

# Local Government Law News

Salmon P. Chase College of Law ♦ Kentucky Department for Local Government ♦ Northern Kentucky University

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## E-MAIL, CHAT ROOMS, AND OPEN MEETINGS

Modern communication technologies sometimes pose challenges for open records laws as shown in an article in the last issue of this newsletter.<sup>1</sup> Those technologies present challenges for open meetings acts, too, as shown in the recent case of *Beck v. Shelton*.<sup>2</sup>

*Beck* involved the open meetings provisions of the Virginia Freedom of Information Act. The plaintiffs complained that the mayor, vice-mayor, and three members<sup>3</sup> of the city council of Fredericksburg, Virginia “‘deliberately e-mailed each other in a knowing, willful and deliberate attempt to hold secret meetings, avoid public scrutiny’ and ‘discuss City business and decide City issues without the input of all the council members and the public.’”<sup>4</sup> Both sides agreed that those public officials corresponded with each other by e-mail concerning specific items of public business. They disagreed about whether the exchange was a meeting subject to the act.<sup>5</sup>

At the beginning of its open meetings analysis, the Virginia Supreme Court noted that the use of computers for textual communication takes different forms. In one form it is the functional equivalent of a letter sent by ordinary mail, courier, or facsimile transmission. In this form there may be significant delay between its preparation and its receipt, and there may be additional delay between receipt and reply. In another form textual communication is the functional equivalent of a discussion potentially involving multiple persons. Chat rooms and instant messaging are examples. The e-mail at issue in *Beck* fell into the former category. The shortest interval between sending a message and receiving a response was more than four hours; the longest interval was more than two days.

The trial court held that such use of e-mail was a meeting for the purpose of the Virginia act.<sup>6</sup> Because the officials held this meeting in private, without notice to the public and without opportunity for the public to attend, the lower court said this was a violation of the Freedom of Information Act. For the trial court the issue was not the electronic nature of the transmission but the way in which e-mail was used. The Virginia Supreme Court agreed that the manner of use was dispositive but disagreed that this use constituted a meeting.

There is no question, said the high court, that e-mails fall within the definition of public records. The question was whether they also fell within the definition of a meeting. This turned on whether there was an “assemblage” of members. An assemblage, the court reasoned, “entails the quality of simultaneity.”<sup>7</sup> That quality may be present in a chat room or in instant messaging, but it is not present when e-mail is the functional equivalent of ordinary mail, courier, or facsimile transmission. Drawing support from another section of the Freedom of Information Act,<sup>8</sup> the court concluded that some electronic communication may constitute a meeting and some may not. The key difference is the feature of simultaneity.

To reinforce its conclusion, the Virginia Supreme Court cited an opinion of the Virginia Attorney General.<sup>9</sup> That opinion did not address chat rooms or instant messaging, but it did discuss an exchange of e-mails like that in *Beck*. The Virginia Attorney General concluded that this was essentially a form of written communication. Although not binding on it, the court said the opinion was “entitled to due consideration,” particularly where the General Assembly had known of the opinion for five years and had done nothing to change it.<sup>10</sup>

A less permissive approach than that of the Virginia Supreme Court is the one taken by the Washington Court of Appeals in *Wood v. Battle Ground School District*.<sup>11</sup> Wood alleged that school board members violated Washington’s Open Public Meetings Act when they discussed board business by exchanging e-mail over a period of several days.

The Washington court noted that elected officials no longer conduct public business solely at in-person meetings. The court said that if face-to-face contact were

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# DIRECTOR'S DESK

“New Economy” might be a good example of Humpty Dumpty language, a phrase the meaning of which is determined by the user. For some, like Judge Richard Posner of the Seventh Circuit Court of Appeals, it refers to electronic and high-technology sectors such as the Internet, telecommunications, biochemicals, and semiconductors. For others, like former Secretary of the Treasury Lawrence H. Summers, it refers to a shift from an economy based on the production of physical goods to an economy based on the production and application of knowledge. For still others, like Dr. Jacquelyn Robinson of the Alabama Cooperative Extension System, it refers to an economy with a global focus, not one with a focus on local, state, and national markets. When the General Assembly enacted the Kentucky Innovation Act in 2000 and created the Office for the New Economy, it seemed to have all these definitions in mind.

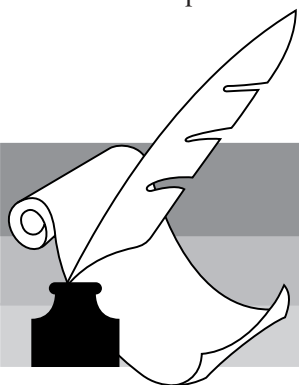
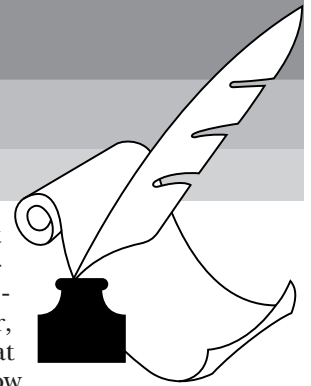
Recently a student suggested to me that the thread that ties these differing definitions together is entrepreneurial activity. A New Economy company is one that values entrepreneurial activity as part of its workforce culture. The General Assembly hinted at this idea when in the Kentucky Innovation Act it found that in 1997 Kentucky ranked 48<sup>th</sup> among the states in terms of self-employment and in 1999 ranked 47<sup>th</sup> in the number of fast growth companies. About the same time, in the title of a report for the Kentucky Long Term Policy Research Center, Michael Childress called entrepreneurs “Kentucky’s Neglected Natural Resource.”

This underscores the importance of a meeting convened last November by the Council of State Governments called *Future of Rural*. The meeting brought together policy makers from Kentucky, Indiana, and Tennessee to collaborate, educate, and inform each other about issues related to rural development in the region. The meeting proceeded along three tracks, one of which was rural entrepreneurship.

The exit report noted that there is great interest in entrepreneurship as a rural development strategy. However, those in attendance agreed that the level of awareness is too low, particularly among state and local leaders. Development interests, the report said, continue to focus on traditional development approaches such as maintaining commodity industries. As Dr. Robinson points out, in the old economy the factors that drew industry to a state included low taxes, cheap land, adequate natural resources, abundant low-priced labor, and good physical infrastructures. However, in the New Economy, infrastructure emphasizes information flow, and abundant low-priced labor is not enough because to New Economy companies education is more important than cost. Where in 1950 60 percent of the jobs could use unskilled labor, today only 15 percent can.

The conference identified four key issues for rural entrepreneurship. First, business regulations and their administration are potential barriers to formation of and entry into business for extremely small enterprises. Second, zoning and land use policies often do not consider the needs of entrepreneurs. Third, urban sprawl puts pressure on rural lands available for value-added agricultural uses. Fourth, and in the opinion of the participants perhaps the most important, lack of access to affordable health insurance is a particular problem for the self-employed and small businesses.

*Future of Rural*, like Childress before it, concluded that responding to the challenges of the New Economy means placing a far stronger emphasis on entrepreneurship. As Childress says, “Kentuckians need to hear from their elected representatives at every level, from community leaders, from teachers, and from all those who influence public perceptions, that building a good life does not necessarily require leaving this state or any region of it. More Kentuckians must come to believe and understand that opportunity can be created in their communities. It does not necessarily lie in the hand of someone, somewhere else.”



necessary for a meeting it would be too easy to evade the requirements of an open meetings act.<sup>12</sup> It followed that a definition of meeting that required physical presence of members in the same location would defeat the purpose of the Washington act. Virtual presence is enough.<sup>13</sup> As the Washington Attorney General interprets it, “[a] meeting occurs if a majority of the members of the governing body were to discuss or consider [agency business] no matter where that discussion or consideration might occur,”<sup>14</sup> to which the court might add “... and regardless of the particular means used to conduct it.”<sup>15</sup> Thus, the *Wood* court concluded that the exchange of e-mail, even without the feature of simultaneity important to the *Beck* court, could constitute a meeting.

