

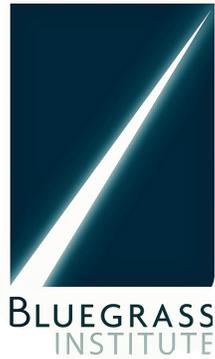


## **Shining the Light on Kentucky's Sunshine Laws**

A Proposal for Legislative Revision to  
Kentucky's Open Meetings and Open Records Laws

By Amye L. Bensenhaver, Director  
Bluegrass Institute Center for Open Government

May 2017



Published by:  
The Bluegrass Institute  
P.O. Box 11706  
Lexington, Kentucky 40577-1706

[www.bipps.org](http://www.bipps.org)  
[www.freedomkentucky.org](http://www.freedomkentucky.org)

The Bluegrass Institute is Kentucky's free-market think tank, dedicated to the principles of free markets, individual liberty and limited, transparent government. Founded in 2003, the institute is a 501 (c) 3 non-profit educational organization.

### **Warranty Of Scholarship Excellence**

The Bluegrass Institute commits itself to delivering commentary and research on Kentucky issues with unquestionable quality and reliability. Thus we guarantee that the information we originate is true and accurate, and the sources from which we quote are accurately represented.

We invite you to investigate our work and encourage you to report any material error, inaccuracy or misrepresentation you find. If you do, we will respond to your inquiry in writing. If we have made a mistake, we will prepare an errata sheet and attach it to all future distributions of the particular publication, which will be the complete and final resolution under this warranty.

# Shining the Light on Kentucky’s Sunshine Laws

A Proposal for Legislative Revision to Kentucky’s Open Meetings and Open Records Laws

By Amye L. Bensenhaver

## Executive Summary

Enacted in the ‘70s, revised in the ‘90s and heavily litigated over the course of their existence, Kentucky’s open meetings and open records laws have long served the salutary purpose of ensuring public agency openness, transparency and accountability while generating controversy on both sides of the access divide. Public agency officials frustrated by the burdens the laws impose are quick to criticize them as unfunded mandates that impose unreasonable demands. Access advocates denounce agency noncompliance, but, wary that the laws may be eroded by change, are largely silent on the subject of legislative revision.

Nevertheless, “rapid changes in the dynamics of communication and information transmission,”<sup>1</sup> coupled with successive legal challenges, have exposed deficiencies in the statutes that must be addressed by lawmakers.

Comprehensive revision of the open meetings and open records laws that focuses on clarification, reconciliation and modernization, and is guided by the clearly expressed legislative bias favoring openness, will yield a favorable outcome for public officials in navigating these complex laws and for the public in exercising its statutorily recognized right to know.

This report identifies the ambiguities, conflicts and anachronisms in the statutes themselves that impede effective enforcement. The analysis centers on open meetings and open records provisions that require:

- clarification, including those that: define the term “public agency,” prohibit serial less-than-quorum meetings of public officials and empower the attorney general to adjudicate disputes involving access to public records;
- reconciliation, including those that: create conflicting open meetings and open records exemptions, establish internal inconsistencies in the requirements for conducting closed sessions and assign the burden of proof in open meetings/records appeals;
- modernization to bring them into the 21st century, including those that: employ obsolete language and concepts, implicate evolving technology and changing practice in communication, assign penalties for noncompliance and establish training initiatives.

In deference to the legislative prerogative to determine the desired parameters of the law going forward, we suggest where there is a need for revision and, in some instances, advance specific proposals for revision which are consistent with the statements of legislative policy that are the cornerstone of both laws. We also discuss significant events in the evolution of the law that underscore the need for change.

We are committed to preserving what is best in the open meetings and open records laws and encouraging lawmakers, public officials, access advocates and the public to think anew. By eliminating the ambiguities, conflicts and anachronisms in the open meetings and open records laws, lawmakers will ease the burden on public agencies, reduce the likelihood of legal challenges, preserve valuable administrative and judicial resources and, most importantly, promote the clearly stated goal of open, transparent and accountable government.

---

<sup>1</sup> *Quon v. City of Ontario*, 560 U.S. 746 (2010).

## Introduction

*“The General Assembly finds and declares that the basic policy of [the Open Meetings Law] is that the formation of public policy is public business and shall not be conducted in secret and the exceptions. . . provided for by law shall be strictly construed.”<sup>1</sup>*

*“The General Assembly finds and declares that the basic policy of [the Open Records Law] is that free and open examination of public records is in the public interest and the exceptions. . . provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.”<sup>2</sup>*

As evinced in these strongly worded statements of legislative policy, Kentucky’s open meetings<sup>3</sup> and open records laws<sup>4</sup> begin with a presumption of openness, transparency and accountability. Since their enactment in the ’70s, they have equipped citizens with effective tools for shining sunlight<sup>5</sup> on every state and local public agency,<sup>6</sup> a term broadly defined to include, *inter alia*, legislative boards, commissions and committees; governing bodies, councils, school district boards, special district (special purpose governmental entity) boards and municipal corporations; agencies created by or pursuant to state or local statute, executive order, ordinance, resolution or other legislative act; the policymaking boards of educational institutions; and in the case of the open records law, otherwise private entities that derive 25 percent or more of the funds they expend in the commonwealth from state or local authority funds.

