The Kentucky Open Records Law: A Retrospective Analysis

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The early 1970s ushered into Kentucky a push to bring about statutory changes that would open up state and local government to more effective public oversight. Prior to that time, Congress had enacted the federal Freedom of Information Act, and numerous states had followed suit with similar laws. Kentucky, however, had not codified the public's right to review governmental records. In the wake of the Vietnam War and the Watergate scandal, Kentucky's newspaper editors and publishers, working through the Kentucky Press Association, began to actively lobby the Kentucky General Assembly to bring more transparency to Kentucky government.

Beginning with the Open Meetings Act enacted in 1974, and culminating two years later with the enactment of the Open Records Act, Kentucky began the process of trying to ensure that government would be more transparent and more accountable to the public for its actions and inactions. In the subsequent 36 years, judicial interpretations and additional legislative efforts, have given the public more tools to monitor the activities and actions of Kentucky public agencies, resulting in a higher level of public scrutiny and debate.

The Passage of the Act

The Open Records Act's (ORA's) stated principle is that "access to information concerning the conduct of the peoples' business is a fundamental and necessary right of every citizen in the Commonwealth of Kentucky."[1] "All public records shall be open for inspection by any person, except as otherwise provided by this Act [codified at KRS 61.870 to 61.884], and suitable facilities shall be made available by each public agency for the exercise of this right."[2] "Public records" were broadly defined as "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings or other documentary materials regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency."[3] "Public agency" was defined as:

> every state or local officer, state department, division, bureau, board, commission, and authority; every legislative board, commission committee and officer; every county and city governing body, council, school district board, special district board, municipal corporation, court or judicial agency, and any board, department, commission, committee, subcommittee, ad hoc committee, council or agency thereof; and any other body which is created by state or local authority in any branch of government which derives at least twenty-five percent (25%) of its funds from state or local authority.[4]

The Act explicitly exempts certain types of records from disclosure; the original version of the Act set forth the following 10 exemptions:

- public records containing "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;"
- records confidentially disclosed to an agency for certain sanctioned purposes;
- public records pertaining to the prospective location of a business or industry;
- real estate appraisals, engineering or feasibility estimates, and evaluations made for the acquisition of real property;
- test questions, scoring keys, and other examination data used for licensing examinations;
- records compiled by law enforcement and administrative adjudication agencies in a pending investigation;
- preliminary drafts, notes or correspondence with private individuals other than correspondence intended to give notice of final action by a public agency;
- preliminary recommendations, and preliminary memoranda with opinions expressed or policies formulated or recommended;
- public records that federal law or regulation prohibits disclosing; and
- public records that another act of the state legislature prohibits disclosing or makes confidential.[5]

The most contentious exemptions, and the ones upon which this article will focus, are the personal privacy and preliminary documents exemptions currently set forth in Ky. Rev. Stat. § 61.878(1)(a), (i), and (j). We will also look at the definition of "public agency," a controversial area of debate that has generated much litigation.

Early Cases Mixed on Degree of Transparency Required

The breadth of the concept of personal privacy has always presented problems, both for agencies responding to records requests, and for courts in subsequent litigation. Despite the Act's apparent preference for transparency and disclosure of public records, early opinions construing the Act applied the personal privacy exemption broadly and

sometimes inconsistently.[6] For example, in *Board of Education of Fayette County v. Lexington-Fayette Urban County Human Rights Commission*, the Kentucky Court of Appeals refused to recognize the presumption in favor of disclosure of public records in applying the personal privacy exemption to certain personnel records.[7] The court noted that in applying a similar exemption under federal law, federal courts performed a balancing test, weighing the individual's interests against the public's right to be informed, with a tilt in favor of disclosure. The Kentucky Court of Appeals, however, refused to "subscribe to the tilting towards disclosure doctrine."[8] Instead, it stated that it would "balanc[e] the interests of the parties as well as those of the public measured by the standard of a reasonable man."[9]