In Kentucky, the Open Meetings Act defines “meeting” 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.”<sup>16</sup> The inclusion of video teleconferences in the definition of meeting reinforces the conclusion that electronic meetings are meetings for the purpose of the Open Meetings Act. One can draw several inferences from KRS 61.826, which grants authority to a public agency to conduct any meeting, other than a closed session, through video teleconferencing. One is that physical presence is not a necessary condition for a meeting for the reasons stated by the *Wood* court. Another, which follows from the rule of statutory construction that the expression of one thing is to the exclusion of another, is that the statute precludes any kind of electronic meeting other than video teleconferencing. Legal authority tends to support this inference.<sup>17</sup>

Because the word “gathering” in the Kentucky definition of meeting is similar the word “assemblage”<sup>18</sup> on which the Virginia Supreme Court focused in *Beck*, one might be tempted to infer that simultaneity would be important in Kentucky. After all, the fact that video teleconferencing shares the feature in common with traditional gatherings in person was probably important to the General Assembly when it enacted KRS 61.826. However, to stop there is to ignore the implications of the serial meetings provision in KRS 61.810(2). A recent open meetings decision, Ky. Op. Atty. Gen. 03-OMD-092, suggests how that provision might apply.

In 03-OMD-092, the Attorney General addressed the situation where less than a quorum of a city council attended a meeting with representatives of bidders on a city contract. Following that meeting, the mayor conducted telephone discussions with at least one absent council member. A citizen asked the Attorney General to declare this a violation of KRS 62.810(1) or (2) which provide:

(1) All meetings 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....

(2) Any series of less than quorum meetings, where the members attending one (1) or more 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 subsection (1) of this section shall be subject to the requirement of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussion is to educate the members on specific issues.

The Attorney General said that on the facts of this appeal, a series of meetings of less than a quorum occurred:

The Shively City Council, consisting of six members, acknowledges a meeting of the Mayor, three council members, and the two responsive bidders, and a second telephone meeting between the Mayor and at least one absent council member, arguing that a telephone conversation between two members of a public agency should not be considered a meeting. We agree that, standing alone, a single telephone conversation between two members of a public agency cannot be said to constitute a violation of the Open Meetings Act. Where, however, that telephonic meeting follows an earlier less-than-quorum meeting of the members of a public agency, and the members attending one or more of the meetings collectively constitute at least a quorum, here four members of the six-member body, that series of less-than-quorum meetings constitutes a violation of KRS 61.810(2) if the meetings “are held for the purpose of avoiding the requirements of [KRS 61.810(1)].” Following these meetings, and with little or no discussion, the city council approved a municipal order awarding a contract to Derrick Manufacturing at its next regular meeting. We find that the record on appeal confirms two of the three elements of the conduct proscribed in KRS 61.810(2) and that the final sentence of that statute, upon which the city council relies as a defense to its actions, did not authorize a series of less-than-quorum discussions of the “alternatives to a given issue about which the [council] has the option to take action.”

Ky. Op. Atty. Gen. 03-OMD-092 at 4. Only the inability to determine whether the participants intended to avoid the requirements of the Open Meetings Act prevented the Attorney General from concluding that a violation of the act occurred.

As 03-OMD-092 shows, simultaneity is not a condition necessary to a violation of the Kentucky Open Meetings Act. In addition, it is easy to see from the *Wood* decision how an exchange of e-mail could substitute for the first (in-person) meeting in 03-OMD-092 and easy to see from the *Beck* decision how an exchange of e-mail could sub-

stitute for the second (phone) meeting. Making those substitutions suggests the possibility that an exchange of e-mail among a quorum of members of a public body could constitute a meeting for the purpose of the Kentucky Open Meetings Act.

Hawaii recently addressed this issue using language similar to that used in 03-OMD-092. It said, “[T]he Legislature’s intent in enacting the statute was to ensure that the formation and conduct of public policy, i.e., discussions, deliberations, decisions and actions, are conducted openly. The Sunshine Law requires that Committee members discuss Official Business in a meeting, not through position statements circulated outside of a meeting. Stated differently, the forum for ‘committee members to record and inform other members of their position on certain matters’ is at a properly noticed meeting....”<sup>19</sup> The opinion goes on to say that serial communications “violate[], at a minimum, the spirit of the Sunshine Law”<sup>20</sup> and that e-mail “cannot be used to circumvent the spirit or requirements of the Sunshine Law or to make a decision upon a matter concerning Official Business.”<sup>21</sup>

### Endnotes

1. *E-mail as a Public Record*, Local Government Law News, Fall 2003, 1.
2. *Beck v. Shelton*, 593 S.E.3d 195 (Va. 2004).
3. Some of the conduct complained of occurred while the members were still members-elect. The court had to decide whether the Virginia Freedom of Information Law applied to members-elect and concluded it did not. 593 S.E.3d at 197-8.
4. 593 S.E. at 198.
5. The court also had to decide whether certain other conduct that was unrelated to the exchange of e-mail (a street gathering characterized as a citizen-organized informational forum) was a meeting subject to the act. The court affirmed the trial court finding that it was not. 593 S.E. 3d at 200-1.
6. “Meeting” or “meetings” means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body

- or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. The gathering of employees of a public body shall not be deemed a “meeting” subject to the provision of this chapter. Va. Code Ann. § 2.2-3701.593 S.E.3d at 199.
8. “[N]othing contained herein shall be construed to prohibit separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member’s position with respect to the transaction of public business, whether such contact is done in person, by telephone or by electronic communication, provided the contact is done on a basis that does not constitute a meeting as defined in the chapter.” Va. Code Ann. § 2.2-3710(B). See also Va. Code Ann. § 2.2-3708, “Electronic communication meetings.”
9. 1999 Va. Op. Atty. Gen. 12.
10. 593 S.E.3d at 200.
11. *Wood v. Battle Ground School District*, 27 P.3d 1208 (Wash. Ct. App. 2001). As in *Beck*, a threshold issue was the applicability of the open meetings act to members-elect. Noting that the Washington Open Public Meetings Act was modeled on those in California and Florida, and that courts in those states had reached dissimilar conclusions on the question, the Washington court concluded that its act did not apply to members-elect. *Id.* at 1213-5.
12. *Id.* at 1216, citing with favor *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency*, 171 Cal.App.3d 95 (1985).
13. See Jessica M. Natale, *Exploring Virtual Legal Presence: The Present and the Promise*, 1 J. High Tech. L. 157, 158 (2002) [“Virtual presence is achieved through a number of electronic means such as e-mail, teleconferencing, videoconferencing, and even electronic bulletin boards.”].
14. 27 P.3d at 1216-7 citing Attorney General’s *Open Records & Open Meetings Deskbook*, 1.3B.
15. 27 P.3d at 1216.
16. KRS 61.805(1).
17. See, e.g., *Fiscal Court of Jefferson County v. Courier Journal*, 554 S.W.2d 72 (Ky. 1977) (telephone votes void). See also Ky. Op. Atty. Gen. 03-OMD-092 at 4 (citing previous opinions).
18. See, e.g., Stephen Glazier, Random House Word Menu 612 (1992), which defines assemblage as “a gathering of persons for specific purpose” (emphasis added).
19. Haw. OIP Op. Ltr. 04-01 at 8-9 (2004).
20. *Id.* at 9.
21. *Id.* at 10.



# DECISIONS OF NOTE

## KENTUCKY SUPREME COURT



### Claims Against Local Governments Act – Immunity

A spectator at an interscholastic softball tournament, injured in a fall, sued the county, certain county officials, the county board of education, and certain of its officials. The complaint alleged that the defendants negligently caused her injuries by failing properly to maintain the bleachers. On appeal from a summary judgment in favor of the defendants, the Supreme Court affirmed. A county government enjoys sovereign immunity. However, plaintiffs argued that KRS 65.200, the Claims Against Local Governments Act, constituted a waiver of the county's sovereign immunity, an argument the court rejected. A board of education, as an agency of the state, enjoys governmental immunity for governmental functions but not for proprietary functions. The conduct of the softball tournament was a governmental function for which it was immune. The charging of an admission fee and the selling of refreshments did not turn the tournament into a proprietary function. The individual defendants, sued in their official capacities, enjoyed the same immunity as the governments they represented. *Schwindel v. Meade County*, 113 S.W.3d 159 (Ky. 2003).