To ensure that the public’s right of access is not devalued by exclusion and that the laws cast the widest possible net, the terms “meeting” and “record” are also broadly defined, respectively, as “all gatherings of every kind”<sup>7</sup> and documentation “regardless of physical form or characteristics” that is “prepared, owned, used, in the possession of or retained by a public agency.”<sup>8</sup>

The open meetings and open records laws underwent minor amendment in the ’80s and substantial amendment in the early ’90s. But the passage of time<sup>9</sup> and developments in the courts have exposed serious problems in the application and interpretation of the laws that are seldom discussed and even more rarely addressed, owing to the legitimate fear that additional statutory amendment might actually dilute the entrenched principles of openness, transparency and accountability.

However, much can be done to address these problems and enhance the public’s right to know if lawmakers resist the temptation to dilute the open meetings and open records laws and focus on clarifying, reconciling and modernizing the policies. In so doing, lawmakers must be guided by the statements of legislative policy, recognized in the ’70s, codified in the ’90s and set forth above, that animate the laws. This proposal for amendments to the open meetings and open records laws proceeds from these objectives and is informed by these policies.

---

<sup>1</sup> [KRS 61.871](#).

<sup>2</sup> [KRS 61.871](#).

<sup>3</sup> The open meetings law is codified at [KRS 61.800](#) through [KRS 61.850](#).

<sup>4</sup> The open records law is codified at [KRS 61.870](#) through [KRS 61.884](#). Penalty provisions for both open meetings and open records violations are found at [KRS 61.991\(1\)](#) and [\(2\)](#).

<sup>5</sup> It was Kentucky’s own United States Supreme Court Justice Louis D. Brandeis who first recognized, “Sunlight is said to be the best of disinfectants” in “Other People’s Money—and How Bankers Use It” (1914).

<sup>6</sup> [KRS 61.805\(2\)](#) and [KRS 61.870\(1\)](#).

<sup>7</sup> [KRS 61.805\(1\)](#).

<sup>8</sup> [KRS 61.870\(2\)](#).

<sup>9</sup> The last comprehensive revision of the open meetings law occurred 24 years ago and the last comprehensive revision of the open records law occurred 22 years ago.

## Open meetings and open records provisions that require clarification

Disputes concerning the scope of the open meetings and open records laws regularly arise. These disputes often result from conflicting interpretation of the term “public agency.” Defined at KRS 61.805(2) and KRS 61.870(1), the term has been analyzed by the courts in a number of cases, including those involving: a presidential-search committee appointed by a university board of trustees,<sup>10</sup> university foundations,<sup>11</sup> the Department of Insurance commissioner in his role as rehabilitator of a distressed insurance company<sup>12</sup> and the operator of a university hospital and related facilities.<sup>13</sup> What constitutes a public agency emerged as the central issue in an open meetings appeal filed with the Office of the Kentucky Attorney General<sup>14</sup> by the Bluegrass Institute in 2015 when the Kentucky Board of Education elected to conduct meetings of a committee tasked with recommending a search firm for the new commissioner by telephone rather than in an open, public forum. The board unsuccessfully argued that the committee was not a public agency as defined in the open meetings law and the institute prevailed on the issue.<sup>15</sup>

### KRS 61.870(1)(h): Defining “public agency” as entities receiving public funds

The single most confounding provision of either law is found at KRS 61.870(1)(h). This provision was intended to expand the application of the open records law<sup>16</sup> to private entities that derive at least 25 percent of the funds they expend in the commonwealth from state or local authority funds. Records relating to these public funds that are prepared, owned, used, in the possession of or retained by the otherwise private entity are public records and, unless exempt under one or more of the statutory exemptions, are accessible under the open records law.

Never a model of clarity,<sup>17</sup> KRS 61.870(1)(h) was amended in 2012 to exclude state or local authority funds the entity receives for goods or services under a public competitively bid contract from the 25 percent calculation. This has enabled entities doing substantial business with public agencies to resist disclosure of records reflecting the expenditure of public funds. In one notable case, Utility Management Group, LLC, a privately owned, for-profit company which provides management and operational services for public waterworks under competitively bid contracts with the Mountain Water District and the City of Pikeville and that derives virtually all its revenue from payments received under these contracts, has disclaimed its status as a public agency under a retroactive reading of the 2012 amendment.

---

<sup>10</sup> *Lexington Herald-Leader v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884 (Ky. 1987).

<sup>11</sup> *Frankfort Publishing Company v. Kentucky State University Foundation, Inc.*, 834 S.W.2d 681 (Ky.1992); *University of Louisville Foundation, Inc., v. Cape Publications, Inc. d/b/a/The Courier Journal*, 2003 WL 22748265 (unpublished) followed in *Cape Publications, Inc., v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818 (Ky. 2008).

<sup>12</sup> *Kentucky Central Life Insurance Co. ex rel. Stephens v. Park Broadcasting*, 913 S.W.2d 330 (Ky. App. 1996).

<sup>13</sup> *University Medical Center Inc. v. American Civil Liberties Union of Kentucky, et al.*, 467 S.W.3d 790 (Ky. App. 2015).

<sup>14</sup> Pursuant to KRS 61.880(2), the Kentucky Attorney General is charged with the duty of reviewing open records appeals, consisting of the written request and written denial, and issuing open records decisions (ORD) within 20 business days stating whether the agency violated the open records law. These decisions, if not appealed to the appropriate circuit court, have “the force and effect of law” and are binding on the parties, pursuant to KRS 61.880(5)(b). The same authority is vested in the attorney general to resolve disputes arising under the open meetings law and issue open meetings decisions (OMD) within ten business days. KRS 61.846(2). These decisions also have “the force and effect of law,” pursuant to KRS 61.846(4)(b), if not appealed to circuit court.

