

2018

Decisions of the Attorney General

Open Records

The following are brief summaries of Open Records Decisions issued by the Office of the Kentucky Attorney General. Decisions of the Attorney General may be appealed to the Kentucky Courts. Those decisions that are appealed to the Kentucky's appellate 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 beginning 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.

These summaries are designed as a study and reference tool for officers in training classes. Although care has been taken to make these summaries as accurate as possible, official copies should be consulted when possible before taking any actions that may have legal consequences. For a full copy of any of the opinions summarized below, please visit <https://ag.ky.gov/Priorities/Government-Transparency/orom/Pages/default.aspx>.

The issues, arguments and summaries that appear in each summary are only the opinions of the compilers of the listed summary. They are only meant to be used for guidance, are not offered as legal opinions, and should not be relied upon or cited as legal authority for any action. Always consult legal counsel when in doubt about the meaning of a statute, court decision or Decision of the Attorney General.

KENTUCKY
Open Records Statutes
Updated through 2019

61.870 Definitions for KRS 61.872 to 61.884

(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, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, any funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a public agency under this subsection;
 - (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;

(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; and

(9) "Booking photograph and photographic record of inmate" means a photograph or image of an individual generated by law enforcement for identification purposes when the individual is booked into a detention facility as defined in KRS 520.010 or photograph and image of an inmate taken pursuant to KRS 196.099.

Effective: July 15, 2016

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.

Effective: July 14, 1992

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.

Effective: June 25, 2009

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:

(a) 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;

(b) Facsimile transmission of the written application described in paragraph (a) of this subsection; or

(c) E-mail of the application described in paragraph (a) of this subsection.

(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.

Effective: June 27, 2019

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.

Effective: July 15, 1994

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.

Effective: July 15, 1994

61.8746 Commercial use of booking photographs or official inmate photographs prohibited -- Conditions -- Right of action -- Damages.

(1) A person shall not utilize a booking photograph or a photograph of an inmate taken pursuant to KRS 196.099 originally obtained from a public agency for a commercial purpose if:

(a) The photograph will be placed in a publication or posted on a Web site; and

(b) Removal of the photograph from the publication or Web site requires the payment of a fee or other consideration.

(2) Any person who has requested the removal of a booking photograph or photo taken pursuant to KRS 196.099 of himself or herself:

(a) Which was subsequently placed in a publication or posted on a Web site; and

(b) Whose removal requires the payment of a fee or other consideration;

shall have a right of action in Circuit Court by injunction or other appropriate order and may also recover costs and reasonable attorney's fees.

(3) At the court's discretion, any person found to have violated this section in an action brought under subsection (2) of this section, may be liable for damages for each separate violation violation, in an amount not less than:

(a) One hundred (\$100) dollars a day for the first thirty (30) days;

(b) Two hundred and fifty (\$250) dollars a day for the subsequent thirty (30) days; and

(c) Five hundred (\$500) dollars a day for each day thereafter.

If a violation is continued for more than one (1) day, each day upon which the violation occurs or is continued shall be considered and constitute a separate violation.

Effective: July 15, 2016

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.

History: Created 1976 Ky. Acts ch. 273, sec. 4.

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;

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly, including any information acquired by the Department of Revenue in tax administration that is prohibited from divulgence or disclosure under KRS 131.190;

(m) 1. Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act and limited to:

- a. Criticality lists resulting from consequence assessments;
 - b. Vulnerability assessments;
 - c. Antiterrorism protective measures and plans;
 - d. Counterterrorism measures and plans;
 - e. Security and response needs assessments;
 - f. Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage, and gas systems;
 - g. The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawings, schematics, maps, or specifications of structural elements, floor plans, and operating, utility, or security systems of any building or facility owned, occupied, leased, or maintained by a public agency; and
 - h. Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact physical location of hazardous chemical, radiological, or biological materials.
2. As used in this paragraph, "terrorist act" means a criminal act intended to:
- a. Intimidate or coerce a public agency or all or part of the civilian population;
 - b. Disrupt a system identified in subparagraph 1.f. of this paragraph; or
 - c. Cause massive destruction to a building or facility owned, occupied, leased, or maintained by a public agency.
3. On the same day that a public agency denies a request to inspect a public record for a reason identified in this paragraph, that public agency shall forward a copy of the written denial of the request, referred to in KRS 61.880(1), to the executive director of the Kentucky Office of Homeland Security and the Attorney General.
4. Nothing in this paragraph shall affect the obligations of a public agency with respect to disclosure and availability of public records under state environmental, health, and safety programs.
5. The exemption established in this paragraph shall not apply when a member of the Kentucky General Assembly seeks to inspect a public record identified in this paragraph under the Open Records Law; and
- (n) Public or private records, including books, papers, maps, photographs, cards, tapes, discs, diskettes,

recordings, software, or other documentation regardless of physical form or characteristics, having historic, literary, artistic, or commemorative value accepted by the archivist of a public university, museum, or government depository from a donor or depositor other than a public agency. This exemption shall apply to the extent that nondisclosure is requested in writing by the donor or depositor of such records, but shall not apply to records the disclosure or publication of which is mandated by another statute or by federal law.

