# An Overview of Kentucky's Open Meetings Act

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# THE KENTUCKY OPEN MEETINGS ACT

## KRS 61.805 – 61.850

The basic policy of KRS 61.805 to 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for by KRS 61.810 or otherwise provided for by law shall by strictly construed.

# PURPOSE AND INTERPRETATION OF OPEN MEETINGS LAW

"The express purpose of the Open Meetings Act is to maximize notice of public meetings and actions. The failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good."

*Floyd County Board of Education v. Ratliff*
955 SW 2d 921 (1997)

"Statutes enacted for the public benefit should be interpreted most favorably to the public."

*Courier Journal and Louisville Times Co. v. University of Louisville Board of Trustees*
*569 SW 2d 374 (1979)*

# MANDATE OF THE OPEN MEETINGS ACT

All meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times [except as otherwise provided in the Act].

KRS 61.810(1)

1. Quorum of members
2. Discussion of public business OR
3. Taking action

# PUBLIC MEETING/PUBLIC AGENCY DEFINED

"Public meeting" is defined as "all gatherings of every kind, including video teleconferences, regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting."

"Public agency" is broadly defined in eight subparts and includes "committees, subcommittees, ad hoc committees, [and] advisory committees" created by a public agency.

# GENERAL REQUIREMENTS FOR PUBLIC AGENCY

- Time and Place of Meeting (convenient to public)
- Regular Meeting Schedule (adopt/make available)
- Minutes of Meeting (record/make available)
- Public Attendance at Meeting (without condition)
- News Media Coverage (must permit)

# *Knox County v. Hammons*
# 129 SW3d 839,845 (Ky. 2004)

"The open meetings statutes are designed to prevent government bodies from conducting business at such inconvenient times or locations as to effectively render public knowledge or participation impossible, not to require such agencies to seek out the most convenient time or location."

Court determines that fiscal court did not violate Open Meetings Act when it conducted a meeting at a location near a busy county festival, "literally the epicenter of activity," where there was nothing in the record "to indicate that persons wishing to attend or participate in the proceeding were effectively prevented from doing so."

# REQUIREMENTS FOR HOLDING SPECIAL MEETINGS

- Who May Call: Presiding Officer or Majority of Members
- Notice Requirements: Date, Time, Place, and Agenda
- Notice Requirements: Delivery (members/media) and Posting (conspicuous place)
- Emergency Situations: Exception to Notice Requirements (RARELY permissible)

# Email Notification of Special Meetings

Effective July 15, 2008, public agencies may transmit written notice of special meetings by email to all public agency members and media organizations that: (1) file a written request with the agency (2) include their email addresses.

# REQUIREMENTS FOR CONDUCTING CLOSED SESSIONS

- Notice (General nature of business to be discussed, reason for closed session, and exception authorizing)
- Motion (Made and carried in open session)
- No Final Action
- Matters Discussed (Only those publicly announced in open session)

"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 in order to permit a secret session. There must be specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting."

*Ratliff* at 924

"Notice must be given in a regular open meeting of the general nature of the business to be conducted in the closed session and the reason for the secrecy. Closed sessions may be held only upon adoption of a motion for that purpose made in open, public session."

*Reed v. City of Richmond*
582 SW2d 651, 654 (1979)

# Commonly Invoked Exception Authorizing a Closed Session

The exceptions to the open meetings laws are not to be used to shield the agency from unwanted or unpleasant public input, interference, or scrutiny.

*Floyd County Bd. of Ed. v. Ratliff,*
955 SW2d 921,924 (Ky.1997)

The courts of the Commonwealth must narrowly construe and apply the exceptions so as to avoid improper or unauthorized closed, executive, or secret meetings.

*Floyd County Bd. of Ed. v. Ratliff at 923*

# KRS 61.810(1)(b)

Deliberations on the future acquisition or sale of real property by a public agency, but only when publicity would be likely to affect the value of a specific piece of property to be acquired for public use or sold by a public agency[.]

- "Only when a public agency is discussing a specific piece of property. . . And the discussion if made public would likely affect the price of that property, can the matter be discussed in a closed session. Confidentiality is only permissible when the public interest will be directly affected financially." (OAG 80-530)
- If the terms of the purchase or sale have been disclosed, the exception is not applicable. . . .