Despite the Court of Appeals' pronouncement, other early opinions mandated increased government transparency. In *Kentucky State Board of Medical Licensure v. Courier-Journal & Louisville Times Co.*, the Kentucky Court of Appeals required the Board of Medical Licensure to disclose certain files that the board categorized as private, including "complaints from private individuals, certain correspondence between the Board and other agencies and physicians and reports of investigations."[10] The board claimed that these files were "private" unless and until a formal statutory complaint was filed by the board against a physician, and that they therefore fell within the preliminary documents exemptions currently found in Ky. Rev. Stat. § 61.878(1)(i), (j).[11] But the Court of Appeals disagreed, holding that "once final action is taken by the Board, the initial complaints must be subject to public scrutiny."[12] In other words, "once such notes or recommendations are adopted by the board as part of its action, the preliminary characterization is lost, as is the exempt status."[13] This limitation on the extent of the preliminary documents exemption helped to open other records.

The finality requirement was again discussed in *University of Kentucky v. Courier-Journal & Louisville Times Co.* In that case, the Louisville Courier-Journal sought the disclosure of an official response that was prepared after an internal university investigation into various NCAA allegations, and that was provided to the NCAA.[14] Although the university argued that portions of the response need not be disclosed because they fell within the preliminary documents exemptions, the Kentucky Supreme Court rejected this argument.[15] The Court explained that the state legislature "placed the burden on public agencies to prove that a public record is exempt from disclosure and stated that the exemptions to public disclosure 'shall be strictly construed even though such examination may cause inconvenience or embarrassment to public officials or others.'"[16] Because the response constituted the final action of the university after extensive investigation, the Court held that it did not fall within the preliminary documents exemptions. The Court explained that "[t]he fact that the Response was submitted prior to final action by the NCAA is irrelevant. The only agency subject to the provisions of the Act is the University. The submission of the report to the NCAA by the University constitutes final action of the University."[17]

In the early 1990s, the courts continued to acknowledge the Act's emphasis on openness and preference for disclosure, even in a case where an exemption was upheld. Thus, in *Kentucky Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, the Kentucky Supreme Court refused to require the disclosure of names of patients who accused a psychologist of sexual improprieties.[18] Applying the personal privacy exemption, the Court found that disclosure "would constitute a serious invasion of the personal privacy of those who complained against [the psychologist], as well as other former clients involved in the investigation."[19] Despite this result, the Court ruled that disclosure is generally favored and recognized that the agency bears the burden of proof in contesting an application for access to public records. The Court also acknowledged that the Act "exhibits a general bias in favor of disclosure" in considering the personal privacy exemption, and held that the personal privacy exemption could not be applied as a matter of general policy, but had to be reviewed on a "case-by-case basis."[20] This signified an important shift in the jurisprudence regarding the personal privacy exemption. Limiting the ability of an agency to declare certain documents "private" as a matter of policy, regardless of the particular circumstances or identities of the people involved, has been instrumental in enabling the public to see the inner workings of important public agencies.[21]

Early on, the courts also addressed what constitutes a "public agency" under the Act. In *Frankfort Publishing Co. v. Kentucky State University Foundation, Inc.*, the foundation argued that it need not provide access to its travel and entertainment records, as it was not a public agency as defined by the Act.[22] Noting that the foundation "is a nonprofit Kentucky Corporation, the purpose of which is to receive funds, gifts, grants, devises and bequests and apply them for the benefit of Kentucky State University or its students, faculty, staff, or agents," the court reasoned that "[a]n interpretation of KRS 61.870(1), which does not include the foundation as a public agency, is clearly inconsistent with the natural and harmonious reading of KRS 61.870 considering the overall purpose of the Kentucky Open Records law."[23] The "obvious purpose" of the Act, the Court continued, is "to make available for public inspection, all records in the custody of public agencies by whatever label they have at the moment."[24] Thus, the Court found that the phrase "or agency thereof" in the ORA definition of "public agency" encompassed the foundation.[25]

Amendments to the Act Increase Transparency

During the 1990 General Assembly, the ORA came under attack by several legislators, apparently upset over particular rulings relating to public agencies in their districts. There was a serious effort to amend and limit the applicability of the Act, which was opposed strenuously by the Kentucky Press Association (KPA) and others. An agreement was reached between the leg-

islators and the KPA to delay any action in 1990, and to create an interim committee to review the ORA and its impact on the Commonwealth. Various legislators were appointed to that committee, as well as three representatives of the print media in the Commonwealth.