(o) Records of a procurement process under KRS 45A or 56. This exemption shall not apply after:

- 1. A contract is awarded.
- 2. The procurement process is canceled without award of a contract and there is a determination that the contract will not be resolicited; and
- (p) Communications of a purely personal nature unrelated to any governmental function.

(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, lay-offs, 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.

Effective: June 27, 2019

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.

Effective: July 15, 1994

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.

Effective: July 14, 1992

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.

History: Created 1976 Ky. Acts ch. 273, sec. 8.

18-ORD-001

In re: Lawrence Trageser/Kentucky State Police

ISSUE: Whether the Kentucky State Police (“KSP”) violated the Open Records Act in partially denying requester’s undated inquiry, delivered to KSP Headquarters, in which he asked for “any and all records reflecting” activity logs for listed troopers as well as said troopers’ “personnel files.”

ARGUMENT: KSP claims no IA investigations existed pertaining to four of the named troopers, but further advised since an investigation is pending regarding one trooper any records that may exist are preliminary records, as the agency has not taken any final action in the matter and are exempt.

SUMMARY: KSP violated the Open Records Act in denying access to all records contained in two Internal Affairs investigative files on the bases of KRS 61.878(1)(i) and (j). The records forfeited their preliminary characterization insofar as the final decision maker adopted those records by concurring with the findings and recommendations of the IA Commander.

18-ORD-003

In re: Sherry Keith Kelley/Jefferson County Sheriff’s Office

ISSUE: Whether Jefferson County Sheriff’s Office (“Sheriff’s Office”) violated the Open Records Act in its disposition of an attorney’s open records request for records relating to complaints that may have been lodged with the Sheriff’s Office against a client of the attorney.

ARGUMENT: The Sheriff’s Office claims it is not an agency that accepts complaints. Its duties consist of serving paperwork and notices as required by the courts; therefore, it does not house any of the requested documents.

DECISION: The Sheriff’s Office misinterpreted a request for complaints as a request for a criminal background check and responded appropriately for such a request. On appeal, the error was

explained and the Appellant was directed, in accordance with the Open Records Act, to the most likely custodian of the requested records.

18-ORD-005

In re: Kentucky Center for Investigative Reporting/Department of Military Affairs

ISSUE:

Whether the Department of Military Affairs (“Department”) violated the Open Records Act in its denial of a reporter’s request to inspect records relating to certain complaints concerning employment-based discrimination made by state employees.

ARGUMENT:

The Department argues the requested items are exempt because they contain information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. Furthermore, they are records other than correspondence giving notice of a final action of the agency or are preliminary recommendations and memoranda in which opinions are expressed. Finally, the documents are actions in adjudication as well as qualify as attorney client work product.

DECISION:

The Department failed to meet its burden to establish exemptions under KRS 61.878(1)(a) or (h), or the attorney work product doctrine, for the entirety of 12 files dealing with employee complaints of sexual harassment, sex/gender discrimination, and/or sexual assault. Identifying information on complainants in sensitive cases could be redacted under KRS 61.878(1)(a) if its disclosure would be a clearly unwarranted invasion of personal privacy. Matters still pending final agency action were subject to exemption as “preliminary” under KRS 61.878(1)(i) and (j), whereas records relating to completed matters must be disclosed unless they fit the exempted categories and were not adopted as the basis of final action.

18-ORD-006

In re: Gerald McKinney/Kentucky Department of Corrections

ISSUE: Whether the Department of Corrections violated the Open Records Act in declining to comply with a request for documents that DOC already provided to requester in response to a previous request(s).

ARGUMENT: The Department of Corrections argues that DOC is not required to provide duplicate copies of records previously provided without an explanation of the necessity for additional copies to be provided.

DECISION: A public agency is not required to honor a duplicative request in the absence of any justification by the requester.

18-ORD-010

In re: Jon Fleischaker/Kentucky State Police

ISSUE: Whether Kentucky State Police violated the Open Records Act in denying access to all records, except for the final actions by the agency, contained in four Internal Affairs investigative files on the bases of KRS 61.878(1)(i) and (j).

ARGUMENT: KSP claimed that it provided the final dispositions of each Internal Affairs Branch (IA) investigation to the requestor. KSP also explained that it is the Appellant in a pending Kentucky Court of Appeals case “involving the same subject of this appeal; therefore, this matter must be held in abeyance pending resolution of that appellate matter.”

DECISION: KSP violated the Open Records Act by withholding the requested documents. The records forfeited their preliminary characterization insofar as the final decision maker adopted those records by concurring with the findings and recommendations of the Acting Commander, Internal Affairs Branch.