### Board of Claims Act – Vicarious Liability

The parents and estate of a high school student killed in an automobile crash in transit to a school function sued the state Department of Education for wrongful death and loss of consortium. The complaint alleged that negligent supervision of an extracurricular activity by high school faculty was a substantial factor in causing the student's death. The Board of Claims and the lower courts dismissed both the wrongful death and loss of consortium claims. The Supreme Court affirmed as to the loss of consortium claim, but reversed as to the wrongful death claim. Compulsory education gives rise to a special relation between a school district and its students. As a result a school teacher can be held liable for injuries caused by negligent supervision of students. The enforcement of rules, such as the prohibition of use or consumption of alcohol at school-sponsored activities, is a ministerial, not discretionary function. Applying the Board of Claims Act, in particular KRS 44.072(2) and (15), the court found the Commonwealth vicariously liable for the negligent performance of ministerial acts in instances such as this case. *Williams v. Kentucky Department of Education*, 113 S.W.3d 145 (Ky. 2003).

### Search and Seizure – Neutral Magistrate

A criminal defendant indicted for trafficking in a controlled substance sought to suppress evidence recovered during a search of her home. She claimed that the trial commissioner who issued the warrant was not a neutral and detached magistrate because the trial

commissioner's husband was employed by the Commonwealth Attorney's office as a Victim Advocate. The trial court denied the motion to suppress, but the Court of Appeals reversed. The Supreme Court affirmed the Court of Appeals holding that the trial commissioner, "due simply to her marital status," was not the neutral magistrate the state and federal constitutions require. Citing with approval the decision of the Court of Appeals in *Dixon v. Commonwealth*, 890 S.W.2d 629 (Ky. App. 1994), the Supreme Court held that mere association with the Commonwealth Attorney's office creates an appearance of impropriety that destroys the trial commissioner's character as a neutral and detached issuing authority. *Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003)

### Civil Rights Act – Punitive Damages

A female corrections officer filed a sexual harassment complaint with the Equal Employment Opportunity Commission that led to another employee's formal apology and demotion. Over the next eight-and-a-half years, she applied for promotion 26 times and was denied each time. She sued alleging gender discrimination and unlawful retaliation in violation of the Kentucky Civil Rights Act. A jury found against her on the gender discrimination claim and for her on the retaliation claim, awarding compensatory and punitive damages. The Supreme Court accepted review in part to address whether the act provides for an award of punitive damages. The court agreed that the officer had made out a *prima facie* case of retaliation and found that a jury could have and did infer that the reasons offered for not promoting her were pretextual. Turning then to punitive damages, the court held that KRS 411.184 and 411.186 do not make them available under KRS 344.450. In enacting KRS 411.184 and 411.186, the court said, the General Assembly intended to preempt the common law on punitive damages and so occupy the field. The General Assembly's treatment of punitive damages since the enactment of the two sections, including the provisions in KRS 344.660 and KRS 344.665, imply no right to punitive damages in all cases where the statutory elements for punitive damages are present. *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003).

## KENTUCKY COURT OF APPEALS



### Human Rights Commission – Default Judgment

A patron of a retail store filed a complaint with the Lexington-Fayette Urban County Human Rights Commission charging that the store mistreated her because of her race. The commission investigated and determined that there was probable cause to support the charge. Despite receiving notice, the store did not respond to attempts at conciliation or to the subsequent public hearing. Only when the hearing officer proposed to award

damages did the store respond with a motion to set aside the default judgment and to hold a new hearing. The commission denied the motion, and the store appealed to the Circuit Court, which ordered a new hearing. The commission then appealed, and the Court of Appeals held that the store was not entitled to a new hearing. The store's failure was the result of an internal problem, and the disregard of a legal matter due to the carelessness of a party is not a reasonable basis upon which to set aside the judgment. *Lexington-Fayette Urban County Human Rights Commission v. Wal-Mart Stores, Inc.*, 111 S.W.3d 886 (Ky. App. 2003).

### **Merit System Council – Authority**

The Lexington-Fayette Urban County Health Department dismissed an employee upon a finding of gross misconduct related to the use of a department credit card. The employee appealed his dismissal to the Merit System Council, as was his right. After a hearing, the Merit System Council refused to uphold the dismissal and directed reinstatement to his position as a school liaison worker. The health department refused to reinstate, claiming it had good cause to terminate and that it had eliminated the position. The employee sued in circuit court for reinstatement, back pay, and injunctive relief, asserting that the order of the council was binding on the department. The department responded that the order was not binding and that proper recourse was an appeal to the Board of Health, which it claimed had final authority over employee termination and discipline. Finding KRS 212.627, upon which the department relied, inapplicable to internal personnel actions and finding the department's arguments in court inconsistent with its positions before the council, the court ruled that the department is bound by the decision of the council. *Lexington-Lafayette Urban County Health Department v. Lloyd*, 115 S.W.3d 343 (2003).

## **UNITED STATES COURT OF APPEALS**



### **Offensive Behavior – Tort of Outrage**

A family services worker complained to the Cabinet for Families and Children that her supervisor engaged in pervasive sexually offensive behavior. The cabinet investigated and found the claims unsubstantiated. The complainant was transferred to another office but was subsequently reassigned after "six months of antagonism." She sued the former supervisor for the tort of outrage and the cabinet for unlawful retaliation. After summary judgment for both defendants, she appealed. The court of appeals reversed the district court on the tort of outrage claim. The question whether the alleged behavior was sufficiently extreme and outrageous was one for the jury to determine. In the opinion of the court, the claims against the cabinet were properly dismissed. *Akers v. Alvey*, 338 F.3d 491 (6th Cir. 2003).

### **Illegal Searches – Damages**

Following dismissal of an indictment on drug charges, the arrestee sued the arresting officers and the city for damages caused by illegal searches and the subsequent prosecution. The district court granted summary judgment for the defendants, but the court of appeals reversed in part. The district court reasoned that because the information gathered from the illegal searches was purged from the affidavit supporting the subsequent warrants, the plaintiff suffered no injury. However, because the searches were unconstitutional and the officers were not entitled to qualified immunity, the plaintiff can seek compensatory damages for impairment of reputation, personal humiliation, and mental anguish and suffering. *Shamaeizadeh v. Cunigan*, 338 F.3d 535 (6th Cir. 2003).

### **Teachers – Discrimination**

A new school superintendent abolished the district's grants department and reassigned its director to classroom duties. The director asserted that the reassignment was in retaliation for her support of the previous superintendent, who resigned under a cloud. The director also claimed that she was unable to perform classroom duties because of disabilities resulting from an automobile accident and needed to be assigned to a non-classroom position. She accepted the classroom assignment under protest and immediately applied for disability retirement, which was granted. Subsequently she sued alleging that the superintendent and the school board deprived her of her First Amendment rights and discriminated against her on the basis of her disabilities in violation of the Americans with Disabilities Act. Relying on two closely related cases, *Hager v. Pike County Board of Education*, 286 F.3d 366 (6th Cir. 2002) and *Dotson v. Pike County Board of Education*, 21 Fed.Appx. 368 (6th Cir. 2001), the court of appeals held that the position was not exempted from First Amendment protection from dismissal on the basis of her political support and that her receipt of a disability pension did not estop her from arguing her ADA claim. *Justice v. Pike County Board of Education*, 348 F.3d 554 (6th Cir. 2003).

