be explained in clear and direct terms – and if it does not do so, it is deficient. As such, although the ultimate denial and explanation were sufficient, the failure to provide the explanation promptly made the response procedurally deficient.

15-ORD-029 In re: Lawrence Trageser/Spencer County Sheriff's Office
Decided February 12, 2015

Trageser requested the personnel files for two named deputies. The Sheriff's Office responded that the files were currently in use for one deputy and in storage for the other, as he had left the sheriff's office." As such, additional time would be needed to retrieve them, and there were anticipated necessary redactions due to personal information in each file. The Office indicated an anticipated date the records would be ready as 10 days in the future. Trageser appealed, but before it could be processed, the files had been produced.

The Decision noted that the issue was not moot, since there was a question of timeliness. The Decision found that there was a procedural violation since the records were not produced within three days, and no adequate explanation was made for the delay, with the Decision noting that the "mere statement that records were "in use" or "in storage" does not constitute a "detailed explanation of the cause … for further delay." Since reviewing and redacting files is an ordinary part of fulfilling a request, it does not constitute, in itself, a reason for any additional delay.

15-ORD-032 In re: Marvin W. Phipps/Kentucky State Police
Decided February 19, 2015

Phipps requested notes of a meeting involving his complaints against three state troopers along with copies of any paperwork or recordings made. KSP responded that the meeting in question was "closed" and not recorded, and claimed the exemption under KRS 61.878(1)(i) and (j), which allows the non-disclosure of preliminary documents which may express opinions and are not indicative of final action by the public agency. The OAG was provided with the contested withheld record, which consisted of a "few lines of typed notes in what appears to be a two-page summary of the matters discussed at the classification meeting." The document did not include a recommendation but did contain expressions of opinion. The Decision looked to 01-ORD-47, which listed the ways such records "may retain or lose their exemption after final agency action is taken." If the record is adopted as part of the final action, it forfeits its "preliminary characterization." If not, they do. If the final actions "necessarily stem[s] from 'that document,' it is considered by be adopted. In this case, although it was noted that recommendations may have been made orally, they were not reflected in the meetings notes. As such, it was properly withheld.

15-ORD-038 In re: Enquirer Media/City of Florence
Decided March 9, 2015

Van Benschoten (Enquirer Media) requested a robbery incident report from a specific date and time, and which resulted in a multi-county pursuit of a suspect involving Florence PD. (The suspect was ultimately located and shot the day after the pursuit by an officer with another agency.) The Florence PD denied the record as part of an ongoing investigation under KRS 61.878(1) (h), (i), and (j). Enquirer Media appealed,

arguing that the Kentucky State Police was actually handling the investigation. Further, it argued, the city demonstrated no harm from releasing the record, and since the suspected robber was deceased, Enquirer Media argued that any local investigation was moot. The Decision noted that this was a matter of first impression for the ORA, in that the "the requestor is seeking information which has been forwarded to another agency of wider jurisdiction and made a part of that agency's continuing investigation. . . . If portions of the State Police investigation, which would likely be exempt from a direct ORA request to that agency, can be obtained from another agency who supplied that information to the State Police, then the purpose of the legislature in creating the law enforcement continuing investigation protections would be frustrated."

The Decision noted that the OAG has "generally deferred to a law enforcement agency's classification of an investigation as inactive, active, or closed, fully recognizing that this office lacks authority to compel a public agency to close an investigation for Open Records purposes . . . ." 12-ORD-098." Since the events in question were very fresh, having occurred only a month before, it would not override the agency's claim of an open investigation.

With regards the incident report, the Decision noted that when there is concurrent jurisdiction in an investigation, both investigations must be considered, but "it is incumbent on the agency resisting disclosure of the requested records to "provide particular and detailed information" and to articulate the basis for denying access to the specific documents requested in terms of the requirements of that exemption." In this case, Florence "did not meet its burden to assert the law enforcement exemption on behalf of the Kentucky State Police." Further, "police incident reports are final documents which are reports of fact, and not preliminary documents." Nor did the City "demonstrate the harm that would result from the release of information in order to invoke the law enforcement exception, either on its own behalf or on behalf of the Kentucky State Police." As such the failure to provide the incident reports violated the ORA.

15-ORD-041 In re: Roger Lambert/Kentucky State Police
Decided March 9, 2015

Lambert requested a copy of video footage that showed his visit to KSP Post 3 on a specific date and time. KSP denied the request, stating that "public disclosure of the video would reveal the video recorded locations and blind spots, which would endanger the life and physical safety of both sworn police officers and dispatch personnel, and would create a risk of serious physical injury of law enforcement personnel." It also argued that it was too burdensome to produce. Upon his appeal, KSP further invoked KRS 61.878(1)(m), arguing that the camera was part of the post's security system. Lambert's respond is that he only sought images of a purported altercation he had with a KSP trooper in the post lobby.

The Decision noted that producing what amounted to five minutes of video, but that KSP has made no showing, by clear and convincing evidence, that releasing the

footage would reveal anything of risk. With respect to the "homeland security exemption," the Decision noted it was not sufficient to simply claim the release "could expose a vulnerability," but there must be a "reasonable likelihood" that the public safety would be threatened by the release by a terrorist group. In this case, the risk would be to individual officers or employees, but no the general public. Further, simple footage from a camera is not what is contemplated in the statute. As such, the exemption does not apply.

15-ORD-048 In re: Kenneth Arkenau/Harrison County Fiscal Court
Decided March 17, 2015

Arkenau requested the name of an individual who had reported him, via a phone call, in an animal abuse matter. He was told that information did not exist. He followed up with a request for the records of the possible violation, apparently directed to Fryman, the Animal Control Officer, but received no response. Upon appeal, the County insisted there was no record of the name of the caller, although it may have been "jotted down" at some point, it was now non-existent. The Decision agreed that the County could not produce a record it did not have. With respect to the second request, which was properly framed and hand-delivered, despite the County assertion that it was identical to the first request, the Decision noted that the two requests were not, in fact, identical. In the facts as presented, Fryman was obligated to pass it on to the official custodian and the county was obligated to search for the requested record, and then to advise Arkenau of the findings.