18-ORD-014

In re: Tracy Shipley/Kentucky State Police

ISSUE: Whether the Kentucky State Police (“KSP”) violated the Kentucky Open Records Act by denying requestors petition for all records relating to her concealed weapons (“CCDW”) permit, including her initial application and renewals.

ARGUMENT: Requestor argues that she is entitled to records relating to her CCDW permit under KRS 61.884 which provides: “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.*”

DECISION: KSP properly withheld records relating to concealed weapons permit and application pursuant to KRS 61.878(1)(l), incorporating confidentiality provision in KRS 237.110(10).

18-ORD-022

In re: Lawrence Trageser/Kentucky State Police

ISSUE: Whether the Kentucky State Police (“KSP”) violated the Open Records Act in its disposition of Lawrence Trageser’s request for records concerning four individuals employed by KSP.

ARGUMENT: KSP argues the subject of the request is the subject of a pending appeal, thus the agency will turn over the records pursuant to a court order when litigation concludes. KSP also argues some of the records requested do not exist.

DECISION: Kentucky State Police partially violated the Open Records Act in denying access to all records, except for the initiating complaints and final actions, contained in Internal Affairs investigative files; however, an agency is not required under the Act to provide nonexistent records or to create records with specific content. Categorical redactions of personal identifying information were proper under KRS 61.878(1)(a).

18-ORD-027: **In re: Kathleen Fiddie/Louisville Metro Police Department**

ISSUE: Whether the Louisville Metro Police Department (“LMPD”) violated the Open Records Act in denying the request for “the open inspection of all LMPD public records relating to the investigation of the disappearance and/or death of James Michael Kimsey.

ARGUMENT: LMPD invoked KRS 61.878(1)(h) and KRS 17.150(2)(d), incorporated into the Open Records Act by operation of KRS 61.878(1)(l), in denying Ms. Fiddie’s request for all investigative records pertaining to her brother’s death as the matter was still an open investigation.

DECISION: Louisville Metro Police Department provided adequate specificity to justify its denial of a request for all investigative records in a particular ongoing case on the basis of KRS 17.150(2)(d).

18-ORD-035 **In re: The Springfield Sun/Washington County Sheriff’s Department**

ISSUE: Whether the Washington County Sheriff’s Department (“Department”) violated the Open Records Act in denying a request for several items regarding the arrest of a named individual on December 16, 2017. The request included the employment status of the two deputies involved in the incident, as well as their “performance records,” hire dates, “and any disciplinary actions they have received throughout their employment” at the Department.

ARGUMENT: Citing KRS 17.150(2) and KRS 61.878(1)(h), the Department acknowledged that such records “would be open to the public ‘if prosecution is completed or a determination not to prosecute has been made.’” In this instance, the named individual had not been arraigned. Since the case remained open, the Department claimed the records sought were exempt.

DECISION: The Department ultimately provided adequate specificity to justify its denial of a request for a specified body-worn camera

("bodycam") video on the basis of KRS 17.150(2)(d), incorporated into the Open Records Act by operation of KRS 61.878(1)(l). The denial of the request was affirmed.

18-ORD-043

In re: Andrew Wood/Nicholasville Police Department

ISSUE:

Whether the Nicholasville Police Department ("NPD") violated the Open Records Act in its denial of Andrew Wood's January 14, 2018, request for records in connection with an assault occurring on January 13, 2018.

ARGUMENT:

Wood requested the following items:

1. All records related to a named individual,
2. All body worn camera recordings for any interactions with the named individual occurring on listed dates.
3. All internal electronic messages, memorandums, notes, or other documents related to the incident.
4. Any reports, photographs, recordings, evidence logs, or other documents related to the above referenced incident.
5. All policies, procedures, guidelines or other documents which govern the actions of officers within the Nicholasville Police Department.

For onsite inspection, the subject requested to view:

1. Complete personnel files for every Nicholasville Police Officer on duty during the above referenced incident.
2. Training records for each Nicholasville Police Officer on duty during the above referenced incident.

NPD partially denied the request and argued requests 1-4 were "compiled in the process of detecting and investigating statutory or regulatory violations," and the information contained in them was "expected to be used in a prospective law enforcement action which has not yet been completed." With regard to the remaining requests, NPD required the requestor to ask for specific information since the items requested either contained information that posed a security risk for officers and citizens or contained exempt and non-exempt information. Upon further

specification by the requestor, NPD provided redacted some documents and continued to deny access to others.

DECISION: NPD violated the Open Records Act by withholding its policy and procedure manual in its entirety, and subverted the intent of the Act by imposing an appointment requirement upon the inspection of public records within regular business hours. In all other respects, the NPD's ultimate disposition of Mr. Wood's request was justified under the Act.