<sup>15</sup> 15-OMD-155.

<sup>16</sup> There is no corresponding provision of the open meetings law.

<sup>17</sup> In 2009, Division 13 of the Jefferson Circuit Court declared KRS 61.870(1)(h) unconstitutionally vague in the context of a dispute concerning access to the records of the contractor at risk to the Louisville Arena Authority (*William H. Chilton, III v. M.A. Mortenson Company*, No. 09-CI-02749). Two years later, Division 12 of the Jefferson Circuit Court took the opposing view, declaring that the statute is not unconstitutionally vague (*University Health Care, Inc. v. The Courier Journal*, No. 10-CI-04753).

This prolonged dispute has involved the Office of the Attorney General and the courts from 2011 to the present.<sup>18</sup>

At the same time, lawmakers attempted to address ambiguities in [KRS 61.870\(1\)\(h\)](#) that prompted one division of the Jefferson Circuit Court to declare the statute unconstitutionally vague.<sup>19</sup>

Whereas the earliest iteration of the statute established no time frame within which to calculate the 25 percent state or local funding requirement, the 2012 amendments introduced language aimed at capturing funds received “within any fiscal year.” This language compounds the ambiguity, raising as many questions as it answers in the interpretation and application of [KRS 61.870\(1\)\(h\)](#). Two bills aimed at carving out exceptions for state or local funds received for certain types of publicly bid goods and services and bringing these funds back into the 25 percent calculation were proposed in the last two legislative sessions. Neither bill passed.<sup>20</sup>

## Recommended

Lawmakers should reconsider the wisdom of the 2012 amendments to [KRS 61.870\(1\)\(h\)](#). At a minimum, lawmakers should eliminate these ambiguities by clearly delineating the provision’s intended goal and formulating language that achieves that goal. Because the attorney general is statutorily charged with the responsibility to adjudicate disputes arising under [KRS 61.870\(1\)\(h\)](#),<sup>21</sup> but is not empowered to compel private entities disputing receipt of 25 percent of their funds from state or local authorities to substantiate their financial claims, lawmakers should also establish a mechanism by which the attorney general can demand proof supporting the entity’s claims.<sup>22</sup>

---

<sup>18</sup> In [11-ORD-143](#), the attorney general determined that UMG is a public agency for open records purposes under the pre-amendment language of [KRS 61.870\(1\)\(h\)](#). On appeal, the Pike Circuit Court reversed the attorney general’s conclusion based on a retroactive application of the 2012 amendment. The Court of Appeals rejected the circuit court’s opinion in *Pike County Fiscal Court v. Utility Management Group, LLC*, No. 2013-CA-000929 (June 2015), concluding the amendment could not be applied retroactively. The issue is currently before the Kentucky Supreme Court, *Utility Management Group, LLC v. Pike County Fiscal Court*, 2015-SC-680-DG (oral argument held in February 2017).

<sup>19</sup> See Note 17, above.

<sup>20</sup> [HB 80](#), 2016 Regular Session; [HB 194](#), 2017 Regular Session.

<sup>21</sup> See Note 17 above.

<sup>22</sup> Lawmakers should also consider refining [KRS 61.870\(1\)\(c\)](#) which extends “public agency” status to “every state or local court or judicial agency.” In *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978), and subsequent opinions, the Kentucky Supreme Court declared that custody and control of records of the courts and judicial agencies resides exclusively in the courts, rejecting statutory regulation of its records. The records at issue in that case consisted of “materials generated by the court incident to the decision-making process,” and part of its “ongoing work.” *Farley*, n.4. Questions have arisen concerning the broad application of this holding to exclude from public inspection records reflecting expenditure of funds appropriated to the courts by the General Assembly. The Court itself has suggested that the *Farley* holding should be limited to the judiciary’s “core powers,” such as bar admission, discipline and rulemaking, and that funds generated by the courts in the exercise of these constitutionally conferred powers should be distinguished from funds appropriated to the courts by the General Assembly. *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682 (Ky.1982). In [04-ORD-037](#) the attorney general analyzed this issue in depth, reluctantly deferring to the Administrative Office of the Courts in its reliance on *Ex parte Farley* to withhold records relating to construction of justice centers within the state. Citing *Horn v. Commonwealth*, 916 S.W.2d 173,175 (Ky. 1995), the attorney general nevertheless emphasized that AOC may have “painted with too broad a brush in applying *Ex parte Farley*. . . to support its position.” This lack of transparency constitutes a continuing problem that can be corrected by refining the language of [KRS 61.870\(1\)\(c\)](#). “[State Agency Under Investigation for ‘Irregularities’ in Surplus Vehicle Auction.](#)” The presence of the definition in its current form lends itself to overbroad application and generates unnecessary confusion and legal challenges.

## KRS 61.810(2): Prohibiting a series of less-than-quorum meetings

KRS 61.810(1) mandates that all meetings of a quorum of the members of a public agency at which public business is discussed or action is taken must be conducted in an open, public forum. In response to criticism that public agencies could avoid this requirement by conducting a series of less-than-quorum meetings in contravention of the open meetings law's basic mandate, lawmakers amended the law in 1992 to prohibit "any series of less-than-quorum meetings, where the members attending one or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding" the requirement of an open, public meeting found at KRS 61.810(1).