15-ORD-049 In re: Lawrence Trageser/Spencer County Fire Protection District
Decided March 17, 2015

Trageser requested the private phone records of the chairman of the FPD Board, to determine the origin of a telephone call. The FPD denied the record, stating that they were both private and personal records. Upon appeal, Spencer County further noted that the record was not in the county's possession or control, as the telephone was the personal possession of the individual in question. The Decision agreed that the records were not public records under the ORA.

15-ORD-053 In re: WLKY-TV/Jefferson County Public Schools
Decided March 19, 2015

WLKY requested a surveillance video from on board a JCPS school bus. The JCPS denied the recording under Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and Kentucky Family Education Rights and Privacy Act ("KFERPA"), KRS 160.705. (What was depicted in the video was the subject of a criminal complaint against a police officer.) WLKY argued that the videos were not education records but instead were made in the ordinary course of monitoring the security of the school. JCPS argued that redaction of children in the recording would be impossible. Following

this, at least part of the video was shown in open court and documented by the news media present, and then available to the public through that media outlet.

The Decision noted that FERPA/KFERPA provides for the protection of education records for elementary and secondary school students. In Medley v. Bd. of Educ., Shelby Cnty., 168 S.W.3d 398 (Ky. Ct. App. 2004), the court had agreed that video recordings from inside a classroom were education records. Further, the FERPA rights of other students might be implicated in a recording as well, and it was agreed that redactions would prove virtually impossible. In two earlier decisions, 07-ORD-005 and 12-ORD-034, the OAG had agreed that bus video was protected. Another decision, however, 11-ORD-106, which involved only adults, was releasable as it was possible to redact the faces of the children in that case. The case in question, however, involved an adult and a student, and also depicted multiple children in the frame. As such, the JCPS was permitted, even required, to deny the request absent written consent from all parents involved.

15-ORD-056 In re: Lawrence Trageser/Office of the Spencer County Attorney
Decided March 25, 2015

Trageser requested a variety of records, reflecting local government meetings and regarding the purchase of camera surveillance equipment in the Sheriff's Office, and complaints concerning sexual harassment or misconduct. The County responded with respect to the first request that the recording had been "recorded over" and was unavailable. The Decision noted that an agency could not provide what it did not have, but noted that the absence of the record suggested a records management issue, as the item should have been retained for 30 days under the Retention Schedule, provided that minutes have been transcribed and approved. (The recording should be retained if the minutes were challenged.) Since the request was made within 8 days of the meeting, its absence would "necessarily be out of compliance with the records retention schedule." With respect to items connected to the Sheriff's Office, the county responded that the request should be made directly to the Sheriff's Office. The Decision noted, however, that the records in question were allegedly maintained by the Judge-Executive, and not the Sheriff's Office, although they related to the Sheriff's Office, and thus the denial subverted the intent of the ORA. With respect to the last, the county provided the policy for reporting sexual harassment and misconduct, which was not what the request asked for – noting that it was "unambiguously clear" that he was not asking for the policy but for actual complaints filed under the policy.

15-ORD-058 In re: J. Robert Cowan/Jessamine County Emergency Services
Decided March 31, 2015

Cowan requested information, both recordings and written records, concerning a specific call which generated an EMS response. (Apparently Cowan's client was the party involved in the call.) Jessamine County EMS requested a signed release from the

client and the completion of a preprinted form. However, the records were provided to Cowan before he appealed, without the completion of the form. The County noted the release was pursuant to HIPAA as some of the records were protected both under federal medical privacy provisions as well as contained information of a personal nature. The Decision noted that the county should have better clarified that the use of the form for requests was optional and should further advise which documents were withheld pending the proper release

15-ORD-063 In re: Marvin Pennington/Lexington-Fayette Urban County Division of Police
Decided April 8, 2015

Pennington requested records from his criminal case file from the LFUCG. When he received nothing and appealed, the County advised it had not received the original request. He was further advised that the PD was checking with the Commonwealth Attorney to determine if he had an active appeal and he would receive an update in 5-7 days. It was further confirmed that the records were in storage due to age. Upon followup, the request was denied, as the trial court had sealed the trial recordings. However, the Decision noted that it was unclear how a court order sealing certain videotapes justified withholding all of the records requested.

15-ORD-064 In re: David Hull/Kentucky State Police
Decided April 8, 2015

Hull requested documents relating to complaints against a named KSP trooper. KSP responded with some records, and denied others under KRS 61.878(1)(i) and (j), which exempted records of a preliminary nature. The OAG, having received the denied records, discussed when a record is considered preliminary and noted that the document in question was simply a form that recorded the attendees of the meeting and the disposition of the complaints considered at the meeting. As the complaint was classified at that meeting, it was agreed that the final agency action did occur as the result of the meeting and as such, it was not preliminary and should have been released.

15-ORD-067 In re: Lawrence Trageser/Hopkinsville Police Department
Decided April 14, 2015

Trageser requested via email documents concerning a former Hopkinsville PD employee, of resumes, disciplinary information, resignations and investigations. The City Clerk responded with some documents with personal information redacted under KRS 61.878(1)(a), and preliminary notes were also held back under (1)(i). Upon reviewing the withheld documents, the Decision noted that the agency failed to provide any explanation as to which of the documents formed the basis of their final action, but maintained that only the initiating complaint and the final action were subject to inspection. This, the Decision noted, violated the act and that "Those records or portions thereof which did not form the basis of the agency's final action, whether

explicitly or implicitly, maintained their preliminary characterization; the remainder were improperly withheld from disclosure and must be separated and made available per KRS 61.878(4).