18-ORD-047 **In re: Andrew Wood/Jessamine County E-911**

ISSUE: Whether Jessamine County E-911 ("E-911") violated the Open Records Act in its denial of Andrew Wood's January 14, 2018, request for records in connection with an assault occurring on January 13, 2018.

ARGUMENT: The requestor asked for the following items:

1. Complete computer aided dispatch (CAD) report for incident 2018-00002779.
2. All recordings for the radio frequencies for Jessamine County EMS, Nicholasville Police Department, Jessamine County Sheriff Department, and Jessamine County EMS' hospital channel beginning at 22:30 on January 13, 2018, and ending at 0130 on January 14, 2018.
3. All phone calls, patches, or other audio recordings related to the above referenced incident.
4. All reports, e-mails, memorandums, or other documents related to the above referenced incident.

Jessamine County E-911 denied the request on the basis of KRS 61.878(1)(h) and KRS 17.150(2)(d), asserting that "records of law enforcement agencies are exempt if the disclosure of the information would harm the agency by premature release of information to be used in a prospective law enforcement action."

DECISION: Jessamine County E-911 committed a procedural violation by not actively looking for requested documentation not in its possession, but no substantive violation of the Open Records Act occurred.

18-ORD-048: **In re: Kentucky Center for Investigative Reporting/Finance and Administration Cabinet**

ISSUE: Whether the Finance and Administration Cabinet (“Finance”) violated the Open Records Act in withholding documents related to sexual harassment complaints on the grounds of personal privacy, protected health information, attorney-client privilege, and as preliminary.

ARGUMENT: Finance claimed that it had provided responsive records, but withheld some records based on attorney-client privilege, and redacted documents based on protected health information, personal privacy, and as preliminary notes and drafts. The Kentucky Attorney General’s Office asked Finance to provide the documents redacted or withheld for *in camera* review. Finance argued that, “because the KCIR’s objection is based on a category of redactions, and not a claim that the specific redactions were erroneous, there is no need to review the un-redacted version of the production.” Finance did not turn over the documents for *in camera* review.

DECISION: In refusing to provide records for *in camera* inspection, the Finance and Administration Cabinet did not meet its burden to establish its asserted exemptions, and violated the Open Records Act.

18-ORD-059: **In re: Kate Howard/Kentucky Labor Cabinet**

ISSUE: Whether the Kentucky Labor Cabinet violated the Open Records Act by withholding the name of employee whose alleged sexual harassment of a co-worker was unsubstantiated upon investigation.

ARGUMENT: The Cabinet argues the name and certain identifying information of the alleged harasser, as well as that of the complainant, are not releasable pursuant to KRS 61.878(1)(a). The Cabinet claims that since the privacy interest of the alleged harasser should outweigh the public interest in knowing his identity because he was absolved of the allegation.

DECISION: The Cabinet violated the Open Records Act by not disclosing the identity of the individual accused of sexual harassment. The public's interest in monitoring agency action outweighed the privacy interest of the employee who was exonerated of misconduct. According to the Office of the Kentucky Attorney General, disclosure of the complaint, the final action taken, and investigative records will show whether the public agency faithfully discharged its duties.

18-ORD-062: **In re: Michael Smith/Oldham County Dispatch**

ISSUE: Whether a privacy interest of a caller in domestic violence incident outweighs a public interest in disclosure of 911 recording and computer aided dispatch report under KRS 61.878(1)(a).

ARGUMENT: Disclosure of the recording and report would constitute a clearly unwarranted invasion of personal privacy.

DECISION: In this case, both the audio recording and the CAD report consist of personal information that would be particularly sensitive in a domestic violence context, including the identity of the caller, the reported conduct of the alleged perpetrator, the persons living in the residence, and the presence or absence of weapons in the home. In *Bowling v. Brandenburg*, 37 S.W.3d 785 (Ky. App. 785), the Kentucky Court of Appeals reasoned:

Releasing the tapes of 911 calls seeking police assistance, *particularly in instances of domestic violence*, would have a chilling effect on those who might otherwise seek assistance because they would become subject to ... retaliation, harassment, or public ridicule.

The Court of Appeals held that the heightened privacy interest of the 911 caller in this domestic violence situation outweighs the public interest in disclosure of the records. Based upon this reasoning, the Oldham County Dispatch was found not to have substantively violated the Open Records Act by withholding the audio recording and CAD report pursuant to KRS 61.878(1)(a).

18-ORD-064: **In re: WAVE3 News/City of Prospect Police Department**

ISSUE: Whether or not the City of Prospect Police Department properly withheld an officer’s recorded statement, as being a preliminary record.

ARGUMENT: The recorded statement was not the basis of the final action, thus making it preliminary in nature and not subject to disclosure.

DECISION: The City did not violate the Open Records Act. The record confirmed the determination to initiate the administrative inquiry was based upon the offensive content of the Facebook posts and prior to the KRS 15.520 interrogation. Furthermore, the officer’s resignation closed the investigation and became the final action in the matter. Thus, the record did not lose its preliminary characterization.