### **Teachers – Protected Speech**

Two veteran teachers at a troubled elementary school claimed that they were transferred to other schools in the district in retaliation for engaging in protected speech. Their speech involved subjects including the discipline of students, the desirability of educational programs, and procedures used when making school-related decisions. This was, the court reasoned, speech on a matter of public concern. Therefore, the court considered whether the employees' interest in addressing these matters was outweighed by the employer's interest in promoting the efficiency of the public services it performs. In this case the court concluded it was not. Holding that the transfer had a sufficiently chilling effect on the employees' First Amendment rights, the court then considered whether

the speech was a substantial or motivating factor for the transfer. On this point the court found that the employees' evidence, "while not overwhelming," is enough to survive the school district's motion for summary judgment and remanded the matter for trial. *Leary v. Daeschner*, 349 F.3d 888 (6th Cir. 2003).

### Judgments – State and Federal Suits

A traffic stop and an ensuing fatal, one-car accident gave rise to related state and federal court actions against a city, a county, and various law enforcement officers. In a decision discussing the interplay of various state and federal decisions involving the claims, the court permitted the estate to proceed to trial against certain officers. The estate alleged that the police officers at the traffic stop had a special relationship with the victim and breached their duty to her by putting her in the dangerous situation that ultimately resulted in her death. The court also held that the equal protection, excessive force, and falsification of evidence claims of another person involved in the traffic stop cannot proceed. [See *City of Florence v. Chipman*, 38 S.W.3d 387 (Ky. 2001) summarized at *Local Government Law News*, Fall 2001, page 4.] *Stemler v. Florence*, 350 F.3d 578 (6th Cir. 2003).

## 2003 REVIEW OF SIXTH CIRCUIT CASES FROM OUTSIDE KENTUCKY



### Substitute Teacher – Refusal to Rehire

Out of concern for his conduct toward students, a principal and vice principal decided not to call a substitute teacher of two years for any further assignments. The teacher sued alleging sex discrimination and violation of his rights to due process and under the First Amendment. Finding that this substitute teacher had no property right in his position because he was an at-will employee, the court of appeals rejected his due-process claim. The court also found that he failed to establish a *prima facie* case of sex discrimination since the school's action was critical of his behavior, not his sex or gender. Further, since none of the speech involved addressed a matter of public concern, the First Amendment claim also fails. *Lautermilch v. Findlay City Schools*, 314 F.3d 271 (6th Cir. 2003).

### Access to Courts – Americans with Disabilities Act

Disabled citizens sued Tennessee under the Americans with Disabilities Act in order to enforce their due-process rights of access to the courts. The court of appeals held that, based on the record before Congress, it was reasonable to conclude that it needed to enact this legislation and abrogate the states' Eleventh Amendment immunity. The U.S. Supreme Court granted *certiorari* on the question whether this was a valid exercise of Congressional power. *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003), cert. granted in part by *Tennessee v. Lane*, 123 S.Ct. 2622, 156 L.Ed.2d 626 (U.S. Jun 23, 2003) (NO. 02-1667).

### Firefighters – Political Retaliation

A jury awarded Knoxville firefighters damages on their claims that their transfers and denials of raises were in retaliation for their support of the mayor's opponent for election. The judge reduced the award and issued an injunction against the mayor. Both sides appealed. The firefighters claimed that the judge should not have reduced the award because the continuing violations doctrine applied to toll the statute of limitations. Because the claims involved discrete acts, not a hostile environment or long-standing discriminatory practices, the court of appeals upheld the lower court. However, it found the lower court's injunction overly broad and unnecessary in any event because the firefighters failed to establish a sufficient likelihood of future harm. *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003).

### Police Officers – Qualified Immunity

Police officers in Akron, Ohio, stopped and subsequently arrested a man, apparently based only upon an unverified anonymous call to 911. The district court refused to grant the officers qualified immunity, and the officers appealed. The court of appeals found that the officers had qualified immunity for the stop because their behavior was reasonable in light of the information they had, even though the stop violated the Fourth Amendment because the collective information did not amount to reasonable suspicion. The officers also were entitled to qualified immunity on the arrest because they had sufficient reason to believe the suspect was trying to flee. *Feathers v. Aey*, 319 F.3d 843 (6th Cir. 2003).

### Disabled Student – Least Restrictive Environment

Parents of a child with Down Syndrome disagreed with the Individualized Education Program proposed for their child pursuant to the Individuals with Disabilities Education Act. After adverse decisions from local and state hearing officers, the parents sued in federal district court and received a ruling in their favor based on its interpretation of the IDEA's "least restrictive environment" provision. The court of appeals found that provision inapplicable and reversed. The least restrictive environment provision applies when there is a question of mainstreaming; it does not apply to the question of mainstreaming at a particular school. There is no presumption that the least restrictive environment is a neighborhood school. The burden of proof is on the parents to show that the student's placement at another school is inappropriate. *McLaughlin v. Holt Public Schools Board of Education*, 320 F.3d 663 (6th Cir. 2003).

### Student on Leave – Due Process

The Student Promotion Committee and East Tennessee State University placed a medical student on leave of absence because of marginal performance, a decision upheld in internal appeals. The committee later determined that he should be readmitted subject to certain conditions. The student claimed that when the university placed him on leave it deprived him of procedural due

process. Assuming without deciding that the student had a protected property interest in continuing his medical education, the court of appeals concluded that the decision to put him on leave was an academic, not a disciplinary, decision. Such decisions, said the court, do not require formal hearings because they require an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decision making. When the college followed the procedures in the student handbook in placing the student on leave and then permitting him to return, the college afforded him more than adequate due process. *Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003).

### **Water Bill Discount – Due Process**

An ordinance of Flint, Michigan provided that users could “as soon as practicable” receive a five percent discount if they paid their water bills prior to the due date. However, the city’s billing system was not sophisticated enough to handle the processing required. Citizens who did not get the discount sued in state court alleging violations of the procedural and substantive due process rights under the Fourteenth Amendment, and the city removed the matter to the federal courts. The court of appeals concluded that the procedural due-process claim was not properly before it. Either it was not ripe because the users did not avail themselves of the procedures in place to dispute their water bills or it was without merit as a challenge to the dispute process itself. The substantive due process claim also failed because the state-created right to a discount is not a proper subject of federal protection under the due process clause. *Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003).

### **Civil Rights – Private Acts of Violence**

The parents of a mentally disabled nineteen-year-old sued the city of Akron and various officials for delivering her to a man who raped her. The parents alleged violations of substantive due process rights and intentional infliction of emotional distress. The district court granted summary judgment for the city but denied the officials’ claim to qualified immunity. Because the parents sought to hold the officials responsible for acts of private violence, the court of appeals analyzed the officials’ conduct in view of *DeShaney v. Winnebago County Dep’t of Social Services*. By that measure, the court concluded, the officials did not violate the victim’s due process rights. The due process clause does not impose liability on the state for injuries inflicted by private acts of violence. The determination that the city officials did not violate the victim’s rights defeats the claim against the city as well. *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003).

### **Civil Rights Actions – Attorney’s Fees and Costs**

An anti-abortion activist was arrested while staging a protest on the steps of city hall in Owasso, Michigan.

He sued the arresting officers, and ultimately a jury awarded him damages of \$2. The district court granted the protester’s motion for attorney’s fees and denied the officers’ motion for costs. As to the award of attorney’s fees, the court of appeals said that the plaintiff’s “technical victory does not demonstrate a degree of success sufficient to justify an award of attorney’s fees pursuant to [the Civil Rights Attorney’s Fees Award Act of 1976].” As to the denial of costs, because the judgment was not more favorable than the defendant’s settlement offer, Federal Rule of Civil Procedure 68 requires that the plaintiff pay all costs incurred by both sides after the date of the offer. *Poullion v. Little*, 326 F.3d 713 (6th Cir. 2003).

### **Sexually Oriented Business – Prior Restraint**

Union Township, Ohio enacted an ordinance in an attempt to minimize the adverse secondary effects of sexually oriented businesses, which the owner of an adult cabaret challenged as a violation of the First and Fourteenth Amendments. The court of appeals determined that the ordinance was unconstitutional on its face because it did not provide for prompt judicial review of an adverse licensing decision. In addition, the court found that the provision limiting the hours of operation violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Further, court found a substantial likelihood that the health and safety inspection provision violated the Fourth Amendment. However, the provisions for disclosure of information necessary to obtain a license did not violate the First Amendment. Neither were the provisions unconstitutionally vague. *Déjà vu of Cincinnati, L.L.C. v. Union Township*, 326 F.3d 791 (6th Cir. 2003).

