

POLICY:	COE
SUBJECT:	OPEN RECORDS REQUEST
REVIEW DATE:	7/1/2021
APPROVAL:	N/A
PROCEDURE#	N/A
REFERENCE #	KRS 61.870, OAG



### **Definition of Public Records**

Public record means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, or other documentary materials regardless of form or characteristics which are prepared, owned, used, in the possession of or retained by a public agency. KRS 61.870(2)

Electronic mail (e-mail) created or maintained by public agencies meets the statutory definition of a public record in Kentucky.

### **Definition of a Public Agency (KRS 61.870)**

- Every state or local government officer (including City Clerk)
- Every state or local government department, division, bureau, board, commission, and authority (includes City Clerk's Office)
- Every city governing body, council, special district board, and municipal corporation
- Every state or local government agency
- Any body created by state or local authority in any branch of government
- Anybody who derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth from state or local authority funds
- Any entity were the majority of its governing body is appointed by a public agency or by a member or employee of a public agency
- Any board, commission, committee, ad hoc committee, advisory committee, council or agency, except for a committee of a hospital medical staff, created and controlled by a public agency
- Any interagency body of two or more public agencies

### **Adoption of Rules to Govern**

KRS 61.876 requires that cities have procedures in place to provide public access to public records. This is generally done by ordinance. The rules or ordinance must be displayed in a prominent location accessible to the public and must include the following:

- The principal office of the public agency and its regular hours.
- The title, physical and email address of the official custodian of the public agency's records. KRS 61.876(1)(b)
- The fees to be charged for copies of public records.
- The procedures to be followed for requesting public records.

Each public agency must also publish its policies and procedures on its website. KRS 61.876(2)

### **Rights to Inspect and Copy Public Records**

- Any person has the right to inspect public records unless the records are exempt from

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inspection. KRS 61.872(1)

- The person making the request does not have to state a reason or purpose for making the request unless the request is for commercial purposes. OAG 80-641
- A person may inspect public records during the regular office hours of the public agency or by receiving copies of the public records from the agency through the mail or email. KRS 61.872(3) A public agency is only required to mail copies of public records to a person whose residence or principal place of business is outside of the county in which the records are located.
- If the person requesting the information is located outside of the county in which the records are located, the following requirements must be satisfied:
  - ➔ The person must precisely describe the records.
  - ➔ The records must be readily available within the public agency.
  - ➔ The person requesting copies must make advance payment of the prescribed fee, including postage, if not provided through email.
- The City Clerk's Office distributes most redacted records electronically through JustFOIA (a records request software) at no charge, unless otherwise specified. Copies of personnel files, unredacted records, and other sensitive records are not distributed electronically. In these instances, fees and postage would apply.

### **Request to Inspect Records**

- The request should be made to the official custodian of the public agency. The official custodian for the City of Erlanger is the City Clerk. KRS 83A.085(3)(b) states that the City Clerk is required to perform the duties of the official custodian or custodian of the City's permanent record, which means that the City Clerk is responsible for city records and requests to inspect those records. Under the Open Records Act, the Official Custodian is responsible for the maintenance, care, and keeping of public records regardless of whether the records are actually in that person's personal custody and control. Custodian is defined as the official custodian having personal custody and control of public records. KRS 61.870(5)(6)
- The City of Erlanger uses JustFOIA, a records request software. Requesters can submit their requests online at [www.erlangerky.gov](http://www.erlangerky.gov). These requests are routed to the City Clerk's Office.
- If the person to whom the request to inspect is not the official custodian, the individual receiving the request must direct the requester to the official custodian (City Clerk). The City Clerk will keep involved departments or persons apprised. The City cannot avoid responding to a request because it was made to the wrong person. OAG 92-94
- Requests may be made orally, in writing, or through email to the Official Custodian, but the custodian may require a signed written request describing the records to be inspected.