During the numerous committee meetings, held over an 18-month period, an interesting dynamic occurred: because media representatives had opportunities to explain in detail situations that were occurring throughout the Commonwealth that were frustrating the intent of the Act, the committee ended up recommending major revisions to the Act that increased its reach, rather these recommendations were, for the most part, accepted and enacted by the General Assembly.

Specifically, the amendments moved the language previously codified at Ky. Rev. Stat. § 61.882(4) into its own provision at § 61.871. That provision was also strengthened to state:

> The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.88 is that free and open examination of public records is in the public interest and the exceptions provided for by Section 5 of this Act [codified in KRS 61.878] or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.[26]

The amendments also expanded the definition of "public agency" in order to make clear that the term includes all agencies of all governmental units.[27] In addition, the amendments added a new exemption for records confidentially disclosed to an agency, and compiled and maintained in conjunction with certain sanctioned activities, that are generally recognized as confidential or proprietary and that if openly disclosed would permit unfair commercial advantage to competitors.[28]

The 1992 amendments also made an extremely important procedural change. Prior to 1992, any person denied a record by a public agency could ask the attorney general for an opinion as to the propriety of that denial and the attorney general would respond appropriately. While the attorney general's position was that the response had the force of law, there was no mechanism in place to enforce the opinion. As a result, agencies were routinely ignoring adverse decisions. In 1992, the law was amended to allow an appeal from the attorney general's decision, and to state that if no appeal was taken, the decision was to have "the full force and effect of law and shall be enforceable" by the appropriate circuit court.[29]

The provisions of the Kentucky law providing for the use of the attorney general's office have been praised by many, and have been held up nationally as an example of an inexpensive and effective remedy that can be used by both ordinary citizens and by the media. These provisions were central to a recent circuit court decision in an action brought against the Cabinet for Health and Family Services by the Todd County Standard.[30]

Following the 1992 amendments, the Kentucky Supreme Court summarized the application of the Act as follows:

> The unambiguous purpose of the Open Records Act is the disclosure of public records even though such disclosure may cause inconvenience or embarrassment. An extensive mechanism has been created for exercise of the right of inspection and imposes upon the record custodian the duty to respond appropriately. Public agencies are authorized to adopt rules and regulations but may not impose requirements which have the effect of thwarting access. In the event the request for access is denied, the agency must state the specific exemption which authorizes withholding the record and a party denied access may seek review by the Attorney General and the burden of proof is upon the agency.[31]

Although the intent of the 1992 amendments was to increase transparency and effectuate change, the exemptions set forth in § 61.878 continued to be used as a shield against disclosure, and Kentucky courts continued to struggle with balancing the exemptions against the intent of the Act.

Courts Continued to Construe the Personal Privacy Exemption Liberally Despite the Amendments

The courts continued to construe the personal privacy exemption liberally in early cases following the amendments. For instance, in *Zink v. Commonwealth*, despite fully acknowledging the intent of the ORA, the Kentucky Court of Appeals concluded that that employee injury report forms filed with Department of Workers Claims are within the personal privacy exemption and are not subject to disclosure.[32] *Zink*, however, should be seen as a case involving no substantial public interest in the disclosure of records. In fact, in *Zink*, the open records request was made by an individual attorney who sought to use the requested information to solicit business for his law practice, not for the public benefit.