18-ORD-072: **In re: James Coitrone/Warren County Probation and Parole Office**

ISSUE: Whether or not a public agency can refuse to respond to a “duplicative request” where the first request was completed by a different agency.

ARGUMENT: The probation and parole office claimed an agency is not required to provide duplicate copies of records since the Kentucky Attorney General has consistently held that that an agency is not required to fulfill an identical request a second time unless some justification exists for resubmitting the request.

DECISION: The previous decisions by the Kentucky Attorney General’s Office regarding this issue applied to duplicative requests to the same agency. In this case, another agency supplied the order granting shock probation. Probation & Parole cannot claim that this request is duplicative as to the order. Probation & Parole violated the Open Records Act by failing to provide a copy of the requested order.

18-ORD-078: **In re: *The Courier-Journal/Kentucky State Police***

ISSUE: Whether or not the Kentucky State Police (KSP) violated the Open Records Act in denying a request for an electronic copy of the Uniform Citation File database and all its publicly available fields.

ARGUMENT: KSP argued that the citation database contains some data that is confidential in nature including citations for juvenile offenders. It does not have a mechanism in place to generate the requested information for reporting without including the protected information. The agency argued it would be required to manually redact the data placing an unnecessary and undue burden on KSP.

DECISION: Kentucky State Police violated the Open Records Act in denying a request for a copy of the Uniform Citation File database since it is an existing “public record” under KRS 61.870(2). Compliance with the request would not require KSP to create a record or compile a listing. Furthermore, KSP has a duty to separate any exempt material per KRS 61.878(4), which is not equivalent to creating a record.

18-ORD-079: **In re: *John Roth/Highland Heights Police Department***

ISSUE: Whether or not the Highland Heights Police Department violated the Open Records Act in denying a request for “a copy of all material in my case file.”

ARGUMENT: The police department stated that the requested items were protected from disclosure pursuant to KRS 17.150(2)(d) and 61.878(1)(h) because the case was on appeal.

DECISION: The Highland Heights Police Department did not violate the Open Records Act in denying the request for the contents of the case file. The matter is on appeal, and the action is not complete. Additionally, the records in dispute contain information that may lead to identification of a confidential witness(es). Thus, since a specific reason for withholding the

records was provided, and the final response was sufficient to justify denial of the request per KRS 17.150.

18-ORD-096: **In re: Tad Thomas/Louisville Metro Police Department**

ISSUE: Whether or not the Louisville Metro Police Department (“LMPD”) violated the Open Records Act in its disposition of four requests made for records relating to alleged wrongdoing in connection with LMPD’s youth program known as the “Explorer Program.”

ARGUMENT: Various arguments were made regarding each of the four separate requests made for records.

DECISION: Louisville Metro Police Department justified its refusal to release investigative records with adequate specificity under KRS 17.150(3), except for any incident reports/initial offense reports, and made permissible redactions for privacy reasons under KRS 61.878(1)(a). The initial responses to the requests were untimely and insufficiently explained. However, subsequent requests relating to pending litigation were precluded by stay of discovery under KRS 61.878(1).

18-ORD-097: **In re: Jennifer Smith/City of Hillview**

ISSUE: Whether the City of Hillview (“City”) violated the Open Records Act in its disposition of open records requests for personnel records, body camera video, service and maintenance records, and several types of internal investigations

ARGUMENT: The request for any internal audits, internal affairs investigations, professional standards investigations, public integrity investigations from January 1, 2013 to April 3, 2018 would yield quite a few voluminous response[s] and would place an unreasonable burden on the City of Hillview in providing same. The City would have to go through more than

five years' worth of these documents and review same for potential exemption under the Open Records Act.

DECISION: The City violated the Open Records Act. It presented no evidence, clear and convincing, or otherwise, that reviewing five years of investigation reports, and redacting those records as necessary, would be unreasonably burdensome. A mere allegation that a request is unreasonably burdensome does not satisfy the requirements of the statute.

18-ORD-099: **In re: Erik Hermes/Campbell County School Board**

ISSUE: Whether or not the Campbell County School Board properly withheld private reprimand, employee evaluations, home addresses, phone numbers, Social Security numbers and other personal/private information under KRS 161.790(10) and KRS 61.878(1)(a).

ARGUMENT: The private reprimand should be released since the subject "is a candidate for public office" and the Board's response to a second request for records was inadequate.

DECISION: It is well-established line that "private reprimands" pursuant to statute are exempt from disclosure under KRS 61.878(1)(l). The language of the statute is clear that a private reprimand is not public otherwise it would be considered a public reprimand. The Board committed both substantive and procedural violations by withholding unspecified "other personal/private information" from a personnel file without providing a detailed description as to why the Open Records Act did not require disclosure. In other respects, the Board complied with the Act.