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KRS 61.872(2)(a) The City of Erlanger uses the Open Records Request Form provided by the Kentucky Attorney General and should be completed and signed by the requester. For our records, the requestor will sign once again upon receipt of the information. The reason for obtaining the requestor's signature shows proof of receipt of the requested records. However, the city cannot require a person to use the request form. Their written application may be delivered by hand, mailed, emailed, or sent by facsimile. KRS 61.872(2)(a)

- The request to inspect must identify and describe the records. A public agency is under no obligation to produce records when the request is so vague that one cannot determine with reasonable certainty which records are being requested. OAG 02-ORD-115 However, if an applicant cannot identify the records that he wishes to review, the public agency must permit him to review the category of records on his own time and under the restrictions and safeguards of the public agency. OAG 97-ORD-12
- Requests for copies of records must precisely describe the requested records. OAG 05-ORD-235
- A request to inspect police dispatch logs for a four year period is neither a blanket request nor unduly burdensome because of volume and does not support a denial of inspection where the records are of a limited class cumulated by month or year, and where inspection has been allowed to others. OAG 89-20

#### **Responsibilities of the City Clerk**

- The official custodian must determine within five (5) business days (excepting Saturdays, Sundays, and legal holidays) whether to comply with the request to inspect records and must notify the person making the request in writing within the five (5) day period of the decision. KRS 61.880(1)
- The official custodian is not required to respond to an oral request to inspect records. A written request may be required.
- If the records are in active use or storage, or are not otherwise available, the official custodian must immediately notify the applicant and designate a time and place for inspection within five (5) business days from receipt of application, or provide the applicant with a detailed explanation of the cause for further delay and notify applicant of the place, time, and earliest date on which records will be available for inspection. KRS 61.872(5)

#### **Denial of Requests**

- Requests to inspect, including requests that records can be mailed or emailed, may be denied if the request places an unreasonable burden on the public agency or if the official custodian believes that repeated requests are intended to disrupt essential functions of the

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public agency. KRS 61.872(6), OAG 83-386 In the instance of repeated requests, the City Clerk must provide clear and convincing evidence of this fact before denying the request.

- Public agencies are not required to create documents that do not exist. OAG 03-ORD-093 An agency must, at minimum, offer some explanation for the nonexistence of the records. The City Clerk should document efforts made to locate the requested records.
- Only residents of the Commonwealth of Kentucky may request to inspect public records. The definition of resident includes individuals and businesses living, operating, and working within the Commonwealth, also including news-gathering organizations. KRS 61.870(10), KRS 61.872(2)
- If the person submitting a request is not a resident of the Commonwealth of Kentucky as defined by KRS 61.870(10), the public agency may deny a request to inspect records. KRS 61.872(2)
- During a state of emergency, such as the COVID-19 pandemic, contact the Kentucky Attorney General's Office to see if a public agency is permitted to deny in-person inspection of public records at the public agency's headquarters.
- The individual requesting access to records must be notified in writing of the public agency's decision denying a request within five (5) business days. The following requirements must be met:
  - ➔ A statement of the specific exemption authorizing denial.
  - ➔ A brief explanation of how the exemption applies to the record withheld.
  - ➔ The notification must be issued by the official custodian or under the official custodian's authority. The City Clerk may collaborate with the City Attorney to obtain proper language and guidance.
  - ➔ A notification denying a request constitutes final agency action. KRS 61.880(1)

### **Granting of Requests**

- Upon inspection, each applicant has the right to make copies or take notes of the public records. KRS 61.874(1) If the applicant desires copies of public records other than written records, the custodian shall duplicate the records.
  - ➔ If records are kept in an electronic format, the public records must be available for copying in standard electronic or standard hard copy format, as designated by the person requesting the records. Agencies are not required to convert hard copy formatted records to electronic formats.
  - ➔ The minimum standard for hard copy format is paper not less than 8 1/2 inches by 11 inches in at least one (1) color on white paper. For electronic requests, the standard format is flat file electronic American Standard Code for Information Interchange (ASCII). If public agencies maintain the

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information in an electronic form other than ASCII, the record may be provided in that format as long as it meets the requester's requirements.