### **911 Call – Warrantless Entry**

In response to a 911 call, paramedics were dispatched to what they thought was an attempted suicide, and police were dispatched to what they thought was a stabbing. The paramedics arrived first and waited for the police to arrive. The police knocked on the door and were greeted by an inebriated and bleeding male resident. Against his wishes, they entered to investigate a possible crime and ultimately arrested him on a domestic violence charge. Subsequently, the residents sued claiming unlawful entry, unlawful seizure, and malicious prosecution. On the unlawful entry claim, the court of appeals found that the officers’ observations and the need to protect the paramedics supported the conclusion that exigent circumstances existed, justifying entry without a warrant. On the unlawful seizure claim, the court of appeals found that the circumstances were sufficient to provide probable cause to arrest. Further, the court of appeals found that because the arrest was justified by probable cause, no claim for malicious prosecution could succeed. Finally, the court observed, even had there been a constitutional violation, the police officers would be entitled to qualified immunity. *Thacker v. City of Columbus*, 328 F.3d 244 (6th Cir. 2003).

## Nuisance – Municipal Liability

An Indiana motorist injured in a chain-reaction, multi-vehicle collision involving an abandoned vehicle on the shoulder of an interstate highway in Ohio claimed the abandoned vehicle was a nuisance. The motorist sued the county whose police patrolled the highway and others asserting negligence in failing to keep the road free of the nuisance. Applying the Political Subdivision Tort Liability Act and Ohio law addressing nuisance, the court found that the case turned on whether the decision to remove the abandoned car was within the discretion of the patrolling officers' enforcement powers and the duties of their position. The court found that whether an abandoned vehicle obstructs traffic or presents sufficient danger to mandate towing involved the judgment of the patrolling officers. Where, as here, that judgment is exercised in a manner clearly not reckless, the immunity granted by the tort liability act protects the county. *Theobald v. Board of Commissioners*, 332 F.3d 424 (6th Cir. 2003).

## Civil Rights – Duty to Protect

A man to whom police officers had given a ride in their patrol car was later run over by a truck as he lay in the middle of the road. The officers earlier noticed that he smelled of alcohol, and the autopsy showed a blood alcohol level of .27 percent. The victim's wife sued Marine City, Michigan and the officers alleging that the failure to take the victim into custody was a deprivation of his substantive due process rights. The court of appeals rejected the estate's claim that a special relationship existed between the victim and the police officers, giving rise to a duty to protect him. That relationship arises, said the court, only when the state restrains an individual, and here the decedent was never in custody. The court also rejected the estate's claim that the state increased the risk that the victim would be struck by a vehicle. The court cited with favor its decision in *Bukowski v. City of Akron* summarized above. *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003).

## Civil Rights – Excessive Force

As a man was driving out of a motel parking lot in Auburn Hills, Michigan, a police officer walked in front of the car with his gun in one hand and his other hand up in a signal to stop. The driver stopped and asked the officer if he had broken any law. When the officer said no, the driver proceeded to leave. The officer yelled for the driver to stop and shot at the car's tire as it drove away. Subsequently the driver sued the city and the officer claiming that the officer used excessive force in violation of his constitutional rights. The court of appeals determined that there was no seizure for purposes of the Fourth Amendment and, therefore, no constitutional violation. The officer's show of authority by firing his weapon, while designed to apprehend the suspect, did not restrain him. The use of deadly force standing alone does not constitute a seizure. Absent

actual physical restraint, the alleged unreasonableness of the officer's conduct cannot serve as a basis for the cause of action. *Adams v. City of Auburn Hills*, 336 F.3d 515 (6th Cir. 2003).

## Police Officers – Retaliatory Discharge

Two police officers in Knoxville, Tennessee, a father and son, were terminated and subsequently reinstated by court order. The officers then sued the chief of police and others, alleging that the termination was in retaliation for speaking out against another officer in the course of an internal investigation of the officer's use of force. The district court held that the officers failed to state a claim for unlawful retaliation because they did not establish that they were punished for speaking on a matter of public concern. The court of appeals reversed. Because their comments communicated a concern for a fellow officer's potential for use of excessive force, the speech touched on a matter of public concern. The treatment accorded the officers when compared to other officers involved showed that the department targeted them because of their speech. *Taylor v. Keith*, 338 F.3d 639 (6th Cir. 2003).

## Police Custody – Drug Overdose

The estate of an inmate who died of a drug overdose while in the custody of the Oliver Springs, Tennessee police department following a traffic stop sued the arresting officers. The estate claimed that the officers had no probable cause to arrest and that the officers were deliberately indifferent to his medical condition. The court of appeals reasoned that the police had a reasonable suspicion to make the traffic stop and to continue to detain the driver. A search of his person, coupled with flight from the scene, gave rise to probable cause to arrest for possession of cocaine. The police did not see the suspect ingest the drugs that caused the overdose, and the suspect denied taking any drugs. Because the transporting officer did not know of and therefore did not disregard a substantial risk of serious harm, there was no violation of the inmate's constitutional rights. *Weaver v. Shadoan*, 340 F.3d 390 (6th Cir. 2003).

## Municipal Parking – Disabled Persons

A driver who suffered from multiple sclerosis sued the city of Monroe, Michigan alleging that the municipal parking program violated the Americans with Disabilities Act, seeking free all-day parking adjacent to her place of employment. The district court denied her motion for a preliminary injunction on the ground that she failed to establish a likelihood of success on the merits and the court of appeals affirmed. The majority found that the driver had nondiscriminatory access to free all-day parking at specific locations, but this did not translate to a right under the ADA to free parking that allowed access to her destination of choice. Equal results running from the city's provision of the benefit are not guaranteed. *Jones v. City of Monroe*, 341 F.3d 474 (6th Cir. 2003).

## Admission to the Bar – Immunity

An applicant denied admission to the Michigan Bar because he failed to demonstrate that he was a person of good moral character sued the Board of Law Examiners. The applicant claimed that the rules governing the time of his eligibility to reapply were unconstitutional and that the board unconstitutionally used First Amendment activity as a ground to deny his application. The applicant had a long history of “vexatious tactics that have led to years of abusive litigation.” The district court dismissed the action on its own motion, apparently accepting that the board and its members were immune from suit under the Eleventh Amendment and under the Michigan Supreme Court Rules Concerning the State Bar of Michigan. The court of appeals agreed that Eleventh Amendment immunity protected the Board and the Michigan Bar as agencies of the state. However, it did not protect the individual defendants, and the immunity granted them by the Supreme Court rules protects them only from state law claims. No state law can immunize anyone from liability for violating the United States Constitution. *Dubuc v. Michigan Board of Law Examiners*, 342 F.3d 610 (6th Cir. 2003).

## Retaliatory Dismissal – First Amendment

The CEO of an Ohio state mental hospital dismissed the hospital’s director of quality management. Believing her termination to be reverse discrimination (a claim later withdrawn) and in retaliation for her exercise of First Amendment rights, she sued. At issue was a memo criticizing the CEO’s decision to relocate a doctor’s office because of potentially adverse effects on patient privacy. The memo’s concern for the quality of patient care was sufficient in the view of the court to make the matter one of public concern. Turning to the balancing of interests between employer and employee, the court said that the relatively minor risk of disharmony created by the memo did not overcome the public interest in making sure a state hospital maintains a minimum standard of care for its patients. Because the hospital conceded that the memo was a motivating factor in the firing, it is the hospital’s burden to show that it would have fired the employee even in the absence of the protected conduct. That is a question for a jury, and the court remanded the matter to the district court. *Rodgers v. Banks*, 344 F.3d 587 (6th Cir. 2003).