# KRS 61.810(1)(c)

- Discussions of proposed or pending litigation against or on behalf of the public agency.
- "This exception…applies to matters commonly inherent to litigation, such as preparation, strategy, or tactics….The litigation in question need not be currently pending and may be merely threatened. However, the exception should not be construed to apply 'any time the public agency has its attorney present' or where the possibility of litigation is still remote."

*Floyd County Bd. of Ed. v. Ratliff* at 924

- "There must be a direct suggestion of litigation conditioned on the occurrence or nonoccurrence of a specific event….The remote possibility of litigation is not enough to trigger the litigation exception."

*Carter v. Smith* at 420

# KRS 61.810(1)(f)

Discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student….This exception shall not be interpreted to permit discussion of general personnel matters in secret.

"The personnel exemption…does not allow a general discussion…when it involves multiple employees."

*Floyd County Bd. of Ed. v. Ratliff* at 924

"Appointment, discipline, or dismissal are the only personnel matter a public agency may discuss in closed session. Discussions of other matters are expressly precluded."

*Carter* at 420

# KRS 61.810(1)(k)

Meetings which federal or state law specifically require to be conducted in privacy.

# KRS 61.810(1)(m)

Public agencies may close that portion of a meeting devoted to a discussion of a specific public record exempted from disclosure under KRS 61.878(1)(m) [the homeland security exception].

# KRS 61.810(2) --The Open Meetings Act also prohibits:

Any series of less than quorum meetings, where the members attending one (1) 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 requirements of the Open Meeting Act, shall be subject to the requirements of the Act. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.

"The Act prohibits a quorum from discussing public business in private or meeting in number less than a quorum for the express purpose of avoiding the open meeting requirement of the Act."

*Yeoman v. Commonwealth*, Ky., 983 S.W. 2d 459, 474 (1998).

"Public business is the discussion of the various alternatives to a given issue about which the agency has the option to take action.

*Yeoman v. Commonwealth* at 474

# Use of personal electronic devices in conducting public business

- Some states treat such communications as public record, focusing on whether the record was prepared or used by members of a public agency in conducting public business rather than on where, how, or on what device the communication was created.
- Such communications also implicate open meetings as a secret meetings of a quorum of members or a series of less than quorum meetings (secret rolling quorum meetings)
- Email, text messages, instant messages, social media postings and messages, and online discussion board posts relating to public business have both open records and open meetings implications even if conducted on personal devices.
- KRS 61.870(1) and 61.810(2) support a similar resolution of these legal issues in Kentucky.

# THINK BEFORE YOU WRITE !!

- Email
- Text
- Instant message
- Post on Facebook or social media site
- Participate in online discussion board
- Etc., etc., etc.

- If the matters under discussion relate to the agency's public business, those messages may be accessible under the Open Records Act and may run afoul of the Open Meetings Act.
- *City of Ontario v. Quon*, 560 US ___ (2010)
- *McLeod v. Parnell*, 286 P.3d 509 (Alaska 2012)

# Legal Challenges to Agency Action

- Complaint
  - Directed to agency's presiding officer
  - State the circumstances constituting a violation
  - Propose remedial action
- Agency Response
  - Written response
  - Within three business days
  - If agency agrees to remedy violation, a statement that it will comply
  - If agency rejects proposed remedial action, citation to specific statute(s) supporting its position, and brief explanation
  - Issued by presiding officer or under his authority

# ROLE OF ATTORNEY GENERAL

- Appeal to Attorney General/Circuit Court
- Notification
- Request for Additional Documentation
- Decision Stating Whether Agency Violated Open Meetings Act
- Appeal of Attorney General's Decision within Thirty Days

# Penalties

- Any person who knowingly attends a meeting of a public agency of which he is a member that violates the open meetings act can be fined up to $100.00 (KRS 61.991(1))
- The prevailing party in an open meetings lawsuit can be awarded costs, including reasonable attorneys fees, as well as up to $100.00 for each violation (KRS 61.848(6))
- Any formal action taken at a meeting that does not substantially comply with the open meetings act is voidable and can be voided by a court (KRS 61.848(5))
- "A public agency cannot ratify actions improperly taken in closed session. . .by simply taking a vote in open session without any discussion of the matter." *Carter v. Smith*, 366 SW3d 414 (Ky. 2012); see also, *Webster Co. Bd. of Ed. v. Franklin*, 393 SW3d 431 (Ky. App. 2013)