15-ORD-073 In re: Enquirer Media/Covington Police Department
Decided April 22, 2015

Molski (Enquirer Media) requested all incident reports, records and 911 recordings from a specific incident involving a homicide. The request was denied because it was an open investigation. Upon appeal, Molski argued that the CPD did not meet the requirements as it failed to explain how the invoked exemptions applied to the record in question. The Decision noted that in fact, the request was made via email, which was not a "statutorily recognized method of submission" and was sent to the wrong party, as City of Covington has a dispatch system separate from the County. The Enquirer noted that any objection to email was waived when CPD responded via email. (It noted that if any agency did not wish to accept such requests, it should make it clear in its policy and not respond to emails.) Further, it agreed that Covington PD should have informed Molski that any request for 911 information must come from Kenton County. Ultimately, however, CPD agreed to release all responsive records which mooted the issue.

15-ORD-075 In re: R. G. Dunlop/Kentucky State Police
Decided April 24, 2015

Dunlop requested from KSP a copy of all investigations relating to the Grant County Detention Center or any employees for a specified period of time. The request was denied for lack of specificity. Dunlop responded noting that the request did specify a particular investigation (initiated in 2012), and noted that he could not be more specific as the details had not been released by KSP, and that the investigation would be known within the agency. He further expanded his request to cover the prior 15 years, and that KSP did not cite the prior request as being overly burdensome. The response from KSP noted that it did not know the identities of all jail employees to allow such a search, but did not indicate any attempts to search for responsive records. The OAG agreed that it would prove difficult for KSP to respond to such a request, as it would be impossible for them to know the names of all present or former employees of the GCDC. However, the second part of the request was more specific, and noted that it was public knowledge that KSP was, in fact, investigating the GCDC, and that the Dry Ridge Post would be privy to it and it was necessary for the KSP to communicate with the Post for further information.

The Decision also address Dunlop's request be mailed, as he resided outside the county in question. Providing that the records could be specifically described, it was necessarily that such documents be mailed if requested and paid for.

15-ORD-077 In re: Kenneth White/Kentucky State Police

Decided April 24, 2015

White requested all material relating to his own criminal case. KSP responded that the case is still open and thus was withholding the records, under KRS 61.878(1)(l). White argued that the case was twelve years old and that he and his two co-conspirators were in prison. (Kenneth White was convicted in the murder of Sheriff Sam Catron, in Pulaski County, in 2002.) KSP noted that although they were convicted, there was a "significant chance for further proceedings. The OAG noted that when a public agency relied upon that exemption, it was critical to be specific. "First, a public agency must establish that it is a law enforcement agency or a public agency involved in administrative adjudication. Id. Next, it must establish that the requested records were compiled in the process of detecting and investigating statutory or regulatory violations. Id. 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 language of the statute, however, requires that there is a "legislative resolve that the exception be invoked judiciously, and only when each of these tests have been met." The exemption may be invoked only when there is an articulable factual basis for it and only when there is a "concrete risk of harm to the agency in the prospective action." The agency is also required to provide the requester with enough information about the withheld record and the harm to allow the court to decide. KRS 17.150 requires the agency to specify "what that action is or could be." In this case, the Court agreed that KSP's response was sufficient.

15-ORD-078 In re: Angel R. Juarez/Boone County Sheriff's Department
Decided April 24, 2015

Juarez requested all documents in his file (47 pages and a DVD) from the Burlington PD, which does not exist. Apparently, when he received no response, he appealed, and the appeal was forwarded to the Boone County Sheriff's Office (which was called the Police Department in the OAG Decision.). He was charged 4.70 for the copies and $1 for the DVD, but subsequently, they discovered that they did not have the recording. He objected to that, and to the failure to "produce the laboratory reports and detective notes that he specifically requested as well as the unexplained redactions to the reports with which he was furnished." (The agency explained the confusion in a supplemental letter.) The Decision agreed that they did not violate the Open Records Act by its response, and that it properly directed him to where it might be found (the Circuit Court Clerk). However, the agency did not identify the statutory support for the redactions. The Decision also noted a concern for the disappearance of the only copy of a record, which under the Records Retention Schedule for such items (L4662, 80 years). This indicated a records management issue and it was referred to the Dept. of Libraries and Archives.

15-ORD-079 **In re: Lawrence Trageser / Spencer County Sheriff's Office Decided April 24, 2015**

Trageser requested all records (audio/video) regarding the execution of a search and arrest warrant at his home in 2012. The Sheriff's Office responded it had no such record. Trageser appealed, arguing that the failure to have the item was a records retention issue, and he produced a copy of the video (with no explanation as to how he obtained it.) The Sheriff's Office explained that it may have been given to Trageser when property seized during the search was returned to him. The OAG noted that while the Sheriff's Office could not provide what it did not have, its failure to have the items suggested a records management issue. (It also questioned the Retention Schedule under which Trageser believed it should be considered, and in fact, held that the proper record retention category was L4663, which has a five year retention schedule. The fact that he already had a copy did not relieve the Sheriff's Office from an obligation to provide it. Certainly, the Sheriff's Office could not produce what it didn't have, but not having it reflected a records retention issue.