Lawmakers created an exception for "discussions between individual members where the purpose of the discussions is to educate the members on specific issues." The laudable goal of prohibiting floating or rolling quorum meetings was seriously undermined by the inclusion of a required showing of the participants' intent to violate the open meetings law and by the exclusion of discussion between members held to educate members on specific issues.

With few exceptions,<sup>23</sup> public officials defending against allegations of violation of KRS 61.810(2) assert that they did not intend to circumvent the requirements of the open meetings law in conducting less-than-quorum meetings to discuss public business, or the record on appeal is devoid of evidence establishing the officials' intent. Moreover, prohibited series of less-than-quorum meetings are almost universally defended as meetings held to educate members on specific issues. In a challenge never formally presented to the attorney general or the courts, the University of Kentucky Board of Trustees was alleged to have violated KRS 61.810(2) by conducting a series of less-than-quorum meetings among the trustees to discuss the university's budget.<sup>24</sup> Predictably, the board defended the less-than-quorum meetings as meetings held to educate its members and aimed at reducing the length of the public meeting, notwithstanding the broad public interest in the topic and court's recognition that "the right of the public to be informed transcends any loss of efficiency."<sup>25</sup>

## Recommended

Lawmakers should reevaluate the underlying intent of KRS 61.810(2) and reformulate the language of the provision to ensure that the purpose supporting its enactment is not defeated.<sup>26</sup>

---

<sup>23</sup> In 00-OMD-063, the attorney general found that although the county judge announced in a press conference that he privately met with each member of the fiscal court to discuss jail relocation, the record was silent on the question of whether the meetings were held for the purpose of avoiding the requirements of the open meetings law.

<sup>24</sup> "Questions raised about legality of private meetings held by University of Kentucky trustees," *Lexington Herald-Leader*, June 8, 2014. <http://www.kentucky.com/news/local/education/article44492349.html>.

<sup>25</sup> *Lexington Herald-Leader Co. v. Univ. of Kentucky Presidential Search Comm.*, 732 S.W.2d 884, 886 (Ky. 1987).

<sup>26</sup> Lawmakers may also wish to consider clarifying the requirement for framing a motion on final action in an open session. KRS 61.815(1)(a) establishes specific requirements that must be observed in framing a motion to go into closed session. KRS 61.815(1)(c) prohibits final action in closed session but establishes no requirements for framing the motion on final action in open session. This invites vaguely worded motions on final action that communicate very little about the nature of that action to the public in contravention of the law's primary purpose. Additionally, lawmakers may wish to consider addressing the KRS 61.823(4)(a) requirement of 24-hour advance notice of special meetings to media organizations in areas not served by a newspaper with daily circulation. In such locations, 24-hour notice is inadequate to ensure proper notification to the public of special meetings.

KRS 61.880(2)(c): *Scope of attorney general's authority to request documentation in an open records appeal*

As noted, [KRS 61.880\(2\)](#) directs the Office of the Attorney General to mediate disputes between aggrieved records applicants and public agencies. KRS 61.880(2)(c) clearly assigns the burden of proof in denying an open records request to the public agency.<sup>27</sup> Just as clearly, it empowers the attorney general to “request additional documentation from the agency for substantiation. . . [and] a copy of the records involved but they shall not be disclosed.” This express grant of authority is mirrored in [40 KAR 1:030\(3\)](#).<sup>28</sup>

Without this power, which is analogous to a court’s authority to conduct *in camera* inspection, the attorney general cannot meaningfully discharge his statutory duty. Interpretation of this facially unambiguous statute is currently in the courts following the University of Kentucky’s refusal, on multiple occasions, to comply with the attorney general’s [KRS 61.880\(2\)\(c\)](#) requests.<sup>29</sup>

## Recommended

Lawmakers should amend the statute in a manner which authorizes the attorney general to declare that an agency’s refusal to comply with his request for documentation for substantiation or copies of the records in dispute constitutes failure to meet the agency’s burden of proof and to find against the recalcitrant agency.

## Open meetings and open records provisions that require reconciliation

[KRS 61.810\(1\)](#) and [KRS 61.878\(1\)](#): *Conflicting statutory exemptions*

Critics of the open meetings and open records laws occasionally point to irreconcilable differences between the two laws. Exemptions in the open records law protecting certain types of records do not find corresponding exemptions in the open meetings law. As a result, public agencies may be required to discuss otherwise-protected records in open session during public meetings.

---

<sup>27</sup> [KRS 61.880\(2\)\(c\)](#) states “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.”

<sup>28</sup> That regulation states: “[KRS 61.846\(2\)](#) and [61.880\(2\)](#) authorizes the attorney general to request additional documentation from the agency against which the complaint is made. If the documents thus obtained are copies of documents claimed by the agency to be exempt from the open records law, the attorney general shall not disclose them and shall destroy the copies at the time the decision is rendered.”

<sup>29</sup> See, e.g., [16-ORD-161](#) and subsequent circuit court appeal (*University of Kentucky v. The Kernel Press, Inc., d/b/a The Kentucky Kernel*, No. 16-CI-03229 (Fayette Circuit Court, Division 8)). This question was resolved by the Kentucky Court of Appeals in favor of the absolute right of the attorney general to request documentation from the agency and to require production of disputed records by the agency, in *Cabinet for Health and Family Services v. Todd County Standard, Inc.*, 488 S.W.3d 1 (Ky. App. 2016).