## Official Immunity – Search and Seizure

As part of an undercover investigation into drug trafficking, Circleville, Ohio police arrested the defendant and detained her two-year-old daughter with her. About 24 hours after the arrest, the daughter was released to the custody of a friend. More than 48 hours later, the mother was arraigned on drug trafficking charges. Based on these incidents, mother and daughter sued the city for violation of their constitutional rights. The court found that the arresting officers enjoyed qualified immunity on the daughter’s claims that her detention was unreasonable under the Fourth Amendment and a violation of her substantive due process rights under the Fourteenth Amendment. However, the court found that they were not qualifiedly immune to the mother’s

claim that she was denied a prompt judicial determination of probable cause. The record establishes a violation of the 48-hour requirement of *County of Riverside*, 500 U.S. 44. The contention that this delay resulted from the city’s failure properly to train its police defeats the city’s motion for summary judgment and requires a remand to the district court. *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003).

## Library Regulations – Freedom of Speech

A library patron, evicted from the Columbus, Ohio library for going barefoot, sued the library’s governing board claiming that the requirement that patrons wear shoes violated his state and federal constitutional rights. The court rejected the claim that the policy violated the right to receive information and ideas protected by the First Amendment (see *Stanley v. Georgia*, 394 U.S. 557). The court viewed the regulation as a rational means to further government interests in protecting public health and safety and in protecting the library from tort claims of patrons injured because they were barefoot. These concerns, the court said, qualify as significant governmental interests. The court also rejected the claim that the policy unconstitutionally infringed upon a protected liberty interest in personal appearance because the policy did not implicate a fundamental right. The patron’s claims that the policy was improperly adopted and improperly enforced were also without merit. *Neimast v. Board of Trustees of Columbus Metro Library*, 346 F.3d 585 (6th Cir. 2003).

## Disabled Student – Private Placement

Parents of a hearing-disabled child, dissatisfied with his progress in the public schools, placed him in a private school and sought reimbursement from the school district. An impartial hearing officer denied reimbursement, and the decision was affirmed after state-level review. The parents then sued under the Individuals with Disabilities Education Act. The district court found that although the school district failed to offer the student a free appropriate public education, the parents nevertheless were not entitled to reimbursement because the placement and the notice to the district were not proper. The court of appeals affirmed. A unilateral private placement cannot be regarded as proper under the act when it does not as a minimum provide some element of special education services in which the public school placement was deficient. Amendments to the IDEA provide that reimbursement for a private school placement may be reduced or denied if parents did not provide notice that they were rejecting the placement proposed by the public school. *Berger v. Medina City School Dist.*, 348 F.3d 513 (6th Cir. 2003).

## Wrongful Discharge – At-will Employee

The county of Monroe, Michigan offered a position to a prospective employee. The offer letter specifically described the position as “an ‘at will’ non-union position,” and the employee accepted the offer by signing the letter. In the course of his work, the employee became aware of what he regarded as financial improprieties, causing friction with his supervisors and leading to his

discharge. He sued for wrongful discharge, contending that the county's personnel policies change the at-will relation into a just-cause relation. The court of appeals reversed a jury verdict in his favor holding that the employee was bound by the at-will language in the letter. Even were the letter silent on the question, the statements in the personnel policies taken as a whole did not create a legitimate expectation of just-cause employment. *Mannix v. County of Monroe*, 348 F.3d 526 (6th Cir. 2003).

### **RLUIPA – Unconstitutional Violation of Establishment Clause**

State prisoners alleged that various Ohio corrections officials violated the prisoners' rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). In defense the state challenged the constitutionality of the portion of the act that applies to institutionalized persons. The court of appeals found that RLUIPA violates the Establishment Clause because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation. In the court's opinion, RLUIPA was not an attempt to accommodate religion by removing obstacles to religious exercise. It was instead an attempt to advance religion in prisons relative to other constitutionally protected conduct. The court's decision creates a split among the

circuits on the constitutionality of RLUIPA. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003).

### **Dismissal of Student – Due Process**

The college of medicine at Ohio State University dismissed a female African-American student who failed to satisfy various requirements of her studies. She sued the university and numerous officials and administrators claiming that she had both a property interest and a liberty interest in her continued enrollment. She alleged a deprivation of those interests without due process, a denial of the equal protection of the laws, and discrimination on the basis of race and gender. Assuming, the court said, that she had a property interest in her seat in the medical school, the record reflects that she received at least as much due process as the Fourteenth Amendment requires. In addition, even if she could claim that her continued enrollment was protected by substantive due process, she offered no evidence that the defendants denied that protection. Neither could she show that the defendants treated her differently from male students or non-minority students; allegations of disparate treatment were not enough. The record showed that she was dismissed for purely academic reasons. *Bell v. Ohio State University*, 351 F.3d 240 (6th Cir. 2003).



# **OPINIONS OF THE ATTORNEY GENERAL**

## **SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS**

### **Meeting Defined – KRS 61.805(1)**

Following their swearing-in, five of the six newly elected city council members went to the mayor's office where the mayor distributed a memorandum concerning city business and then made comments lasting about ten minutes. The city argued that this was not a meeting subject to the Open Meetings Act because the mayor's comments were succinct, unilateral, and not delivered for the purpose of inviting discussion or debate, and no action was taken. The Attorney General finds that this was a meeting because the mayor's presentation was a discussion of public business and a quorum was present. 03-OMD-022.

### **Appointment, Discipline, or Dismissal – KRS 61.810(1)(f)**

A school board invoked the exception for discussion that might lead to the appointment, discipline, or dismissal of an employee to go into closed session to hear a complaint involving the failure to post an extra-duty

position. Because relieving an employee of extra duties cannot be equated with discipline or dismissal, the board's reliance on that exception was misplaced. The propriety of posting a position is a general personnel matter that the statute requires be discussed in open session. Further, the board had no authority in this instance to appoint, dismiss, or discipline an employee; that authority was in the superintendent. Any discussion of the subject by the board was a tangential matter outside the scope of the exception. 03-OMD-148.

### **Serial Meetings – KRS 61.810(2)**

A mayor met with bidders' representatives in a meeting at which three of six city council members were also present. Following that meeting, the mayor telephoned a fourth city council member about the meeting. This constituted a series of meeting of less than a quorum where the members collectively constituted a quorum. Such a series of meetings would be a violation of KRS 61.810(2) if held for the purpose of avoiding the requirements of the Open Meetings Act. Unable to determine the subjective intent of the council members, the Attorney General concluded that the circumstances offended two of the three elements of that provision. 03-OMD-092.

## **Conducting Closed Sessions – KRS 61.815**

A riverport and industrial development authority went into a closed session following a motion that referenced a section of the Open Meetings Act but which did not indicate the general nature of the business to be discussed. Because no announcement of the business was given in open session, it was a violation of KRS 61.815(1)(d) to discuss the matter in closed session. Further, the authority's reliance on the particular exemption authorizing a closed session was misplaced. The stated exemption permits a closed session for deliberation on the future acquisition or sale of real property where publicity would be likely to affect the value of a specific piece of property. The record contained no evidence that publicity was likely to affect the value of the property under discussion. 03-OMD-037.

A county solid waste and recycling board went into closed session to discuss a matter that might lead to the discipline of an employee. While in the closed session, it also discussed separate, on-going litigation. Although it would have been administratively inefficient to ask for a second closed session to re-discuss the litigation issues, the board's failure to do so was a violation of the Open Meetings Act. 03-OMD-170.

A school board convened a public hearing arising from the demotion of a principal, then left the room without explanation to discuss with its attorney the procedural requirements of the hearing. The board took the position that it had a right as a quasi-judicial hearing body to receive confidential legal advice relating to the hearing procedures without complying with the Open Meetings Act. The attorney general concluded that the discussion of procedural matters attendant to the hearing was as much public business as the hearing that followed and was subject to the openness requirement. The board erred in failing to comply with the requirements for conducting a closed session with a proper basis under the act. 03-OMD-178.