However, in 1997, the Kentucky Supreme Court refused to apply the personal privacy exemption to final settlement agreements entered into in connection with lawsuits against a public agency, ultimately holding that "a settlement of litigation between private citizens and a governmental entity is a matter of legitimate public concern which the public is entitled to scrutinize."[33] Several years later, the Kentucky Court of Appeals held that the public has a legitimate interest in personnel complaints of public employees and, thus, those records are not protected from disclosure.[34]

In other circumstances, however, courts chose to enforce the personal privacy exemption in instances dealing with an ongoing police investigation. In 2000, a panel of the Kentucky Court of Appeals unanimously upheld a 911 caller's right to privacy when seeking police assistance.[35] In its opinion, the Court noted that "[r]eleasing the tapes of 911 calls seeking police assistance, particularly in instances of domestic violence, would have a chilling effect on those who might otherwise seek assistance because they would become subject to . . . retaliation, harassment, or public ridicule."[36]

Courts Begin to Apply the Act as Intended as Kentucky Newspapers Seek More Transparency for Sex Crimes and Child Fatalities

In 2001, the Louisville Courier-Journal submitted "a continuing open records request" to the City of Louisville, Division of Police, seeking incident reports of victims of sexual assault crimes.[37] Prior to disclosure, the city redacted the victims' names and addresses and the location of the crimes. In 2002, the attorney general concluded that the city "may redact the names and addresses of the victims of sexual offenses, the location of the offenses if the offenses occurred in the victim's homes, and the complainants' signatures if the complainant and victim are one and the same."[38] The Courier-Journal appealed, maintaining that disclosure of this information did not constitute an unwarranted invasion of personal privacy and that the blanket redaction policy was inconsistent with the "case-by-case" approach envisioned by the Kentucky Supreme Court in *Kentucky Board of Examiners of Psychologists v. Courier-Journal & Louisville Times* Co.[39] The Kentucky Court of Appeals disagreed, ultimately holding that the city may redact the names and other personal information as an unwarranted invasion of personal privacy.

Eight years later, the Kentucky Court of Appeals again held that disclosure of the rape suspect's identity would constitute a clearly unwarranted invasion of personal privacy.[40] However, the Court cautioned that "judicial decisions concerning such open record requests are to be made on a 'case-by-case basis.'"[41]

In 2008, the Kentucky Supreme Court decided *Cape Publications, Inc. v. University of Louisville Foundation, Inc*.[42] In that case, the Louisville Courier-Journal sought disclosure of the identities of certain donors, a number of whom had previously requested that their donations remain secret, and amounts of their donations to the University of Louisville Foundation, "a fundraising arm of the University."[43] Early in the litigation, the trial court held that donor records of corporations and private foundations could not, as a matter of law, implicate personal privacy concerns, and, thus, these records were not exempt under the privacy exception. This decision was affirmed on appeal.

With respect to the identity of individual donors, the trial court found that only the names of the individual donors requesting secrecy were protected by the privacy exemption. Both parties appealed and the Kentucky Court of Appeals subsequently determined that the foundation could withhold the identities of *all* donors because their "interests in personal privacy [were] superior to the public's interest in disclosure."[44] The Kentucky Supreme Court, however, disagreed, ultimately finding that "[t]he public . . . has a legitimate interest in the amounts and sources of monies donated."[45] The Court also noted that "the public's interest is particularly piqued by large donations from anonymous donors, and that a legitimate question of influence is raised by such circumstances."[46] Accordingly, the Court held that it was appropriate, given the balance of interests, to disclose the names of secret donors to public institutions.[47]

In 2009 and 2010, some transparency began to emerge through a series of lawsuits initiated by the Louisville Courier-Journal and the Lexington Herald-Leader against the Cabinet for Health and Family Services, the state agency responsible for child protection services. In 2009, a 20-month-old child living in Wayne County died after drinking a toxic drain-cleaning chemical that his father used in the production of meth. Following the denial of their request to obtain records of child abuse or neglect deaths, the newspapers filed suit against the cabinet. Relying on a 2007 Attorney General Opinion, the cabinet argued that it had the discretion to withhold the documents pursuant to the personal privacy exemption, in addition to other statutory provisions.[48] The

circuit court disagreed.[49] In an opinion issued on May 3, 2010, Franklin Circuit Court Judge Phillip Shepherd held that the personal privacy exemption did not apply to these records and that the mandatory nature of the Act required the cabinet to disclose the records unless exempt under the statute. The cabinet did not appeal.