For example, the argument is advanced that a proposed budget qualifies for exemption under the preliminary documents exemptions in the open records law, found at [KRS 61.878\(1\)\(i\) and \(j\)](#),<sup>30</sup> until it is adopted.<sup>31</sup> But because there is no corresponding exemption in the open meetings law, officials must publicly discuss the contents of the document they may arguably withhold. The public's ability to monitor the officials' discussion of the budget is severely impaired by its inability to review the document itself. Similarly, public official or employee performance evaluations may, absent a heightened public interest in the discharge of the official's or employee's public duties, be withheld from public inspection under the privacy exemption found in the open records law at [KRS 61.878\(1\)\(a\)](#).<sup>32</sup>

No open meetings exemption exists authorizing closed session discussion of performance evaluations unless those discussions "might lead to the . . . discipline or dismissal of an individual employee" per [KRS 61.810\(1\)\(f\)](#). This issue became the focus of a 2008 open meetings appeal to the attorney general involving public discussion of the Spencer County Schools' superintendent's evaluation and subsequent litigation that ultimately led to an amendment to the statute relating to superintendent evaluations.<sup>33</sup>

Test questions and scoring keys also are expressly protected by an exemption to the open records law<sup>34</sup> but no corresponding open meetings exemption authorizes closed-session discussions of these records. One consequence of this conflict is that professional licensure boards developing examination questions for licensure exams must discuss the particulars of each question in an open, public meeting that may be attended by prospective licensees.

## Recommended

Lawmakers should undertake a revision of both laws aimed at reconciling these conflicts in a manner that promotes responsible agency discussion and meaningful public scrutiny. Where the actual need for governmental confidentiality outweighs the public's right to know, they may wish to consider the approach taken in 2005 when a "homeland security" exemption was added to the open records law aimed at shielding from public access "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."<sup>35</sup>

---

<sup>30</sup> [KRS 61.878\(1\)\(i\)](#) authorizes nondisclosure of "preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." [KRS 61.878\(1\)\(j\)](#) authorizes nondisclosure of "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."

<sup>31</sup> [10-ORD-103](#).

<sup>32</sup> [KRS 61.878\(1\)\(a\)](#) authorizes public agencies to withhold "public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In *Cape Publications v. City of Louisville*, 191 S.W.3d 10 (Ky. App.2006), the court determined that the public's right of access to employee performance evaluations must be decided on a case-by-case basis and that the privacy interest in the evaluation must yield where there is evidence of a heightened public interest in disclosure.

<sup>33</sup> Following a successful legal challenge to the school board's closed-session discussion of the Spencer County superintendent's evaluation in 2009, lawmakers in 2010 were persuaded to amend [KRS 156.557\(6\)](#), relating to superintendents' evaluations generally, to require discussion and adoption of summative evaluations in open session but to authorize preliminary discussion between board members, and board members and the superintendent, in closed session. [08-OMD-165](#); affirmed in *Spencer County Board of Education v. Sandra Lee Clevenger*, No.08-CI-00223 (Spencer Circuit Court, October 9, 2009).

<sup>34</sup> [KRS 61.878\(1\)\(g\)](#).

<sup>35</sup> [KRS 61.878\(1\)\(m\)1](#).

Foreseeing the inevitable consequences of public discussion of such records, lawmakers simultaneously enacted a corresponding open meeting exemption authorizing closure of “that portion of a meeting devoted to a discussion of a specific public record exempted from disclosure by [KRS 61.878\(1\)\(m\)](#).”<sup>36</sup> Conversely, where the public’s right to know outweighs any purported need for governmental confidentiality, lawmakers should mandate public access to agenda materials or by some means ensure the public’s right of access to the records and to discussions concerning the records.

[KRS 61.815\(1\) and \(2\)](#): *Requirements for conducting closed sessions*

Disputes concerning the duties of public agencies prior to conducting closed sessions have beset the open meetings law since its enactment.

These disputes are attributable to the conflicting language found at [KRS 61.815\(1\) and \(2\)](#). Referencing the 13 exemptions authorizing closed sessions codified at [KRS 61.810\(1\)\(a\) through \(m\)](#), [KRS 61.815\(1\)](#) requires that, before entering closed session, the agency must give notice in open session “of the general nature of the business to be discussed, the reason for the closed session, and the specific provision of [KRS 61.810](#) authorizing the closed session.” These requirements are aimed at “maximiz[ing] notice of public meetings and actions”<sup>37</sup> and are an essential tool for assessing the propriety of the agency’s decision to conduct a closed session.

Nevertheless, [KRS 61.815\(2\)](#) provides that public agencies conducting closed sessions under every statutory exemption found in [KRS 61.810\(1\)\(a\)through \(m\)](#), except the exemption for “deliberations on the future acquisition or sale of real property by a public agency” and the exemption for “discussions or hearings that might lead to the appointment, discipline, or dismissal of an individual employee member or student,” but only so far as that exemption relates to students, may ignore the [KRS 61.815\(1\)](#) requirements. Thus, [KRS 61.815\(2\)](#) creates an exception that swallows, almost entirely, the rule set forth at [KRS 61.815\(1\)](#) as it relates to 12 of the 13 exemptions, relieving public agencies of the duty to observe the requirements for going into closed session. Literally construed, [KRS 61.815\(2\)](#) deprives the public of the ability to assess the propriety of an agency’s decision to conduct a closed session in virtually all cases.