## **Special Meetings – KRS 61.823**

A board of health failed to substantiate that it had adopted a schedule of regular meetings. Since no schedule of regular meetings existed, the attorney general assumed that the meeting that was the subject of the complaint was a special meeting. In holding a special meeting, the board had to comply with KRS 61.823, which it did not. Similarly, when the board adjourned that meeting to a date certain, the notice requirements for a special meeting applied. 03-OMD-021.

A site based decision making council held a special meeting to discuss "policy and bylaws." All parties were aware that the meeting's sole purpose was to discuss the student dress code. Asked if the agenda item was sufficiently specific to permit the discussion, the attorney general concluded that it was. Although the council could have been more specific in describing the contemplated action (and the attorney general urged the council to be so in the future), the item was not so vague that it deprived the public of fair notice. 03-OMD-149.

## **Minutes – KRS 61.835**

A member of the public complained that the approved minutes of a city council meeting did not accurately reflect a particular discussion and demanded that the minutes be amended. The city asserted that, because the council took no formal action with regard to the matters discussed, the minutes were accurate, and the attorney general agreed. The Open Meetings Act does not require the minutes of a meeting to summarize the discussion or to record what any of the members said. Minutes need only set forth an accurate record of votes and actions at the meeting. Anything more is a matter of parliamentary procedure and at the discretion of the public body. 03-OMD-006.

## **Conditions for Attendance – KRS 61.840**

A water district board routinely used sign-in sheets at its meetings and included the sign-in sheets in its minutes. A regular attendee complained that this violated KRS 61.840, which provides that no person may be required to identify himself in order to attend a meeting. Accepting the board's assertion that signing the attendance sheet was not a condition of attending the meeting, the attorney general found no violation. The inclusion of the attendance sheet in the minutes is not prohibited by the Open Meetings Act. 03-OMD-116.

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Under KRS 61.846 the attorney general reviews complaints alleging violations of the Open Meetings Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available online at [ag.ky.gov/civil/openrec.htm](http://ag.ky.gov/civil/openrec.htm).

## **SUMMARIES OF SELECTED OPEN RECORDS DECISIONS**

### **Record Defined – KRS 61.870(2)**

A county attorney maintained his office within the law offices of the firm in which he was a partner because no public space was allocated. Public documents list the law firm's numbers as the numbers at which the public can contact the county attorney, although the county pays none of the expenses for those numbers. Similarly, the cell phones used by on-call members of the county attorney's office were paid for at private expense. The county attorney denied a request for telephone records because the records were not in his possession as a result of his public office and were not paid for with public funds. The attorney general concluded that the denial was proper, saying that the office of the county attorney cannot be required to comb through the phone records to determine the public or private nature of each call. A log of calls to the county attorney, if maintained, would be subject to disclosure, but phone bills paid for with

private funds and that were primarily for the private practice of law are not. 03-ORD-019.

A city refused a request for records related to a survey of sidewalks, invoking several exemptions in the Open Records Act and claiming that the materials sought were the private notes of a city councilman, not city records. Noting that every state or local officer is a public agency for purposes of the act, records generated and maintained by an officer in the discharge of his public function are public records, even if they remain in his custody and control. If an exemption applies to the records, it is the city's duty to show with specificity how the exemption applies. 03-ORD-196.

### **Records Management – KRS 61.8715**

A city produced all the records it had in response to a request regarding a particular property, but the requester insisted that there should be more records in the city's possession. Noting that the Open Records Act is linked to KRS Chapter 171 pertaining to records management, the attorney general reviewed the Records Retention Schedule for Local Governments and found that it appears to require the creation and retention of records to which the city could not provide access. The attorney general referred the matter to the Public Records Division of the Department for Libraries and Archives for additional inquiry into the records management issue. 03-ORD-031.

When asked for a copy of the audio tape of a city council meeting, the city refused to provide it believing it had to disclose only the written approved minutes prepared from the tape. Once the minutes were typed, the clerk erased the tape, and the requester received only a copy of the written minutes. Since 1992 the attorney general has maintained that such a tape "may not properly be treated as a preliminary document but should be made available to the public upon request." To deny the request was inconsistent with the Open Records Act, and the destruction of the tape was improper under the Local Government General Records Retention Schedule. The attorney general referred the matter to the Department of Libraries and Archives. 03-ORD-173.

A member of the city council asked the city clerk for copies of the last three audits done for the city. The city clerk explained that the information requested was at the offices of the auditors, a firm of certified public accountants. The attorney general noted that the city's response to the request was substantively correct; the city cannot provide access to a document it does not have. However, the response suggests either that the city did not timely complete the audits required by KRS 91A.040 or did not retain copies of the audits as required by the applicable records retention schedule. Accordingly, the attorney general referred the matter to the Public Records Division of the Department for Libraries. 03-ORD-240.

### **Right to Inspection – KRS 61.872**

Departing from a line of decisions holding that a request to view a complete personnel file is not sufficiently specific, the attorney general held that it is incumbent on the public agency to separate the excepted and non-excepted material in the file and make the non-

excepted material available for examination. A request for a specific personnel file is a record of an identified, limited class, and the requester does not need to specify what particular document within the file the requester seeks to inspect. A request for access to a personnel file requires no greater degree of specificity than any other open records request, and it is the agency's responsibility to determine what is and is not subject to release under the Open Records Act. 03-ORD-012.

A citizen requested records that would resolve discrepancies in records received in response to earlier requests. In reply, a county generated a summary of the information in dispute and provided the requester a copy of the summary but did not provide access to the records substantiating that information. The agency was under no obligation to create a record that did not already exist but did so here. However, it was still under an obligation to provide access to the records from which the agency extracted that information. 03-ORD-128.

A member of a city council requested access to various financial and operational records of the city and its police department. Initially access was denied; subsequently the city agreed to provide access to redacted records. The attorney general opined that the council member should be permitted to inspect city records in the discharge of her official capacity. Even if records are exempt from public disclosure, they should be available to public officials for legitimate governmental purposes. 03-ORD-134.

### **Suitable Facilities – KRS 61.872(1)**

A mayor made a request for copies of certain records, to which the city clerk replied that the records would be available for inspection. The mayor, however, insisted on receiving copies since "City Hall is now a hostile work environment" for him. Because the mayor both lived and worked in the county, the city's response requiring inspection was proper. As to the hostile work environment, the attorney general said that the city must provide adequate opportunity to inspect the records without interruption and without harassment. 03-ORD-085.

### **Written Application – KRS 61.872(2)**

A citizen received a delayed response to an open records request, which the citizen attributed to his failure to use the agency's preprinted request form. The attorney general was asked to rule on the propriety of the use of the form. Finding that it "creates a potential chilling effect on submission of open records requests ... that is inconsistent with the basic policy of the Open Records Act," the attorney general concluded that its use constitutes a subversion of the act. 03-ORD-086.

### **Inspection and Copies – KRS 61.872(3)**

An industrial authority advised a requester to make an appointment to view the more than 200 pages responsive to his request before the authority undertook to provide him with copies. In this instance the agency did not violate the Open Records Act by requiring on-site inspection of the records before providing copies. The requester's principal place of business was in the county where the records were maintained, and KRS 61.872(3)

provides that a person who both lives and works in the same county where the public records are located may be required to inspect the records first. 03-ORD-013.

In response to a request for offense/incident reports on eleven individuals, a city police chief responded that the request was too broad and asked the requester to narrow his focus. The attorney general agreed that the records sought were not precisely described. KRS 61.872(3)(b) places a greater burden on persons who wish to receive records by mail than on those who wish on-site inspection. 03-ORD-179.

A police department insisted that an individual provide a letter verifying asserted employment outside the county before it would mail copies of the requested records. The applicant indicated a willingness to pay copying fees and postage but did not tender payment. Upon receipt of the payment, the department must forward the documents. "By demanding such letter as condition precedent to mailing records the [police department] subverted the intent of KRS 61.870 to 61.884 short of denial of inspection." 03-ORD-166.