15-ORD-080 **In re: Lawrence Trageser/Jefferson County Sheriff's Office Decided April 24, 2015**

Trageser requested records reflecting an investigation of a named deputy. He was provided with four responsive records but denied other records under KRS 61.872(6) and KRS 61.878(1)(h), arguing that it would unreasonable burden to identify other deputies, who were also on taskforces and in some cases, working undercover. Additional documents were denied under KRE 503 – attorney client privilege. Upon appeal, the Sheriff's Office provided additional information to justify what it withheld, including for example, the deputy's home address. Upon request, the OAG received the documents in question and grouped them into several categories. Upon further discussion, the OAG noted that there was a lack of information as to how certain information withheld is protected from disclosure, and noted that a "particularized justification" is required for each item withheld, with statutory references. It noted that in most cases where there is a dispute, both sides have equal knowledge of the relevant facts, but in ORA cases, only the public agency knows what it holds. As such, it was not enough to simply paraphrase a statute, it is necessary to describe the documents withheld and establish all the necessary elements to authorize the withhold.

With respect to "FBI Documents," the agency "belatedly invoked KRS 61.878(1)(k), which invoked federal law and citing that the records were "federal" documents. However, the OAG noted that ""FOIA has no force as to state records, only the records of a federal agency." It noted that if the Sheriff's Office can establish that they were "loaned" records under 28 U.S.C. 534, the agency might successfully withhold them, but that FOIA exceptions were immaterial to an ORA case.

With respect to certain records identified as "pre-termination/pre-decisional" – the OAG noted that "the agency's response that such documents are not a "final action" is not dispositive." The Sheriff noted that he did not adopt what was in any particular record

in the file as his decision, but instead, that he based his final decision (a suspension) on those things told to him specifically by the deputy. As that was reflected in the internal affairs report in the file, that removed the item from "preliminary status." Such records may not be withheld simply because it includes some protected information, it must, instead, separate the protected from the not protected material.

The OAG agreed that the records withheld under attorney-client were in fact, properly withheld under that argument.

15-ORD-093 In re: David Murrell/Louisville Metro Police Department
Decided May 26, 2015

Murrell requested records related to a 1994 homicide case in Louisville. Due to the age of the file, LMPD responded that it would have to do a search, and gave a projected date for response. A few days before that day, it emailed the requestor that it would have to extend the date for approximately a month more. Murrell appealed, arguing that the delay appeared unreasonable. The OAG noted that the initial delay was reasonable, but that the second response did not explain why the additional time was needed. Eventually, but before the projected date, he was provided with a CD containing 456 pages, with 32 pages being withheld (polygraph and NCIC records) and certain personal information redacted. 18 cassette tapes were available and transcripts were included in the records provided. The decision agreed that Social Security numbers, birth dates and addresses/phone numbers of private citizens were properly redacted. With respect to the polygraph information, it was unclear whether Murrell's client was the subject of the polygraph, if so, then withholding it might be improper, as the privacy interest would no longer apply. NCIC records were properly withheld under KRS 17.150(4). The OAG found that while there was a procedural error in the lack of explanation for the lengthy delay, there was no violation beyond a possible issue with the polygraph.

15-ORD-095 In re: Kristina Goetz/Department of Alcoholic Beverage Control
Decided May 29, 2015

Goetz requested all records filed with the ABC for a period of approximately 5 years. The initial response noted that the records were held in different locations and indicated there would be a delay, but gave no timeframe. Upon further correspondence, the PIO (who was new) responded that she could only provide a total number, but the requestor reiterated she wanted the actual complaints. Upon appeal, the ABC indicated that the newest records were held in a digital format, but that older records were available – even though they should have been purged after two years. It was also discovered that a feature built into the new computer system that allowed it to create a document that mimicked the old complaint form. The Department identified approximately 2250 responsive records, but noted that some might be excluded as law enforcement records on open cases or that would identify informants. It agreed to release all closed complaints, and that it would review open matters (335) to determine if releasing

information would harm those cases. It also noted that attorney-client privilege might apply to some records as well.

The Decision noted that confidential informants could be withheld, as it was not necessary to serve the purpose of the ORA, even if the case was actually closed. (In fact, given the nature of ABC investigations, a CI could provide information in the future as well, as "industry members." The ABC relies heavily on public complaints and has limited staff, so protecting a CI's identity was critical. Ultimately, the ABC made a number of records available, and detailed what was held back, and why. Premature release of open records would damage the ongoing investigation, which was often performed without the knowledge of the business owner under investigation.

The OAG agreed that certain information could be held back categorically, such as identifying information, birth dates, etc. With respect to redactions based on law enforcing grounds, it agreed that holding back information under KRS 61.878(1)(h) and KRS 17.150 on confidential informants was also proper. Other information, such as calls that didn't indicate a violation of the law, were never documented because it was not assigned to an investigator, was also properly denied, as the record did not exist.

15-ORD-098 In re: Tyler Fryman/Lexington-Fayette Urban County Government – Division of Police
Decided June 2, 2015

Fryman requested all records relating to the shooting of a dog in 2010 by Lexington police, including training courses, settlements, presentations, official response and emails. (He also requested that all fees be waived in the public interest.) The request was faxed and when he arrived to pick up documents, Officer Kidd asked for a physical address to provide a proper written response – Fryman had provided an email and phone number. Fryman "reluctantly agreed." Officer Kidd's written respond indicated he was including a dispatch log but that the only other document in existence was an incident investigation report. Other records had been destroyed pursuant to the records retention schedules. Fryman appealed, arguing that it was not proper to require him to provide an address and that he should have been given time to review the records. The LFUCG noted that Fryman picked up the responsive documents, paid .90, and left without asking to inspect them first.

The OAG noted that the responding agency may not go beyond what the General Assembly provided, and the General Assembly did not require that an address is required. Certainly a valid mailing address might be needed in some cases, but in this situation, he had communicated via fax (with email and phone number) and that was adequate. There is, however, no requirement that an agency waive fees for any reason. He was certainly entitled to inspect the records prior to copying, and to decide if he in fact wanted copies, but whether there was a denial access was not clear from what was provided to the OAG.