The newspapers subsequently made requests to the cabinet seeking records relating to child fatalities and near fatalities for a two-year period. Despite the decision in 2010 that was not appealed, the cabinet again refused to respond to the requests. The Courier-Journal and Herald-Leader filed a second lawsuit, seeking to obtain the records that the circuit court had already held to be subject to the mandate of the Act. On Dec. 1, 2011, Judge Shepherd issued another memorandum opinion compelling the cabinet to provide the records in question.[50] Judge Shepherd specifically noted that "the Cabinet is so immersed in the culture of secrecy regarding these issues that it is institutionally incapable of recognizing and implementing the clear requirement of the law."[51] The parties continue to litigate this dispute as a result of the cabinet's redactions.

The last in this series of lawsuits concerned a nine-year-old girl from Todd County. Following multiple reports of suspected abuse and neglect, the girl died from a fatal blow to the head by one of her brothers. The local newspaper, the Todd County Standard, served a request for records to the cabinet. The cabinet initially failed to respond to the request altogether, and when the newspaper appealed to the attorney general, the cabinet alleged that it had no records relating to the child. The newspaper filed suit in Franklin Circuit Court and the cabinet admitted that it did, in fact, have relevant records that it had withheld from disclosure. Judge Shepherd again rejected the cabinet's various arguments, including a personal privacy argument, holding that the records were not subject to any exemption under the Act.[52] The cabinet has appealed this decision.

Expansion of the Meaning of "Public Agency" Increases Accountability

With more and more public awareness, entities sought to avoid the reach of the ORA by creating and using nonprofit corporations to perform arguably public functions, and the courts continued to address the question of what constitutes a "public agency" under the Act.[53] The Kentucky Supreme Court has held that a nonprofit corporation receiving funds that were obtained through the fiscal court's imposition of an occupational tax, and expending or paying out funds under contract with the fiscal court, is a public agency under the Act.[54] However, the Kentucky Court of Appeals has held that hospital patient records, even though kept by a "public agency," are not subject to disclosure because "medical records of those patients in a public hospital are not related to the functioning of the hospital, the activities carried on by the hospital, its programs, or its operations."[55] In 2003, in the first round of litigation in *University of Louisville Foundation, Inc. v. Cape Publications*, discussed *supra*, the Kentucky Court of Appeals considered whether the University of Louisville Foundation was a "public agency" within the meaning of the ORA.[56] In addition to asserting the previously-discussed personal privacy exemption, the foundation argued that it was a private corporation and need not disclose these records.

During this first round of litigation, the circuit court found that the foundation is a public agency under the statute. The foundation appealed. Finding that the University of Louisville created, established, and controlled the foundation, the Kentucky Court of Appeals affirmed, holding that the foundation was a public agency.[57] Despite the foundation's arguments that it was not "controlled" by the University, the appellate court determined that the foundation was, in fact, created "in anticipation of the University joining the state system" and was

effectively a part of the university.[58] The Court then remanded the case to the circuit court to consider the issue of the disclosure of the names of individual donors.[59]

Three years later, the attorney general cited concerns with regard to the Act when he issued a report recommending against the proposed consolidation of the University Medical Center, Inc. (UMC), with several private healthcare systems to create a statewide network healthcare entity.[60] In noting the many unresolved legal issues, the attorney general advised that the merger would defeat the transparency intended by the ORA. Specifically, "[i]f the proposed consolidation transaction is completed, UMC may no longer meet the definition of a "public agency" under KRS 68.870(1)(j). . . . The loss of control of UMC by the University, coupled with the absence of transparency provisions in the Transaction Documents, results in a clear loss of access by the Commonwealth and public to documents related to a public asset, the Hospital."[61] The attorney general ultimately recommended that the governor not approve the proposed merger. On Dec. 30, 2011, the governor announced his rejection of the proposed merger. The issue of whether the hospital is a public agency under the ORA is currently pending in Jefferson Circuit Court.