18-ORD-104: **In re: Eric Todd Lyvers/Edmonson County E-911**

ISSUE: Whether Edmonson County E-911 (“E-911”) violated the Open Records Act in the disposition of Eric Todd Lyvers’ request for recordings and other records pertaining to a traffic safety checkpoint.

ARGUMENT: E-911 improperly destroyed its records because a “former employee” claimed the records were kept for five years. It is further argued that access was improperly denied to the records.

DECISION: The Open Records Act was not violated. The “Records Retention Policy” from E-911 states that dispatch recordings and daily dispatch logs “will be destroyed one (1) year after the date of the incident unless this office is contacted and informed of any investigation that relates to information on the recording at issue.” The dispatch logs were destroyed in accordance with the policy. Furthermore, E-911 never possessed the records requested. The Sheriff’s Office is the custodian of the records, thus the request was directed to the wrong agency.

18-ORD-105: **In re: Charity Whitehill/Department of Corrections**

ISSUE: Whether the Department of Corrections properly withheld “interview questionnaire worksheets” and educational transcript(s) of the successful candidate for a specified position.

ARGUMENT: It was alleged that in denying access to “supporting documentation in the merit promotion process,” including the “interview notes, certified register report, and interview questionnaire worksheet,” DOC violated “rights as a State Employee pursuant to the Open Records Act.”

DECISION: The Department of Corrections properly withheld “interview questionnaire worksheets” that qualified as “examination materials” under KRS 18A.020(4) or an “examination” under KRS 61.878(3). DOC also properly withheld educational transcript(s) of the successful candidate for the specified position under KRS 61.878(1)(a).

18-ORD-106: **In re: Brian Engle/Lexington Police Department**

ISSUE: Whether or not a violation of the Open Records Act exists when there is a discrepancy between the records produced and records expected to be produced. Whether or not failing to disclose an accident report to a person not listed as an exception under the statute is a violation of the Act. Is denial of the existence of a record previously order expunged a violation of the Act?

ARGUMENT: It was alleged other reports existed other than the reports produced to the requestor. The requestor also sought records which no longer existed due to an expungement.

DECISION: A violation of the Open Records Act does not exist where there is a discrepancy between the records produced and records expected to be produced. Furthermore, statutes prohibit disclosing an accident report to requester who did not qualify under the statutory exceptions allowed for disclosure. Finally, a violation of the Act does not occur in denying existence of record where the record had been ordered expunged.

18-ORD-115: **In re: WHAS/Kentucky State Police**

ISSUE: Whether the Kentucky State Police (“KSP”) violated the Open Records Act in its disposition of WHAS-11’s request for “[a]ny and all memoranda, letters, notices from [KSP] Commander of Internal Affairs Branch to the [KSP] Commissioner in regards to the findings and disposition of an internal investigation of a named Trooper.

ARGUMENT: KSP refused to provide most of the documents requested claiming the request asked for items expressing opinions and were preliminary in nature. WHAS argued the Commission made a final decision and substantiated and adopted the findings; therefore, the documents in the file no longer held a preliminary status.

DECISION: Kentucky State Police violated the Open Records Act in denying access to the records contained in the Internal Affairs investigative files based on KRS 61.878(1)(i) and (j). The records forfeited their preliminary characterization insofar as the Commissioner adopted those records by concurring with the findings and recommendations of the Internal Affairs Branch or reviewing personnel.

18-ORD-122: In re: Marcus Green/Louisville Regional Airport Authority

ISSUE: Whether the Louisville Regional Airport Authority (RAA) violated the Open Records Act in denying the release of personnel files, disciplinary records, and letters of separation regarding airport law enforcement officers

ARGUMENT: The Louisville Regional Airport Authority (RAA) denied the release of personnel files, disciplinary records, and letters of separation regarding airport law enforcement officers arguing it was prohibited from providing the requested records under federal statutes and regulations. RAA claimed disclosure would constitute an unwarranted invasion of privacy.

DECISION: Louisville Regional Airport Authority failed to meet its burden of proof to show that federal statute and regulations exempted disclosure of all personnel files, disciplinary records, and letters of separation of airport law enforcement officers.

18-ORD-126: In re: Eric T. Lyvers/Kentucky State Police

ISSUE: Whether the Kentucky State Police violated the Open Records Act in responding to two requests for records relating to laboratory results pertaining to the inmate requester.

ARGUMENT: Kentucky State Police does not possess the records requested.

DECISION: In the absence of any facts or evidence from which existence of responsive documents can be presumed, no basis exists upon which to find that Kentucky State Police violated the Open Records Act in partially denying two requests.

18-ORD-127: **In re: Marissa Bastian/Hodgenville Police Department**

ISSUE: The question presented in this appeal is whether the Hodgenville Police Department (“HPD”) violated the Open Records Act in failing to provide requested documents pertaining to a traffic stop.