15-ORD-105 In re: The Jessamine Journal/Jessamine County Emergency Services
Decided June 11, 2015

Essig (The Jessamine Journal) requested Cad reports and audio recordings on a police-involved shooting. The dispatch agency denied the information on the ALI (Automatic Location Identification) information on the basis of KRS 61.878(1)(l), referring to KRS 65.752(4), with prohibited disclosure of such information. The 911 recording was denied as a personal privacy issue under (1)(a), as a preliminary draft under (1)(i) and as an ongoing investigation under (1)(h), as well as citing Bowling v. Brandenburg, 37 S.W.3d 785 (Ky. App. 2000). The incident was under investigation by KSP, which advised the information was not available for public release. Essig argued that Jessamine County failed to cite any specific harm that could result from the release. Upon the appeal, JCES elaborated further and noted that the information had been collected by JCES on behalf of KSP's investigation, and that investigation was still active and ongoing pending criminal prosecution. The audio recordings included potential witnesses, and release of the information could compromise their recollection of the events and affect their veracity, as well as taint the grand jury pool. Looking to City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013), which discussed the law enforcement exemption at length. Although 911 recordings may not be categorically withheld, under a proper showing of harm, they could be held back pending prosecutorial action. The request, in fact, was made within 48 hours of the shooting. Given that information, and the detailed rationale provided by JCES, the OAG agreed it was proper to withhold the information.

15-ORD-123 In re: The Cincinnati Enquirer/City of Erlanger
Decided July 15, 2015

BieryGolick (Cincinnati Enquirer) requested 911 calls and radio traffic for a particular location and time. Erlanger agreed it held the records, but denied the request pursuant to KRS 61.878(1)(l) and 15.150(2)(d) because of pending law enforcement action. The requestor was referred to the Commonwealth Attorney. The newspaper appealed, arguing that the agency did not make the showing of harm necessary to withhold the records, and noted that in fact, the cited reference was (1)(h). In response the City further cited KRS 17.150(2) and argued that the Ft. Thomas case wasn't relevant to the analysis.[1] The OAG noted that KRS 17.150 does not require a showing of harm and given that the event had only occurred a few days before, even had that been required, Erlanger would have likely been able to make that showing anyway. The OAG agreed that the materials were properly withheld.

15-ORD-126 In re: Cody W. Duvall/Kentucky State Police
Decided July 20, 2015

Duvall requested a copy of the accident history of a particular individual from KSP. KSP noted that driver history records are maintained by the Transportation Cabinet, but also

[1] The OAG also noted that the case that was cited, Skaggs v. Redford, was cited incorrectly.

argued KRS 189.635 to deny records it held, noting that Duvall's law firm was not authorized to receive the records. Duvall advised his agency was involved in litigation involving the subject and that the records were needed to defend a claim. KSP responded that it would only respond to a subpoena duces tecum. Duvall appealed, and KSP responded that the KRS makes such reports confidential. The OAG agreed with KSP in the competing arguments concerning the interpretation of KRS 189.635 and agreed that KRS 61.878(1) authorized the withholding of the relevant records.

15-ORD-132 In re: Minnie M. McCord/Kentucky State Police
Decided July 21, 2015

McCord requested certain records from KSP, and received responsive records. However, she appealed, based on a belief that additional records were available, including a UOR1 and KYIBRS, information on an informant and a copy of the arrest warrant. McCord received a response indicating that UOR reports had been replaced by KYIBRS, and that the only one of the latter available had been produced. She had also been provided with the only warrants KSP had. The Decision agreed that KSP properly denied having any other responsive records and that it was beyond the scope for the OAG to go further, given KSP's denial.

15-ORD-133 In re: Minnie M. McCord/Office of the Fleming County Sheriff
Decided July 21, 2015

McCord requested all records related to a specific case, as well as all records in which she was mentioned by name and additionally, records that were not open to inspection under Open Records relating to her. She received no response initially and sent a second request, to which the Sheriff's Office responded that it had no files on the case, as it was being handled by the KSP. The only responsive documents held by the Sheriff's Office, which were provided, were documentation of service of process for trial subpoenas on specific individuals. McCord appealed, noting that the Sheriff's Office did not respond to her request for other records in which she was named. The Sheriff responded, stating that what was provided was all the office seemed to have, and that records belonging to the previous sheriff had also been searched. The OAG noted that was a procedural violation in the delayed response, and no explanation for it, but no substantive violation.

15-ORD-140 In re: Jesse Kontras/Greenup County Sheriff's Department
Decided August 3, 2015

Kontras requested documents relating to his personnel file. He received no response and appealed. The Sheriff's Office responded that it had received the requested and responded by sending a copy of the requestor's resignation later. The OAG noted that it could not resolve whether the document was sent, but noted that "it is clear that this would have been an incomplete response" to the request, which asked for much more than that. (The OAG noted that an employment of several months would certainly result

in more than a single document in the file.) As such, the Decision found the response insufficient.

15-ORD-158 In re: Andy Tucker/Warren County Rescue Department Decided August 20, 2015

Tucker requested copies of his personnel files and pay stubs for the time encompassing his employment with the agency, as well as minutes of a specific meeting. He appealed, having received no response. The WCRD initially denied being a public agency under KRS 61.870, noting that Warren County only provides about 5% of the agency's total funding. (Note that the definition for whether an agency is mirrored by both the Open Meetings and Open Records Acts.) The Board of the WCRD consists of four members appointed by the County Judge-Executive and three appointed by WCRD, and this means that the County appoints a majority of the board, making it a public agency. Further, since the records requested were not exempt, the response was both procedurally and substantively deficient. (Further, specifically, as the employee in question, Tucker had a right to his own records, under KRS 61.878(3).) Further, the minutes were subject to release under KRS61.835.