The attorney general has construed [KRS 61.815\(2\)](#) in a manner that avoids this consequence<sup>38</sup> and the courts have largely ignored subsection (2),<sup>39</sup> but subsection (2) is regularly invoked by agencies in defense of their failure to observe the requirements for going into closed session. The provision could also be used to justify final action in closed session on 12 of the 13 statutorily authorized topics.

---

<sup>36</sup> [KRS 61.810\(1\)\(m\)](#).

<sup>37</sup> *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921,923 (Ky. 1997).

<sup>38</sup> See, for example, [01-OMD-181](#).

<sup>39</sup> See, for example, *Floyd County Board of Education v. Ratliff* at 924 (“[KRS 61.815](#) provides that prior to going into an executive session, the public body must state the specific exception contained in the statute which is relied upon to permit a secret session. There must be specific and complete notification in the open meeting of all topics which are to be discussed during the closed meeting.”).

## Recommended

Absent any rationale supporting these conflicting provisions, lawmakers should repeal [KRS 61.815\(2\)](#) in the interest of maximizing notice of actions taken by agencies at their public meetings.

### [KRS 61.880\(2\)\(c\)](#) and [KRS 61.882\(3\)](#): *Burden of proof*

[KRS 61.880\(2\)\(c\)](#)<sup>40</sup> and [KRS 61.882\(3\)](#)<sup>41</sup> assign the burden of proof to the public agency to sustain the action taken in an open records dispute. However, whether inadvertently or by design, the legislature has not assigned the burden of proof to public agencies to sustain their challenged actions in an open meetings dispute. A complainant's inability to prove the specific facts supporting an alleged violation is therefore likely to result in a favorable ruling for the agency.

For example, a complainant attends a public meeting during which the members conduct a closed session to discuss proposed or pending litigation against or on behalf of the agency. When the members of the public body return to open session, they approve an agency-wide reorganization.

The complainant has reason to believe that the matters discussed in closed session were not confined to proposed or pending litigation but cannot prove how the closed-session discussion proceeded. Only the members of the agency know what was discussed in closed session. Or, the complainant attends a public meeting where vague reference is made to previous nonpublic discussions between a quorum of the members of the agency of the topic under consideration. A consensus is quickly reached and action is taken on the topic with little or no public discussion.

The complainant forms a reasonable belief that a secret meeting of a quorum or a series of less-than-quorum meetings of agency members collectively constituting a quorum previously occurred at which the topic was discussed but, understandably, cannot identify the date or dates these secret meetings occurred.

The agency has a monopoly on the facts but isn't required to sustain its action by proof such as sworn affidavits of the agency's members attesting to their non-participation in a secret meeting or meetings. No rationale is advanced for the disparity between the open meetings and open records laws with respect to the assignment of the burden of proof.

## Recommended

Lawmakers should consider reconciling the two laws by statutorily assigning the burden of proof to the public agency in sustaining the challenged action taken in an open meetings dispute.

## Open meetings and open records provisions that require modernization

### *Obsolete language and dated concepts*

Technology has been a double-edged sword in the struggle for open government. Given the fact that they have not been substantially amended in more than 20 years, both the open meetings and open records laws are saddled with obsolete language and anachronistic concepts that lend themselves to exploitation.

---

<sup>40</sup> [KRS 61.880\(2\)\(c\)](#) applies to proceedings before the Office of the Attorney General.

<sup>41</sup> [KRS 61.882\(3\)](#) applies to proceedings before the circuit court.

ASCII<sup>42</sup> is defined as the standard format for production of electronic records. Public agencies are authorized to recover medium and mechanical processing cost (“actual costs”) only for records produced in ASCII. A request for production of electronic records in any other format is deemed a “non-standardized request.” Public agencies may deny such requests. If the agencies elect to honor “non-standardized requests,” they are authorized to assess staff costs, in addition to medium and mechanical-processing costs, for production of the electronic records, thus driving up the fees for the records. The explosion in the availability of visual formats since the open records law was substantially amended in 1994, and the limitations imposed by the “plain text” ASCII format, weigh heavily against the law’s statutorily expressed preference for this format.

The laws make only one reference to email, and this is in the context of special meeting notices for which the recipient has expressed a written preference.<sup>43</sup> Emailed open records requests may or may not be permissible under the 1994 provisions authorizing their transmission by fax, hand delivery, or “mail,”<sup>44</sup> although neither a faxed nor emailed request bears a “wet” signature per the requirement in the original open records law. Skyped public meetings may or may not be authorized under the 1994 statute authorizing video-conferenced meetings<sup>45</sup> although the technology, if properly utilized, guarantees the same right of the public to both see and hear officials participating in the meeting.

Moreover, [KRS 61.874\(1\)](#) directs agencies to permit requesters to duplicate records “other than written records” if the agencies lack the ability to do so and take precautions to ensure the records are not damaged. The law does not, however, consider the availability of camera phones, scanners and other devices that might, at the requester’s option and after precautions are taken to ensure that the records are not damaged, eliminate all costs associated with the request, including staff time consumed in the reproduction of public records.<sup>46</sup>

Finally, [KRS 61.872\(6\)](#) authorizes agencies to deny open records requests that “place an unreasonable burden in producing public records,”<sup>47</sup> upon a showing of same by clear and convincing evidence. The statute establishes no standards for determining what constitutes an unreasonable burden. Other than the omission of the word “voluminous” in the early ’90s, [KRS 61.872\(6\)](#) has not been amended to reflect “rapid changes in the dynamics of communication and information transmission.”<sup>48</sup>

Demand for voluminous public records has increased as public officials and employees abandon face-to-face communication in favor of email, text and social media, imposing a greater burden on public agencies. Conversely, advanced search capabilities ease the burden on public agencies formerly associated with manually locating and retrieving public records.