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Conclusion

In the span of approximately 35 years, the actions of the Kentucky legislature, the Kentucky courts, and the press, have dramatically increased access to public records. The accountability of public agencies within the Commonwealth afforded by the ORA was the catalyst for these changes. History shows, however, that the law will continue to evolve, as the courts and the legislature attempt to address the tension between those seeking to shield records from public scrutiny, and those seeking to expand the public's right to those records.

ENDNOTES

1. 1976 Ky. Acts 273.
2. *Id.* at § 1 (codified at Ky. Rev. Stat. § 61.872(1)).
3. *Id.* (codified at Ky. Rev. Stat. § 61.870(2)).
4. *Id.* (codified at Ky. Rev. Stat. § 61.870(1)).
5. *See Id.* at § 5 (codified at Ky. Rev. Stat. § 61.878(1)).
6. For an early analysis of the personal privacy exemption, see Jerome E. Wallace, *Out of the Sunshine and into the Shadows: Six Years of Misinterpretation of the Personal Privacy Exemption of the Kentucky Open Records Act*, 71 Ky. L. J. 853 (1982-83).
7. 625 S.W.2d 109 (Ky. Ct. App. 1981).
8. *Id.* at 111.
9. *Id.* Despite this pronouncement, various early Attorney General opinions simply declared records to be within the personal privacy exemption without performing any balancing of the interests involved. *See, e.g.*, OAG 82-204; OAG 83-286; OAG 86-15.
10. 663 S.W.2d 953, 955 (Ky. Ct. App. 1983).
11. The board relied largely on *City of Louisville v. Courier-Journal & Louisville Times Co.*, in which the Kentucky Court of Appeals held that internal investigative files of the Louisville Police Department (of its own officers) were exempt from disclosure at least until final action is taken by the Chief of Police. 637 S.W.2d 658, 659-60 (Ky. Ct. App. 1982).
12. *Ky. State Bd. of Med. Licensure*, 663 S.W.2d at 956.
13. *Id.*
14. 830 S.W.2d 373, 375 (Ky. 1992).
15. The University also argued that the response was exempt from disclosure under the personal privacy exemption, but the Court rejected this argument because the contents of the response were clearly a matter of public interest—the University spent a great deal of money on its investigation—and their release would not constitute a clearly unwarranted invasion of personal privacy.
16. *Id.* at 377 (quoting Ky. Rev. Stat. § 61.882(4) *amended by* 1992 Ky. Acts 163 § 1, 7).
17. *Id.* at 378.
18. 826 S.W.2d 324, 328-29 (Ky. 1992).
19. *Id.* at 328.
20. *Id.* at 326-27.
21. *See Lexington Herald-Leader v. Cabinet for Health & Family Servs.*, No. 09-CI-1742 (Opinion/Order, May 3, 2010); *Lexington Herald-Leader v. Cabinet for Health & Family Servs.*, No. 11-CI-141 (Order & Judgment, Dec. 1, 2011); *Todd Cnty. Standard. v. Courier-Journal*, No. 11-CI-1051 (Opinion/ Order, Nov. 7, 2011).
22. 834 S.W.2d 681, 681-82 (Ky. 1992)
23. *Id.* at 682.
24. *Id.*
25. *Id.* (citing Ky. Rev. Stat. § 61.878(j)).
26. 1992 Ky. Acts 163 §§ 1, 7 (codified at Ky. Rev. Stat. § 61.871).
27. *See id.* § 2 (codified at Ky. Rev. Stat. § 61.870(1)(i)-(k))
28. *See id.* § 5 (codified at Ky. Rev. Stat. § 61.878(1)(c)); *see also Hoy v. Ky. Indus. Revitalization Auth.*, 907 S.W.2d 766 (Ky. 1995) (applying exemption to records regarding

corporation's tax credits); *Marina Mngmt. Servs., Inc. v. Commonwealth*, 906 S.W.2d 318 (Ky. 1995) (applying exemption to a corporation's financial records in the possession of a state agency pursuant to a licensing agreement).