15-ORD-170 In re: Lawrence Trageser/Bullitt County Sheriff's Department Decided September 10, 2015

Trageser requested the personnel files of two named deputies. He was given records of final actions, although internal affairs records were held back as preliminary documents. Trageser appealed, noting that what he was given clearly indicated that the two were terminated as a result of investigations and as such, that information was no longer preliminary and should be released. The agency responded that his request was originally interpreted to only be for disciplinary actions and that the additional personnel information had been provided. However, it agreed to reevaluate withholding the internal affairs investigation materials, but that it would have to wait until the return of the Chief Deputy, who was out of town. The OAG obtained copies of the disputed records and concluded that some of the documents, including a cover sheet and checklist, should have been released as they are administrative documents and not drafts or notes. A document indicating the complainant (the Sheriff) should have been released, and a redacted copy of one of the deputy's OLs. Additional documents should have been released, particularly sworn statements, emails that reflected final action, CAD reports and notices, as those items did not reflect preliminary actions. Documents that do form to the basis for the decision to terminate are also releasable as "final agency action," and even the one that appears to be a preliminary recommendation, since it was adopted by the Sheriff, the final decisionmaker, forfeited its preliminary status. Some records in the file were properly withheld as they consisted of opinions and recommendations not adopted as part of the final action.

Finally, the OAG noted that the other deputy's file was not produced as it is "in active use." However, it noted that the Sheriff's Office should be guided by the Decision in concluding how it should respond in that request, as well.

15-ORD-171 In re: Ann Cook/Henry County Sheriff
Decided September 11, 2015

Cook hand-delivered a request to records involving a number of people involved in an assault, including herself. When she returned on the third day, she was told that the deputy handling the request had not finished making redactions of private information of citizens. He offered to deliver the records to her by the end of the day, which she refused. (She later said that she was told the records would not be ready for some time, if at all.) Although the OAG could not resolve that factual dispute, it did note that no written request had been made nor was any written explanation made for the redactions. As such, the agency did not meet either its procedural or substantive obligations in the matter.

15-ORD-173 In re: Kenneth C. Human/Bourbon County Sheriff's Office
Decided September 14, 2015

Human requested access to an entire investigative record of a fatal accident. The accident had originally been handled by the Paris PD, which produced records, and then the requestor had been told that a Bourbon County deputy had done the reconstruction and had those records. However, the deputy noted that the accident was still an open investigation and incomplete and denied the records. Human asked to be notified when it was completed but hearing nothing after a period of time, appealed. The Sheriff's office noted that although it did not respond in a timely fashion on the request, it properly denied the records as incomplete and preliminary. (It noted that in initial correspondence with Paris PD, they were not initially told that it was a joint investigation.) Further, it noted, while Human had communication with the deputy, that deputy is not the official custodian for the records and was obligated to immediately forward any such request to the official custodian of the records for the Sheriff's Office. (He was also obligated to communicate such to the requestor, and provide the requestor with information on the official custodian, pursuant to KRS 61.872(4). However, the OAG agreed that it was proper to hold back the document until complete.

15-ORD-176 In re: Tyler Fryman/City of Frankfort Police Department
Decided September 17, 2015

Fryman requested documents relating to the DoD's 1033 program, including items purchased under the program emails and final recommendations concerning a matter and any document referencing overtime, including training materials. The agency refused to respond until he completed a preprinted form. He went to the department 8 days later and was referred to the City Clerk where he was again told he needed to complete the form. Fryman appealed and the agency noted that he'd provided no return address or contact information for a reply. He had been referred to the City Clerk as that individual was the Custodian of Record and the agency reiterated that requiring the form was proper. (The Clerk had attempted to send him a fax on a provided fax

number on the request, but was unsuccessful – in fact, it was a commercial fax number.) Fryman had requested items in electronic format but had failed to provide any method by which such records could be sent.

The OAG noted that it had long held that although a request may be required in writing, a specific form could not be mandated, so long as the request includes a signature, the individual's name and a description of the records. That is all that is required, although on a practical note, responding to a request for electronic records will require a way to transmit those records.

15-ORD-177 In re: Tyler Freeman / Kenton County Sheriff's Department
Decided September 21, 2015

Fryman requested reviews posted to the Sheriff's Office Facebook and a number of other items connected to emails, drafts, memos, and training connected to Facebook or a named deputy sheriff, along with complaints, operating procedures for school resource officers and emails. KCSD responded that due to the size and complexity of the request, additional time was needed, but did not give a time frame. Ultimately, Fryman appealed on that issue. KCSD responded that it was waiting for the county's IT department to give a time frame, and gave a detailed response to why so much time was needed to do the electronic search required, which included current email mailboxes as well as those possibly on the backups. It noted that he was welcome to come review the material, but argued that he had requested copies, initially, not reviews. The OAG noted that although the agency responded in three days, it did not provide a detailed explanation as to why the delay would be needed. (See Edmonson v. Alig, 926 S.W.2d 856, 858 (Ky. Ct. App. 1996).) A "limited and perfunctory response" is not adequate when it does not provide a reason and timeframe. However, it noted that under the circumstances and explanation provided in the appeal, that the delay was in fact, reasonable given the scope of the request. There was no evidence that excessive fees would be assessed, although the agency did not provide any information as to how much it would charge, ultimately.

15-ORD-182 In re: Lisa Koch Bryant/Shelby County Animal Shelter
Decided October 1, 2015

Callahan sought records from the security camera system at the Animal Shelter, as well as other records not at issue. She was informed it would take 6-8 weeks to locate and redact the records and directed to the Director to arrange a time for viewing. Several appointments were made but both were cancelled by the Director. Bryant (on behalf of Callahan) appealed, arguing that the cancellations subverted the Open Records case. In fact, when they finally were allowed access, it was discovered that all stored footage had been deleted several days before, by the security company, apparently when the recorder was adjusted with respect to the time it would save data. The requestor argued that the deletion could not be purely accidental since there were too many steps that had to take place for it to occur.