A request for voluminous records led a city clerk to make the records available for inspection at city hall, but the requesting individual challenged the clerk's refusal to make copies. The attorney general concluded that the city was within its rights to insist on on-site inspection because the requester resided and worked within the county. Even had that not been the case, it was still proper for the city to avoid mailing copies where the records are widely dispersed or otherwise difficult to access. 03-ORD-195.

#### **Unreasonable Requests – KRS 61.872(6)**

A city denied a request for a copy of audio tapes, claiming that the individual's thirty requests in an 18-month period placed an undue burden on the custodian of the records. The attorney general pointed out on appeal that this is not *per se* burdensome and that the subjects of those requests "do not appear to us to be unreasonable." The statute requires clear and convincing evidence to establish that requests are unreasonable or intended to disrupt agency functions, a burden the city failed to meet. To the extent that the city claimed the records were exempt from disclosure, the city had a duty to review the tapes, separate excepted material, explain how the exceptions claimed applied, and disclose the nonexempt portions of the tapes. 03-ORD-157.

#### **Fees – KRS 61.874(2)**

A volunteer fire department made copies of requested records available at 25 cents per page plus the cost of mailing the records by certified mail. The attorney general found that the fire department subverted the intent of the Open Records Act by charging excessive fees. A reasonable fee is 10 cents per page, and the fire department's choice to use certified mail must be borne by the department, not the requester. The attorney general also noted that although strict compliance with the Open Records Act poses special difficulties for an agency such as this, it is held to the same standard under the act as any other agency. 03-ORD-050.

#### **Unwarranted Invasion of Personal Privacy – KRS 61.878(1)(a)**

A county clerk denied a request to inspect voter assistance forms asserting that the records contained personal information the release of which would be a clearly unwarranted invasion of personal privacy. The information on the forms largely mirrors the information in voter registration records, which are subject to disclosure. It was, therefore, improper to deny access to the voter assistance forms. The clerk could protect the Social Security number and make the rest of the record available. Given that voter assistance forms have been used as a fraudulent means to influence elections, the public's interest in disclosure carries great weight. 03-ORD-034.

A city police officer asked to review psychological records in her file. Although KRS 15.400 denies an applicant access to such records, that statute is not applicable here because the police officer was hired before 1998. Therefore, KRS 61.878(3) giving a public employee a right of access to records relating to him or her controls. 03-ORD-043.

A school denied a parent's request to view certain records pertaining to a student on the ground that release would constitute an unwarranted invasion of personal privacy. The school asserted that a parent has no greater right to view the records than does a third party. The attorney general disagreed, saying that where the requester is a student's parent and the records related to that student, generally no privacy interests can reasonably be asserted. The school also sought to withhold the records as preliminary recommendations. The attorney general found the school's explanation of how the exception applies to be inadequate and remanded the matter back to the school for a further determination. 03-ORD-045.

A teacher made an open records request for her personnel file and that of another teacher. As to the latter, the school provided a copy of the teacher's résumé and denied access to the rest of the file as an unwarranted invasion of personal privacy. The attorney general requested to review the file in the course of the appeal and concluded that certain records must be disclosed after removing personal information. The opinion lists by kind the records that must be disclosed and the records that the school properly could withhold. 03-ORD-141.

An inmate requested from a county detention center copies of his inmate account and that of his wife. The detention center provided him with his account but not that of his wife. Because the account contained medical and prescription information, the jailer took the position that release would constitute an unwarranted invasion of personal privacy. The attorney general affirmed the denial noting that a 2002 amendment to KRS 197.025(2) narrowed an inmate's right of access to records to those that contain a specific reference to the requesting inmate. 03-ORD-208.

#### **Unfair Commercial Advantage – KRS 61.878(1)(c)**

A riverport authority denied a request for a copy of a warehouse market analysis on the ground that it

contained confidential or proprietary information, disclosure of which would be commercially harmful to its customers. The bare assertion is not enough to sustain the authority's reliance on the exemption in KRS 61.878(1)(c)(1). Further, the exemption does not protect the whole of the analysis. The authority is obligated to separate the confidential information from the releasable information and make the latter available. In 03-ORD-129, the attorney general concluded that the authority's reliance on the exception was misplaced. 03-ORD-064.

#### **Law Enforcement – KRS 61.878(1)(h)**

A city denied a request for a copy of a videotape pertaining to a high-speed police chase on the ground that it involved an open criminal investigation. The city, however, failed to establish that the surveillance tape was compiled as an integral part of a specific investigation and failed to meet its statutory burden of establishing that premature disclosure of the tape would harm the ongoing investigation. To withhold the tape, the city would have to show that it was compiled in the process of detecting and investigating statutory violations rather than in the course of general surveillance. Even then, the city would have to make more than a bare claim that premature release of investigative record would harm the investigation. It would have to describe the harm that would occur. 03-ORD-017.

An attorney representing a criminal defendant requested a certified copy of a dispatcher's log pertaining to a particular arrest. The county detention center denied the request on the ground that the requested record was an ongoing law enforcement action. However, the center failed to establish that the record was compiled "as an integral part of a specific investigation" or that disclosure would harm the investigation. Therefore, withholding the record was improper. The fact that the record related to ongoing litigation also was not a proper basis for withholding the record. The city need not certify the record since such a requirement does not exist in the Open Records Act. 03-ORD-226.

#### **Confidential by Law – KRS 61.878(1)(k), (l)**

An inmate requested certain records from a county detention center, and the detention center denied the request on authority of KRS 197.025. That section provides that the Department of Corrections is not required to comply with an open records request from an inmate unless the requested record pertains to that individual. The inmate questioned the applicability of the section to jails. Given the broad oversight role statutorily assigned to the department, the attorney general said that an interpretation of the section that does not include jails is legally unworkable in light of its underlying purposes – avoiding disclosure of records that implicate security concerns and swelling the tide of frivolous inmate requests. 03-ORD-074.

In an appeal of the denial of access to an e-mail that expressed a legal opinion, the requester took the position that the attorney-client privilege did not attach because, although rendered by an attorney, the opinion

did not constitute legal services to the government. After reviewing the disputed document, the attorney general concluded that the document was protected. The Open Records Act allows agencies to withhold records made confidential by the General Assembly, including records protected by the attorney-client privilege established in Kentucky Rules of Evidence 503. Because an agency's reliance on legal advice is not the same as "incorporation" of that advice into final agency action, reliance on legal advice does not negate the attorney-client privilege, and the government may protect the document from disclosure. 03-ORD-243.

#### **Public Agency Employee Access – KRS 61.878(3)**

A teacher requested a copy of an anonymous complaint, and the school system denied the request. As a document that relates to the teacher, statute requires its disclosure to the employee. The school system may not withhold it as a preliminary document. The school system must redact any information the disclosure of which is prohibited by the Family Educational Rights and Privacy Act and disclose the balance of the record. 03-ORD-163.

#### **Procedures – KRS 61.880**

In response to a request for its financial records, a volunteer fire department responded that it was not a public agency for the purposes of the Open Records and Open Meetings Acts. It insisted that the requesting party come forward with the information for the conclusion that the department was a public agency. If a fire department derives at least 25% of its funds expended in the state from state or local authorities, it is a covered agency. The burden of proof, however, rests with the agency to show that it is not covered. Absent proof, the attorney general presumed that the fire department is a public agency and must disclose the records sought. 03-ORD-185.

#### **Subversion – KRS 61.880(4)**

In response to a request for access to a broad range of financial and operational records, a city clerk advised the requester that it would take approximately four weeks to compile and duplicate the records but that in the meantime the records would be available for inspection at the city offices. In its response to the request, the city described in detail the difficulty in retrieving and duplicating nearly 6,000 pages of material and maps. The attorney general found that the city's conduct attested to its good faith disposition of the request and did not subvert the intent of the Open Records Act short of denial of the request. 03-ORD-248.

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Under KRS 61.880 the attorney general reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available online at [ag.ky.gov/civil/openrec.htm](http://ag.ky.gov/civil/openrec.htm).

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