29. 1992 Ky. Acts 163 § 6 (codified at Ky. Rev. Stat. § 61.880(5)).
30. *See infra* (discussing *Todd Cnty. Standard v. Courier-Journal*, No. 11-CI-1051 (Opinion/Order, Nov. 7, 2011)).
31. *Beckham v. Bd. of Educ. of Jefferson Cnty.*, 873 S.W.2d 575, 577 (Ky. 1994) (holding that privacy rights may extend to citizens who are not parties to the open records request but who would be substantially affected by the disclosure).
32. 902 S.W.2d 825 (Ky. Ct. App. 1994).
33. *Lexington-Fayette Urban Cnty. Gov't v. Lexington Herald-Leader*, 941 S.W.2d 469, 473 (Ky. 1997).
34. *See Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001) (holding that the public has a legitimate interest in the complaint filed against police officer, alleging that he neglected his work duties by engaging in an improper relationship with another officer while on duty, that outweighed his privacy interest).
35. *See Bowling v. Brandenburg*, 37 S.W.3d 785 (Ky. Ct. App. 2000).
36. *Id.* at 788.
37. *See Cape Publ'ns v. Louisville*, 147 S.W.3d 731 (Ky. Ct. App. 2003).
38. 02-ORD-36.
39. *See supra* note 14.
40. *See Lexington H-L Servs. v. Lexington-Fayette Urban Cnty. Gov't*, 297 S.W.3d 579 (Ky. Ct. App. 2009) (holding that the rape suspect's and rape victim's identity was properly withheld from disclosure).
41. *Id.* at 585 (citations omitted).
42. 260 S.W.3d 818, 824 (Ky. 2008).
43. *Id.* at 820; *see also infra.*
44. *Id.* at 821.
45. *Id*. at 823.
46. *Id.* at 824.
47. "Excepted, however, [were] those 62 persons who requested anonymity and who made donations to the Foundation prior to it being declared a public entity." *Id.*
48. In 2007, the Attorney General held that "[i]nformation *may* be publicly disclosed by the cabinet in a case where child abuse or neglect has resulted in a child fatality or near fatality." 07-ORD-145 (emphasis added). In other words, the Attorney General reasoned that the use of "may" gave the Cabinet discretion to release or not release the records requested.
49. *See Lexington Herald-Leader v. Cabinet for Health & Family Servs.*, No. 09-CI-1742 (Opinion/Order, May 3, 2010).
50. *See Lexington Herald-Leader v. Cabinet for Health & Family Servs.*, No. 11-CI-141 (Order & Judgment, Dec. 1, 2011).
51. *Id.*
52. *See Todd Cnty. Standard v. Courier-Journal*, No. 11-CI-1051 (Opinion/ Order, Nov. 7, 2011).
53. On April 4, 2012, Governor Steve Beshear signed into law an act amending the definition of "public agency" to exclude from disclosure requirements government contractors receiving twenty-five percent or more of their funding from state or local authority funds. *See* H.B. 496, Reg. Sess. (Ky. 2012).
54. *Citizens for a Better Env't, Inc. v. Ohio Cnty. Indus. Found., Inc.*, 156 S.W.3d 307 (Ky. Ct. App. 2004) (applying Ky. Rev. Stat. § 61.870(1)(h)).
55. *Hardin Cnty., Ky. v. Valentine*, 894 S.W.2d 151 (Ky. Ct. App. 1995) (applying subsections (1)(h) and (2)).
56. No. 2002-CA-1590-MR, 2003 Ky. App. Unpub. LEXIS 1370 (Ky. Ct. App. Nov. 21, 2003). The University of Louisville Foundation was created prior to the University joining the state system, but was recognized per Ky. Rev. Stat. § 42.540 as a "nonprofit fiduciary holding funds for the benefit of state organization." *Id.* at *3.
57. *Id.* at *26-27.
58. *Id.* at *2.
59. *See supra* (discussing the Kentucky Supreme Court's 2008 decision, in a later appeal in this case, that the names of public donors and the amounts of their donations are not exempt from disclosure, except for those of sixty-two donors who requested their donations remain anonymous prior to the Foundation being declared a public entity).
60. *See* Report of the Attorney General, Dec. 29, 2011.
61. *Id*.