The OAG noted that although it could not require the release of information the agency does not have, the deletion of the records in the face of a pending request presents a significant records management issue. Further, the repeated cancellations imposed an unreasonable restriction on inspection, violating the ORA.

Further, in in a footnote, it noted that the retention schedule for such videos is 30 days, which begs the question why the recorder would be adjusted to a five day period.

15-ORD-184 In re: William C. Ransdell, Jr./Louisville Metro Government Decided October 2, 2015

Ransdell requested a number of items, including emails, notes, inter-office mail and fax sent from or to a particular individual – as well as instant and text messages to and from an assigned phone. After no response, he sent a second message and received a response, but followed that up with another duplicate request, noting that he believed there was some confusion as to what he was requesting. Ultimately, Louisville Metro responded to the appeal, and indicated that his email request was caught up in the spam filter and that it would be immediately responding to the request. In a follow up, it indicated that it had approximately 35,000 responsive records (and 2300 hours) and asked that the request be narrowed, otherwise, it would be denied under KRS 61.872(6) as too burdensome. Ransdell responded with a narrower request. Metro also noted that it had no access to the phone information as that was held by Verizon, even though the phone was issued to the individual in question by Metro.

When the search was completed, they were to be available on a single CD at a nominal cost, with some being withheld for personal privacy reasons. The OAG noted that the failure to respond in a timely matter and the spam filter issue was a violation of the ORA, as record keeping systems should be maintained so as not to block such requests. Further, its initial response, which did not include everything requested, was deficient in that it did not explain what was withheld, and why, although eventually, that was remedied upon the appeal.

15-ORD-191 In re: Lawrence Trageser/City of Pioneer Village-Pioneer Village Police Department Decided October 6, 2015

Trageser requested documents concerning a particular police officer. He hand delivered the request to an officer in the parking lot, who agreed to give it to the chief. When there was no response, he appealed. The department noted that nothing was delivered to him, nor was anything given to the City Clerk. (It was noted that for the small police department, the chief was often not in the office, but that the clerk always was.) Upon receiving the appeal, the response indicated that there was no officer by the mistaken name initially used in the first part of the request, but that there had been an officer, some 17 years before, by the other name referenced in the request. (The first name was likely a cut/paste error.) However, as the officer had left 17 years before, the agency had no records on him at all. However, there was a discrepancy, as the

chief had initially said he did have records, that was later clarified to be that he had some worker's compensation records and timesheet records, along with some training records. It was noted that prior to 1998, employees were given the option of taking their employment records with him, a practice that violated the law. The OAG noted that due to the way the request was couched, the response was in fact accurate, as the records the agency did have did not meet the request.

The Decision could not address the factual dispute of whether the request was in fact delivered to the agency. However, the decision noted that although the chief is the custodian of records, since the chief is often not in the office, it might be proper to reassign that responsibility to the city clerk, and in addition, to ensure that the rules and regulations are posted.

15-ORD-194 In re: Chris Wiest/Lincoln County Sheriff
Decided October 15, 2015

Wiest requested a number of items relating to the arrest of a named individual. When he received no response, he appealed. The Sheriff and the County Attorney were notified, but the OAG received no communication. At some point, however, Wiest did receive some items by fax, but no audio or video recordings. There was no cover letter explaining what had been withheld, or why. The OAG indicated that the Sheriff had violated the ORA by the lack of response in an adequate and timely manner.

14-ORD-196 In re: Lawrence Trageser/Office of the Attorney General
Decided October 20, 2015

Trageser requested certain records relating to an investigation by the OAG. In a timely response, he was informed the file was in the process of being closed, and he could expect a more substantive response on a date certain 9 days in the future. Ultimately what was provided was partially redacted to protect social security numbers, addresses, birthdates and the like. Trageser appealed. The OAG responded that it had also held back the names of individuals who happened to be on the same page of the precinct roster, since that would be a violation of their privacy, and they had nothing to do with the matter under discussion. The OAG concluded that there was no violation of the ORA in the redactions at issue.

15-ORD-197 In re: Lawrence Trageser/Spencer County Sheriff's Office
Decided October 20, 2015

Trageser requested a number of records regarding the investigation into the death of a magistrate's child. The records were made available, with the exception of the scene photographs and autopsy photographs, which were withheld as a violation of privacy. (The family specifically asked that they not be released.) Trageser argued that there was no explanation as to the absence or exemption of the photos. In 05-ORD-075, the OAG had adopted <u>National Archives and Records Administration v. Favish</u>, 541 U. S. 157 (2004), which "recogniz[ed] that the surviving family members' right to personal

privacy with respect to a close relative's death scene photographs is generally superior to the public's interest in disclosure of those photographs." That privacy interest is strengthened where the family members have "requested that the photographs not be disclosed." In this case, the OAG agreed that the privacy interest in the investigation of an accident outweighed any public interest.

15-ORD-198 In re: Lawrence Trageser/City of Taylorsville Police Department and Taylorsville City Clerk
Decided October 21, 2015

Trageser appealed as to whether the failure of the Taylorsville Police department and City violated the ORA by failing to display the rules and regulations on the ORA in a prominent and accessible location. The city responded that the city clerk was the custodian of records and that when it was brought to their attention, that the rules and regulations were promptly posted in the clerk's office pursuant to KRS 61.876(1)/(2). The Decision noted that it had been addressed and further, that 200 KAR 1:020, Section 6, provides a complaint form to assist agencies in meeting this requirement.