ARGUMENT: HPD violated the Open Records Act by failing to issue a written response to the records request within three days. HPD claims some of the requested documents do not exist.

DECISION: Hodgenville Police Department violated the Open Records Act by failing to issue a timely written response per KRS 61.880(1) and either provide the requester with access to any existing nonexempt documents responsive to the request, or provide a detailed explanation of the cause for delay and the specific date when the records would be available, in writing. The Act was not violated by the denial of access to nonexistent records.

18-ORD-130 **In re: Angela Hoback/Kentucky State Police**

ISSUE: Whether the Kentucky State Police (“KSP”) violated the Open Records Act in denying Angela Hoback’s (“Appellant’s”) requests for nonexistent records.

ARGUMENT: KSP violated the Act by failing to advise requestor the items could not be located.

DECISION: Kentucky State Police did not violate the Open Records Act when it denied a request for nonexistent records. The response to the

request failed to indicate that the records did not exist, in violation of KRS 61.880(1).

18-ORD-131

In re: Ryan Van Velzer/Louisville Metro Police Department

ISSUE: Whether the Louisville Metro Police Department (“LMPD”) violated the Open Records Act in the disposition of Louisville Public Media Reporter Ryan Van Velzer’s request for access to the Personnel files for an officer. The requestor specifically asked for all Special Investigations Division records relating to the specified officer.

ARGUMENT: LMPD denied disclosure of the records stating the documents express opinions and are preliminary in nature. Thus, the records are exempt under KRS 61.878(1)(i) and (j).

DECISION: Per 15-ORD-067, agencies are required to provide “not only any preliminary documents that were expressly incorporated into the [agency’s final action] but any documents that formed the basis of the final agency action.” “[A]n internal affairs report cannot be withheld under KRS 61.878(1)(i) and (j) if the final decision maker adopts the notes or recommendations it contains as part of his final action.” 97-ORD-168, p. 6; Internal affairs reports are not, in and of themselves, exempt from disclosure under the Act.

18-ORD-138

In re: Alton Franklin /City of Henderson

ISSUE: Whether the City of Henderson (City) violated the Kentucky Open Records Act in denying Alton Franklin’s request for a recording of a parking lot incident involving himself and City employees. The recording was made on the cell phone of a City police officer.

ARGUMENT: The requestor claims the recording was made by an on duty officer, so the recording is a public record. The City claimed he recording was taken by the officer’s private cell phone while the officer was not on duty.

Since the recording is not in its possession, it is not a government record, thus, not subject to the Open Records Act.

DECISION: The City did not violate the Open Records Act. It provided a sufficient explanation for the nonexistence of the recording and searched its ID drives to verify the record was not in its possession.

18-ORD-149 **In re: Eric Todd Lyvers/Edmonson County Sheriff's Office**

ISSUE: Whether the Edmonson County Sheriff's Office ("Sheriff's Office") violated the Open Records Act in the disposition of Eric Todd Lyvers's ("Appellant's") requests for records.

ARGUMENT: The Sheriff's Office claims it never received the Open Records request. However, the records requested do not exist.

DECISION: The Sheriff's Office complied with the Act. It is not required to provide a requestor with records that do not exist.

18-ORD-156 **In re: Cassa Gossum/Graves County Jail**

ISSUE: Whether the Graves County Jail violated the Open Records Act in denying Gossum's request for all documents and video footage from the time she entered the Graves Co. Jail until she was discharged. She also requested a copy of the Graves County Jail's Policies and Procedures.

ARGUMENT: The Jail claims the request did not meet the requirements of the Freedom of Information Act as the video is only kept for thirty days, and the request was outside of the thirty day timeframe. The jailer did not address the other documents requested.

DECISION: The Jail did not cite any legal authority to justify destroying the video after thirty days; however, the agency cannot produce records that do not exist. The Jail did not violate the Open Records Act for properly destroying the records in the normal course of business per the records

retention schedule in place prior to the request. However, the Jail did violate the Act by failing to confirm or deny the existence of any records in response the remainder of the request.

18-ORD-157

In re: Tyler Fryman/Kentucky State Police

ISSUE: Whether the Kentucky State Police (“KSP”) violated the Open Records Act in its disposition of Tyler Fryman’s request for records relating to the KSP’s budget, and an electronic copy of the Uniform Citation File database.

ARGUMENT: KSP did not have enough staff to locate the records in a timely manner.

DECISION: KSP violated the Act by failing to provide a detailed explanation for the cause for further delay and the place, time and earliest day the requested documents would be available for inspection.

18-ORD-175

In re: Margaret O’Donnell/Kentucky State Police

ISSUE: Whether KSP violated the Open Records Act in its disposition of the request for 12 categories of records relating to access to the Kentucky Capitol and other public buildings in the area.

ARGUMENT: KSP claimed the records did not exist. The requestor argued that new documents had been created and not produced nor had an exemption been provided for the records.