---

<sup>42</sup> [KRS 61.874\(2\)\(b\)](#).

<sup>43</sup> [KRS 61.823\(4\)\(b\)](#).

<sup>44</sup> [KRS 61.872\(2\)](#).

<sup>45</sup> [KRS 61.826](#).

<sup>46</sup> [KRS 64.019\(1\)](#) vests exclusive authority in county clerks to establish policies prohibiting the use of personal camera phones, scanners and other devices promoting the ill-conceived notion among other agencies that they have the same right.

<sup>47</sup> [KRS 61.872\(6\)](#).

<sup>48</sup> *City of Ontario v. Quon*, 560 U.S. 746 (2010).

## Recommended

Lawmakers should consider emerging technology and evolving practice in revising the language of the open meetings and open records laws with the goal of modernization.

### *Discussion of public business on private devices*

The pervasive use of electronic devices to conduct public business has multiplied the number of public records and created a more extensive electronic “paper trail” of agency action. Unfortunately, these records have proven more difficult to manage and access. Discussions of public business, whether conducted on publicly or privately owned devices and accounts, clearly qualify as public records under [KRS 61.870\(2\)](#) as documentation “regardless of physical form or characteristics” that is “prepared, owned, used, in the possession of or retained by a public agency.”<sup>49</sup>

These records are subject to properly promulgated laws<sup>50</sup> that govern their retention and management but have proven more elusive than their hard-copy counterparts. Officials, including the Kentucky Attorney General, are reluctant to acknowledge their status as public records.<sup>51</sup> Their failure, or refusal, to recognize this legal reality and to adjust agency conduct accordingly represents one of the gravest current threats to both the open meetings and open records laws and government accountability generally.

## Recommended

In the interest of absolute clarity, lawmakers should amend the definition of “public record” in [KRS 61.870\(2\)](#) to include documentation relating to public business conducted by public officials and employees on publicly and privately owned devices and accounts.

---

<sup>49</sup> [KRS 61.870\(2\)](#).

<sup>50</sup> The General Schedules for State and Local Government Records recognize that “electronic records fall under the definition of public records. Records-management standards and principles apply to all forms of recorded information, from creation to final disposition, regardless of the medium in which the records are created and/or stored.” Official correspondence is scheduled at L4954, Routine Correspondence is scheduled at L4955, and Non-Business Related Correspondence is scheduled at L5866 on the General Schedule for Local Agencies. All schedules are promulgated into state regulation by operation of [725 KAR 1:061](#).

<sup>51</sup> [15-ORD-226](#); [16-ORD-262](#). At the risk of oversimplification, these open records decisions conclude that communications on private devices concerning public business are not public records because they are not “possessed” and/or “used” by the public agency. This stands in contrast to recent authority from other jurisdictions, construing narrower definitions of the term “public record” but recognizing that communications concerning public business on private devices are public record and accessible to the public if not exempted by statute. *Competitive Enterprise Institute v. Office of Science and Technology*, 827 F.3d 145 (D.C.Cir. 2016) (recognizing that the federal Freedom of Information Act, 5

U.S.C. 552, reaches work-related emails in the private email accounts of agency officials); *City of San Jose v. Superior Court of Santa Clara County*; *Ted Smith, Real Party in Interest*, No. S218066 (California Supreme Court, March 2, 2017) (holding that when a city employee uses a personal account to communicate about public business, the communications are public records and may be subject to disclosure under the California Public Records Act, Government Code Section 6250 *et seq.*); *Nissen v. Pierce County*, 2015 WL 5076297 (determining that public employee text messages sent on his private cell phone were public records under Washington Public Records Act, RCWA 42.56.010). In February, 2015, Mayor Greg Fisher announced a Louisville Metro Government policy directing the assignment of public email addresses to all boards and commission members and requiring the members to use their public email addresses rather than personal accounts in the conduct of public business. In a more far-reaching effort to address this problem, the city of Corvallis, Oregon has adopted comprehensive city policies aimed at retention and management of electronic communications, ensuring transparency and providing training and guidance on proper use that provides a model for other jurisdictions. <https://www.corvallisoregon.gov/modules/showdocument.aspx?documentid=86>

If adapted to Kentucky retention requirements and properly implemented, such a policy, whether adopted into law, regulation, ordinance or executive order, would disabuse public officials and employees of the notion that they can evade public oversight by conducting public business on personal devices/accounts and casually destroying the public records generated on these devices/accounts at will.