15-ORD-201 In re: William C. Van Cleve/City of Ravenna
Decided October 23, 2015

Van Cleve requested an itemized list of all donors to a city picnic, as well as a copy of all expenses paid. The city responded that the event was organized by a council member and the fire chief, and that the city did not have those records, nor were any city funds expended on the event. Van Cleve appealed, arguing that since it was approved by the City, and the fire chief was directly involved in the finances, it should be available. Fundraising flyers cited the Mayor and the Fire Chief, and noted the involvement of the City of Ravenna. The City reiterated that it had no records, although there might be some bank records, but that wasn't requested. The OAG noted that the City was certainly a public agency, and the council member involved as a local government officer, and as such, and records with respect to her public function were subject to open records. The City's response did not indicate that any search for responsive records were made available, and could not disclaim all knowledge simply because it didn't financially support the event or hold any of the records.

However, the agency could not produce what it did not have nor was it required to compile a list or create a record in order to satisfy a request. The fact that the newspaper was able to print some of the names of the donors suggested a record did exist, somewhere, and the City had an obligation to seek out that information and provide it.

15-ORD-206 In re: C. Lynnette Thomas/Kentucky State Police
Decided November 10, 2015

In 2014, Thomas requested a number of records from KSP related case from 2002. She was advised in 2004 that no further action would be taken. She was advised by

KSP that no responsive records could be found but if she could find additional information, they would attempt another search. She provided addition information that she'd received from investigating troopers as to possible suspects, but again was told there were no responsive records. She further advised KSP that the crime occurred in 1997 but the investigation did not begin until 2002. KSP was still unable to find any records related to the case, despite her being able to show a photograph of the investigator. KSP confirmed that the investigator was no longer with KSP, but did attempt to contact him, to no avail. Finally, in September, 2015, she appealed.

KSP responded that it had responded several times to Thomas, but did not continue to respond as they had nothing to add. KSP reiterated that it had no records. The Decision agreed that it could not produce what it did not have and that no statutes regulation or case law required the creation of the record requested. KSP indicated that no investigation was conducted because apparently, there was no evidence of a crime being actually committed. As such, the denial was proper.

15-ORD-212 In re: Marvin T. Pennington/Lexington Police Department
Decided November 17, 2015

Pennington requested a copy of communications (phone calls, emails, etc.) from police to various named entities. It was partially denied on the basis of KRS 61.878(1)(i) as investigatory materials. It was also partially denied on the basis that it would be an undue burden to attempt to find that many communications. It also indicated as to the remainder, that the entire file had been produced previously. Pennington appealed arguing that the records involved public individuals and the date requested was only two months, and that the records in question were not part of his earlier request. LPD reiterated that the request was not limited and involved communications to several other public agencies, without an identifying individual at those agencies or a date range.

The OAG indicated that he must precisely describe what he would like to have and that his request was far too broad and vague to satisfy that requirement. As such, it was properly denied.

15-ORD-215 In re: Rev. Russell/City of West Buechel
Decided November 20, 2015

Russell requested a number of specific pieces of information, but the request was not couched in the form of a request for documents. When he received no response, he appealed. The OAG noted that the request was not framed properly as a request for responsive documents and as such, it was properly deniable. However, it was a procedural violation to fail to respond to the request in any way.

15-ORD-218 In Re: Joshua Powell/Kentucky State Police
Decided December 2, 2015

Powell requested certain information from KSP, rather than documents.

KSP responded that it had no obligation to compile data, rather than produce documents. The OAG agreed that KSP was correct in its response.

15-ORD – 219 In re: Christophe Stewart/Louisville-Jefferson County Metropolitan Sewer District
Decided December 9, 2015

Stewart requested a number of documents surrounding legal services provided to MSD. He did not receive a timely response and engaged in emails with the agency, and was told that they were collecting records but would require at least a week to do so. He was delayed again. He appealed and the parties agreed on what he would receive. However, the OAG agreed that the response was untimely and a procedural violation. Further, for items that were initially denied, MSD failed to adequately cite the statutory bases and support the denial, and the reason for the delay.

15-ORD-221 In re: Neil Gilreath/Office of the Boone County Sheriff
Decided December 15, 2015

Gilreath asked for a number of investigative records relating to a particular accident. It was submitted on his employer's letterhead, but he did not indicate in any way that he was entitled to the records under the provisions of KRS 189.635(5) as representing a party of a news-gathering organization. The request was denied by the Sheriff, citing KRS 61.878(1)(l) and KRS 189.635(5). Gilreath argued that although the actual report might be shielded from disclosure, other documents relating to it would not be. Upon the appeal, the Sheriff responded that the only document that exists is the actual accident report and its response correctly denied that record under the legal prohibition against release.

15-ORD-222 In re: Robert D. Cron/Office of the Butler County Sheriff
Decided December 15, 2015

Cron made a request to the Sheriff for certain documents. He appealed on the basis of the staff informing him that although that request would be satisfied, in the future, he would be required to make his own copies, at a cost of ten cents a page, with no explanation as to how he was expected to do that. He also argued that the rules and regulations where not posted at the agency. (He had complained to the agency and received a response that he deemed less than responsive to his concern.) The OAG noted that the requirement to post rules and regulations was mandatory. However, since Cron was not actually required to make the copies in the other instance, at this point, there was no controversy on that issue to resolve.

15-ORD-226 In re: Scott Dickens/Louisville Water Company
Decided December 30, 2015

Dickens requested a number of items, including communications made to and from personal equipment, such as cell phones/text messaging. The LWC denied the items

held on personal devices as outside the possession of the agency and not public records. He appealed and although the OAG agreed that the items in question were not public, but noted that a “document created using public funds stored or otherwise hidden on a private cell phone retains its status as a public record and will still be subject to the Open Records Act.” The Decision acknowledged “the limitations of the existing legal framework to address communications carried out on private cell phones,” it “admonishe[d] public employees against using private cell phones to carry out public work in an attempt to shield such communications from the purview of the Open Records Act.”

UPDATE

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.