# Violations of the Open Meetings Act may be based on

1. A private meeting of a quorum of the members of a public agency at which public business is discussed *or* action is taken (KRS 61.810(1))
2. A series of less than quorum meetings attended by members of the agency collectively constituting a quorum and held for the purpose of avoiding the requirements of the Open Meetings Act (KRS 61.810(2))
3. Failure to adopt a schedule of regular meetings or inadequate notice of special meetings (KRS 61.820 and KRS 61.823)
4. Deviation from agenda for special meetings (KRS 61.823(3))
5. Failure to observe requirements for going into closed session (KRS 61.815(a)-(d))
6. Improper topic for closed session or discussion of topics in closed session that were not publicly announced before entering closed session (KRS 61.810(1)(a)-(m) and (KRS 61.815(1)(d))

# Violations of the Open Meetings Act may be based on

7. Taking final action in closed session (KRS 61.815(1)(c))
8. Conducting meetings at times or places that are inconvenient to the public (KRS 61.820)
9. Failure to properly record minutes of meetings and to afford the public access to the minutes no later than immediately following the next meeting of the agency (KRS 61.835)
10. Placing conditions on attendance, requiring attendees to identify themselves, failing to provide meeting room conditions that allow effective public observation, and refusing to permit the media or a member of the public to record the meeting (KRS 61.840)
11. Failure to respond to an open meetings complaint (KRS 61.846(1))

# Ruling delayed on Enquirer's suit

## Judge says Ohio's open-meetings statute is complicated, more research needed

**BY TIM BONFIELD**
The Cincinnati Enquirer

A judge refused to rule Friday on a legal motion by *The Enquirer* challenging the closed-door methods Cincinnati City Council used in the ouster of City Manager Gerald Newfarmer.

After hearing more than an hour of arguments, Judge Thomas Crush of Hamilton County Common Pleas Court said he was taking the matter under advisement.

Ohio's open-meetings law is so complicated that he needs to do more legal research before ruling on *The Enquirer's* motion, he said. Another hearing has been scheduled for March 19.

"Interpreting this law is very difficult. Whoever wrote it should be taken out and shot," Crush said. "And they don't need to have an executive session to do it."

*The Enquirer's* lawsuit claims that an executive session held Monday was illegal. At least five council members have confirmed that during the meeting members voted 6-3 to fire Newfarmer, a move that led to Newfarmer's resignation Tuesday. The vote and the alleged failure to notify Newfarmer of the meeting violate the state's sunshine laws, the suit contends.

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> — Judge Thomas Crush
> Hamilton County
> Common Pleas Court

Newfarmer leaves his $141,933-a-year post after 2½ years. He remains on the city's payroll until June and will receive $70,000 in severance pay.

*The Enquirer* is asking Crush to prohibit any violation of the sunshine law and invalidate any formal actions taken by council.

Attorneys for the city on Friday denied *The Enquirer's* allegations. They filed an affidavit from Marilyn Kaiser, chief deputy clerk of council, who stated that "no further formal action of any kind was taken" after the executive session.

Among the issues debated Friday was whether Newfarmer had a right to request a public hearing before council discussed his employment status in an executive session.

A single paragraph in state law spells out that right, *Enquirer* attorney Richard Creighton contended. But Newfarmer could not request a public hearing because the city did not notify him of the executive session, Creighton said.

Karl Kadon, deputy city solicitor, said, "I don't know if he was notified or not. To us, that is irrelevant."

The city contends that the right to request a hearing applies only to executive sessions called to investigate charges or complaints against city employees — not to discuss terminations or demotions.

Nancy Johnston, open-government coordinator for the Ohio attorney general's office, disagreed with the city's view in a phone interview after the hearing.

"I have never heard the interpretation that would limit (a right to a hearing) just to the investigation of charges and complaints," she said. All employees, she said, are entitled to some degree of due process before termination.

Creighton said Friday the newspaper was not trying to defend Newfarmer. Instead, it was concerned that city officials might have abused their powers.

"The sunshine law stands for the rights of the people. That's *The Enquirer's* sole objective in this case," Creighton said.

*Jeff Harrington contributed to this article.*