An Overview of the Open Meetings Act

Amye L. Bensenhaver
Assistant Attorney General

amyebensenhaver@ky.gov
(502)696-5664
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)

• “The right of the public to be informed transcends any loss of efficiency.”

  *Lexington Herald-Leader v. UK Presidential Search Com.*
  732 SW2d 884 (Ky. 1987)

• “Statutes enacted for the public benefit should be interpreted most favorably to the public.”

  *Courier Journal and Louisville Times Co. v. UofL Board of Trustees*
  569 SW 2d 374 (1979)
MANDATE OF THE
OPEN MEETINGS ACT (KRS 61.810(1))

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].

1. Quorum of members
2. Discussion of public business OR
3. Taking action
KRS 61.810(2)

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 requirements of the Act shall be subject to the Act.

Aimed at prohibiting meetings of “floating” or “rolling” quorums and/or “serial meetings”
Violation of the Open Meetings Act relating to “secret meetings”

1) KRS 61.810(1)—a private (unpublicized) meeting of a quorum of the members of a public agency at which public business is discussed OR action is taken;

2) KRS 61.810(2)—a private series of less than quorum meetings attended by members of the agency collectively constituting a quorum held for the purpose of avoiding the requirements of the Act.
PUBLIC AGENCY/PUBLIC BUSINESS DEFINED

“Public agency” is broadly defined in eight statutory subparts and includes “committees, subcommittees, ad hoc committees, [and] advisory committees” created by a public agency. (KRS 61.805(2)).

“Public business,” the courts have held, “is not simply any discussion between two officials of the agency. 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. Com. Health Policy Bd.
983 SW2d 459,474 (Ky. 1998)
GENERAL REQUIREMENTS
FOR PUBLIC AGENCY

• Record minutes of meeting and make minutes available upon request

• Place no conditions on public attendance and provide meeting room conditions that allow effective public observation (with a particular focus on space requirements, seating capacity, and acoustics)

• Permit news media coverage

• Adopt a regular meeting schedule and make copies of the schedule available upon request (Regular v. Special meetings)

• Conduct meetings at times and places convenient to public
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.”
“Meetings” Defined: Regular v. Special

“Meetings” are “all gatherings of every kind, 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.”

• Regular meetings are those that appear on the meeting schedule adopted by the agency and made available to the public upon request
• Regular meetings--No notice or agenda required and not restricted to agenda topics
• Special meetings are called meetings or rescheduled regular meetings
• Special meetings--Notice and agenda required and restricted to discussion of specific agenda topics
Examples

Subject to the Open Meetings Act

• Work sessions
• Retreats
• Discussions of public business occurring before or after meeting
• Committee meetings

Not subject to the Open Meetings Act as long as public business is not discussed

• Social gatherings
• Church services
• Sporting events
• Conferences sponsored by an outside entity
• Chance encounters

REMEMBER: Public business is “the discussion of the various alternatives to a given issue about which the [agency] has the option to take action.”
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 UNDER ONE OF 13 EXCEPTIONS

• 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 Cited Exceptions 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_ at 924

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 366 SW3d 414, 420 (Ky. 2012)*

- Not applicable to agency counsel report on legal issue facing the agency, or other general legal guidance, unless related to proposed or pending litigation against or on behalf of agency.
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 matters a public agency may discuss in closed session. Discussions of other matters are expressly precluded.”

  *Carter* at 420

• Not resignations, not reorganizations, not pay raises, not elimination of positions unrelated to discipline or dismissal
KRS 61.810(1)(k)

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

Examples include KRS 620.055(12)—External Child Fatality and Near Fatality Review Panel; KRS 211.678(1)—Perinatal Advisory Committee; 20 USC Section 1232g—Family Educational Rights and Privacy Act
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].
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 746 (2010)
  • McLeod v. Parnell, 286 P.3d 509 (Alaska 2012)
Does KRS 61.826 authorize remote participation by skype?

(1) A public agency may conduct any meeting, other than a closed session, through video teleconference.
(2) Notice of a video teleconference shall comply with the requirements of KRS 61.820 or 61.823 as appropriate. In addition, the notice of a video teleconference shall:
   (a) Clearly state that the meeting will be a video teleconference; and
   (b) Precisely identify the video teleconference locations as well as which, if any, location is primary.
(3) The same procedures with regard to participation, distribution of materials, and other matters shall apply in all video teleconference locations.
(4) Any interruption in the video or audio broadcast of a video teleconference at any location shall result in the suspension of the video teleconference until the broadcast is restored.
July 2, 2014 miscellaneous letter issued by the OAG

• Reaffirms longstanding view that “use of speakerphone teleconferencing to remotely participate in [public] meetings is impermissible under Kentucky law.”

• “Neither audio nor video teleconferencing may be used to allow a member to participate in closed session meetings, and video teleconferencing may be used for open session meetings subject to the requirements of the Open Meetings Law.”
Requirements

• Any location where a member is present and participating is a “location” which must be treated as a meeting site and to which the public must be admitted.

• Notice of teleconferenced meeting must identify all locations as meeting sites.

• No closed sessions

• Interruption in video or audio broadcast must result in suspension of meeting

• All members and all attendees must be able to simultaneously both see and hear all participating members.
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 of the statute(s)’ application
  – Issued by presiding officer or under his authority
ROLE OF ATTORNEY GENERAL

• Appeal to Attorney General/Circuit Court (must be initiated within 60 days of denial or agency nonresponse per KRS 61.846(2))

• 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)
Webster County Board of Education v. Franklin at 436

Clearly, the rationale behind this reasoning is that any ability to ratify actions done improperly renders the Open Meetings Act meaningless. Ratification cannot be allowed to legitimize unauthorized conduct at an improperly closed session.

[An agency] cannot ratify an action that never [legally] took place.
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. And they don’t need to have an executive session to do it.”

— 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.