- Those requesting to inspect records will be given a location to view them in. An employee designated by the City Clerk will be present while the requester is inspecting the records.
- Please note: The City Clerk's Office distributes most redacted records electronically through JustFOIA (a records request software) at no charge, unless otherwise specified. Copies of personnel files, unredacted records, and other sensitive records are not distributed electronically. In these instances, fees and postage would apply.
- A public agency may charge a reasonable fee for copies. The fee charged may not exceed the actual costs of the copies, including postage, but excluding the cost of staff time. KRS 61.874(3) The City of Erlanger charges \$.10 per page of paper copies. There is a \$.50 fee for CDs. Postage is included when required. Fees may be waived if total cost is less than \$.50 or if the request is court ordered.
- The City Clerk keeps copies of all requests on file and/or on JustFOIA. These copies include the original and signed request form and copies of the actual documents provided to the requester.

**Public Records Used for Commercial Use (KRS 61.874(4))**

- The Open Records Act defines commercial purpose as 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. Commercial purpose does not include publication or related use of a public record by a newspaper or periodical; use of a public record by a radio or television station in its news or other informational programs; or 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.
- KRS 61.874 was amended to allow public agencies to set a reasonable fee for the commercial use of public records and require the requester to enter into a contract with the agency for the purpose of setting a fee. This fee can be based on the cost of producing a copy of the record, as well as the cost of creation, purchase, or other acquisition of the record. Additionally, the public agencies can require the requester to provide a certified statement of the purpose for which the public records are to be used.

*It is unlawful for a person to obtain a copy of any part of a public record for a commercial purpose without stating the commercial purpose. If the records request is being used for commercial purposes, the City of Erlanger requires the requester to submit a Certified Statement stating the commercial purpose for which they shall be used, and*

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*may require the requestor to enter into a contract with the agency.*

## **Exempt Records (KRS 61.878)**

### ***In General***

- Public records containing information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of personal privacy. Examples are: addresses, phone numbers, social security numbers, marital status, and medical information.
- Records confidentially disclosed to an agency and compiled and retained for scientific research. This exemption, however, does not apply to records the disclosure or publication of which is required by another statute.
- Records confidentially disclosed to an agency, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair advantage to the competitors of the entity that disclosed the records.
- Public records pertaining to a prospective location of a business or industry where no previous disclosure has been made of the business' or industry's interest in locating in, relocating within, or expanding within the Commonwealth. This exemption does not include those records pertaining to an application to agencies for permits or licenses necessary to do business or to expand business operations within the state.
- 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 examination or audit criteria and related analytical methods.
- The contents of real estate appraisals, engineering or feasibility estimates, and evaluations made by or for a public agency relative to the acquisition of property, until such time as all of the property has been acquired; provided, however, that the law of eminent domain is not affected by this exemption.
- 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.
- 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 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 become open records after the enforcement action is completed or a final decision is made to take no action.

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- Preliminary recommendations, preliminary memoranda in which opinions are expressed or policies formulated or recommended. EXCEPTION: Proposed budget submitted to the city’s legislative body pursuant to KRS 91A.030(7) is an open record. OAG 10-ORD-103
- The “homeland security exception” exempts public records which, if disclosed, have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating, or responding to a terrorist act.

***Other***

- None of the exemptions in KRS 61.878 prohibit the disclosure of statistical information not descriptive of any readily identifiable person.
- None of the exemptions in KRS 61.878 can be construed to deny, bridge, or impede the right of a public agency employee or an applicant for employment to inspect and copy any record that relates to him.
- If any public record contains material which is not exempt, the public agency must separate the exempt material and make the nonexempt material available for examination. (redaction) KRS 61.878(4); OAG 83-386 If separating out exempt material from nonexempt material places an unreasonable burden on an agency, the request to inspect can be denied. However, the burden may be overcome by allowing the person who requested the records to inspect a small number of records at a time. OAG 84-278
- The exemptions do not 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 legitimate government function.
- The Assistant City Clerk acts as the official custodian in the absence of the City Clerk.