DECISION: Initial response by the Kentucky State Police lacked the specificity required under KRS 61.880(1). However, KSP ultimately satisfied its burden per KRS 61.880(2)(c) by explaining the search that was undertaken to identify and locate all responsive documents and confirming that no documents existed aside from those already provided. KSP complied with KRS 61.872(4) on appeal by notifying the requester of the custodial agency for any further documents.

18-ORD-177

**In re: Tanyqua Oliver/Lexington-Fayette Urban County Government
Division of Police**

ISSUE: Whether the Lexington-Fayette Urban County Government (“LFUCG”) Division of Police (“Division”) violated the Open Records Act in its disposition of Oliver’s request for copies of items related to an internal affairs complaint filed against a LFUCG officer investigating a child sexual abuse case from 2006.

ARGUMENT: Initially, only certain documents in the internal investigation file were provided without an explanation as to why other documents were not given other than personal identifiers had been removed from said documents. With regard to the criminal investigation records, the LFUCG police claimed records were withheld due to the investigation being ongoing.

DECISION: Division of Police violated the Open Records Act in denying access to all records, except for the initiating complaints and final actions, contained in internal investigation file. The Agency did not meet its burden of establishing exemption of the entire internal investigation or an entire criminal investigative file under KRS 61.878(1)(h) by linking meaningful categories of records to concrete risks of harm.

18-ORD-195

In re: Mike Thompson/Shively Police Department

ISSUE: Whether the Shively Police Department violated the Kentucky Open Records Act in the disposition of Mike Thompson’s request for copies of e-mails.

ARGUMENT: The Shively Police Department failed to assert any exceptions permitting it to refuse to provide the requested emails.

DECISION: The Shively Police Department violated the Act since it failed to respond to Mr. Thompson’s request.

18-ORD-198

In re: *The State Journal*/Frankfort Police Department

ISSUE: Whether the Frankfort Police Department (“FPD”) violated the Open Records Act in denying the requests made for an internal memorandum and recording.

ARGUMENT: Frankfort did not provide the memorandum claiming it was an internal memorandum in which opinions and observations are expressed and was preliminary in nature. The request for the recording was denied on the same basis. Frankfort claimed the recording was the equivalent of a preliminary note.

DECISION: Frankfort Police Department violated the Act in denying requests for post-decisional public records. An *in camera* review did not reveal any of the items requested were preliminary in nature. However, if the content of either public record does not relate to a specified case that has been resolved, and is therefore not responsive to requests, FPD can properly redact such information per KRS 61.878(4).

18-ORD-199

In re: *Dayton Jones*/Kentucky State Police

ISSUE: Whether or not the Kentucky State Police violated the Open Records Act in its response for records by an inmate.

ARGUMENT: KSP claimed all responsive requests were provided and those withheld were the basis of an ongoing investigation.

DECISION: Inmate failed to appeal within twenty (20) days of denial by Kentucky State Police of his requests for records, as required by KRS 197.025(3), and his appeal is consequently time-barred.

18-ORD-222

In re: Katrina Sexton/City of Burgin

ISSUE: Whether the City of Burgin violated the Open Records Act by denying a request for a copy of a Law Enforcement Safety Act (“LEOSA”) application form.

ARGUMENT: The form is part of an ongoing criminal investigation, and is not subject to disclosure.

DECISION: City of Burgin met its burden of proof under KRS 17.150(3) by stating a specific reason for withholding a requested record pursuant to KRS 17.150(2).

18-ORD-224

In re: Heather Childress/Kentucky State Police

ISSUE: Whether Kentucky State Police violated the Open Records Act in its disposition of a request for the personnel file of a former KSP employee and information regarding that former employee.

ARGUMENT: Kentucky State Police initially responded to the request claiming the records sought were not immediately available because it allowed the former employee the opportunity to object to the release of personnel or disciplinary records because of privacy interests. The subsequent response of the Kentucky State Police stated the requested records were destroyed pursuant to its record retention schedule.

DECISION: Kentucky State Police violated the Open Records Act in delaying disclosure of requested records to allow a former KSP employee to object to release of records related to him. KSP did not violate the Act where the records requested were destroyed in the normal course of business pursuant to applicable records retention schedules.

18-ORD-226

In re: Kay Hensley/McCreary County Sheriff's Office

ISSUE: Whether the McCreary County Sheriff's Office violated the Kentucky Open Records Act in denying a request for toxicology reports.

ARGUMENT: The McCreary County Sheriff's Office claimed they could not provide the report because it was not in its possession.

DECISION: McCreary County Sheriff's Office did not violate the Open Records Act when it denied a request for a toxicology report that it did not possess. The Sheriff's Office violated KRS 61.880(1) in failing to advise the requester that it did not possess the toxicology report and violated KRS 61.872(4) in failing to properly direct the requester to the agency in possession of the toxicology report.