## Penalties

In *Cabinet for Health and Family Services v. The Courier Journal, Inc., and Lexington H-L Services, Inc.*, 493 S.W.3d 375 (Ky. App. 2016), the Kentucky Court of Appeals recognized that the strongly-worded statement of legislative policy supporting the open records law is advanced not only by strict construction of the statutory exemptions to public access but also by “a liberal reading of those provisions aimed at the meaningful punishment of those who willfully obfuscate the public’s ability to examine non-exempt records.” Acknowledging that the \$756,000 in penalties imposed on the cabinet in that case were “substantial,” the court reasoned: “Substantial, too, is the legal obligation the Cabinet owed the public and the effort it expended in attempting to escape it. While it will ultimately be the public that bears the expense of this penalty, we maintain that the nominal punishment of an egregious harm to the public’s right to know would come at an even greater price.”<sup>52</sup>

The court concluded that “the Open Records Act is neither an ideal nor a suggestion; it’s the law. Public entities must permit inspection of public records as required or risk meaningful punishment for noncompliance. Rigid adherence to this stark principle is the lifeblood of a law which rightly favors disclosure, fosters transparency, and secures the public trust.”

The penalty provisions at issue in *Cabinet for Health and Family Services v. The Courier Journal, Inc., and Lexington H-L Services*, which are located at [KRS 61.882\(5\)](#), and those relating to open meetings violations located at [KRS 61.848\(6\)](#) have remained largely unchanged since the laws’ enactment in the ’70s. Critics assert that the \$25 per-day fine for willful withholding of public records and the \$100 per-incident fine for willful violation of the open meetings law<sup>53</sup> should be increased as a greater deterrent to agency noncompliance.

## Recommended

Whatever the legislative will in this regard, lawmakers should consider a revision to the laws that would require public agencies to pay attorneys’ fees and costs incurred by open records applicants and open meetings complainants who prevail in their appeals to the attorney general if the agencies thereafter appeal the attorney general’s open records or open meetings decisions to circuit court and again receive an unfavorable ruling. Such a revision would “make whole” open records applicants or open meetings complainants who are acting in the public interest but get “hauled into court” by disgruntled public agencies.

---

<sup>52</sup> The parties later settled this case, which involved access to records relating to the deaths and near-deaths of children under the supervision of the Cabinet, for \$250,000 in the interest of “promot[ing] greater openness in child welfare.” <http://www.kentucky.com/news/local/watchdog/article72496592.html>

<sup>53</sup> [KRS 61.848\(6\)](#) and [KRS 61.882\(5\)](#) also provide for the discretionary award of costs and reasonable attorneys’ fees. Additionally, [KRS 61.848\(5\)](#) authorizes the courts to void “any rule, resolution, regulation, ordinance, or other formal action of a public agency without substantial compliance with the requirements of” the statutes relating to legal bases for closed session, conducting closed sessions, conducting regular meetings, and conducting special meetings. On more than one occasion, the courts have demonstrated a willingness to impose this sanction by voiding actions taken at illegal public meetings. *Carter v. Smith*, 366 S.W.3d 414 (Ky. 2012); *Webster County Board of Education v. Newell*, 392 S.W.3d 431 (Ky. App. 2013).

## Training

The 2005 enactment of a training requirement for local, school and university officials demonstrated the legislature's continuing commitment to government transparency but has fallen short of its laudable goal.<sup>54</sup> The laws provide for distribution of written materials to elected and appointed public officials when they first take office and when the open meetings or open records laws are amended. Although they require proof of distribution and receipt of the materials, they create no mechanism for verifying recipients' actual review of the materials.

## Recommended

To advance the goal of open meetings and open records literacy, lawmakers should amend the laws to extend to all public officials, state and local.<sup>55</sup> To verify the official's compliance, lawmakers should direct implementation through a mandatory online training module that concludes with an assessment of the official's understanding of the laws and certification that the official completed the training. Lawmakers may even wish to consider penalties for noncompliance.

## Conclusion

There is much about Kentucky's open meetings and open records laws that must be jealously guarded to ensure its continuing vitality. Nevertheless, the time has come for lawmakers to undertake a comprehensive revision aimed at addressing the problems identified above and driven by an unwavering commitment to the recognition that "the formation of public policy is public business and shall not be conducted in secret," and that "free and open examination of public records is in the public interest." Without meaningful opportunities for open meetings and open records training, public officials at all levels will continue to run afoul of the laws at the expense of the reputations of the agencies they serve, and, more importantly, at the expense of the public's right to open, transparent and accountable government recognized in the statements of legislative policy with which this proposal began. Until they do, public agencies will exploit the ambiguities, inconsistencies and anachronisms in the laws, and unnecessary disputes concerning interpretation and application of the laws will strain the resources of the attorney general and courts. And for all that is good in Kentucky's open meetings and open records laws, they will continue to stumble through the not-so-new century at the price of effective public-agency oversight.

---

<sup>54</sup> The duties imposed on the Office of the Attorney General are found at [KRS 15.257](#). Companion legislation relating to the duties of county judge-executives and mayors, school superintendents and university presidents is found at [KRS 65.055\(1\)](#), [KRS 160.395\(1\)](#), and [KRS 164.465\(1\)](#), respectively.

<sup>55</sup> Local agencies, schools and universities do not have a monopoly on open meetings and open records noncompliance. In 2016, the Kentucky Horse Park Commission, an agency attached to the executive branch of state government, attempted to exclude the media from a meeting of a quorum of its members held to discuss the park's future. The commission incorrectly characterized the meeting as "informal" and therefore nonpublic. <http://www.kentucky.com/news/politics-government/article100375002.html>

---

*Amye L. Bensenhaver is director of the Bluegrass Institute Center for Open Government.*

*She is one of the foremost experts on Kentucky's nationally recognized open records and open meetings laws, having written nearly 2,000 legal opinions forcing government entities to operate in the open during a 25-year career as an assistant attorney general in the Kentucky Attorney General's Office.*