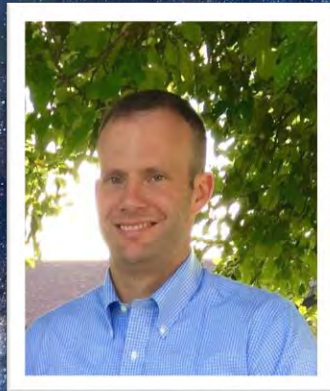


Legal Issues for Boards: New Board Member Training, Part 2

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STRONGER

by degrees



OPEN RECORDS & OPEN MEETINGS LAWS IN KY: A Brief Overview

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KY Open Meetings Act (KRS 61.800-.850)

“All meetings of a quorum of the members of any public agency at which public business is discussed or at which action is taken by the agency, shall be public meetings, open to the public at all times...”



Public Agency

- Every state board is a “public agency” for purposes of the Act.
- “Public agency” is broadly defined in eight statutory subparts and includes “committees, subcommittees, ad hoc committees, [and] advisory committees” created by a “public agency.” KRS 61.805(2)(g).



Meetings of a Quorum of Members

- A majority of voting members constitute a quorum.
- Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of the Act, shall be subject to the Act.
 - Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues. KRS 61.810(2).



Public Business or Action Taken

- "Action taken" means a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body. KRS 61.805(3).
- **"Public business is the discussion of the various alternatives to a given issue about which the agency has the option to take action."** Yeoman v. Com. Health Policy Bd., 983 SW2d 459,474 (Ky. 1998).
- Group email discussion could be a violation of the Open Meetings Act.



Meeting Notice

- All public agencies shall provide a schedule of regular meetings and make it publicly available. KRS 61.820(2).
- Special Meetings
 - Called by majority of members or presiding officer.
 - Written notice shall be provided with date, time, place, and agenda at least 24 hours in advance (except in emergencies) to all members and media requesting receipt.
 - Discussion and action limited to the items on the agenda. KRS 61.823.



Location of Meetings

- All meetings shall be held at places which are convenient to the public. KRS 61.820(1).
- All agencies shall provide meeting room conditions, including adequate space, seating, and acoustics, which insofar as is feasible allow effective public observation of the public meetings. All agencies shall permit news media coverage, including but not limited to recording and broadcasting. KRS 61.840.



Video Teleconferencing

- Individuals must be able to see and hear each other. KRS 61.805(5).
- Notice requirements the same, but must include:
 - ✓ A statement that the meeting will be video teleconference; and
 - ✓ All locations, including the primary one, if any. KRS 61.826(2).
- Closed sessions via teleconference are not permitted. KRS 61.826(1).



Exemptions-Closed Sessions

- Discussions on future acquisition or sale of real property when publicity could impact the value of the property.
- Discussions of proposed or pending litigation.
- Discussions or hearings which might lead to the appointment, discipline, or dismissal of an employee or student.
 - Does not permit discussion of general personnel matters in secret.
- Meetings that federal or state law specifically require to be conducted in private. KRS 61.810.



Requirements for Closed Sessions

- Notice shall be given in regular session of the general nature of business to be discussed, the reason for the closed session, and the authorizing provision of the law.
- Motion must be made to go into closed session and must be carried by a majority vote.
- No matters may be discussed in closed session other than those publicly announced.
- No final action can be taken in closed session. KRS 61.815



Minutes

The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body. KRS 61.835.



Legal Challenges to Agency Action

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



Appeals and Role of Attorney General

- Appeal to Attorney General/Circuit Court [must be initiated within 60 days of denial or agency nonresponse per KRS 61.846(2)].
- Notification provided to agency.
- Request for additional documentation.
- Decision stating whether agency violated Open Meetings Act.
- **Appeal of Attorney General's** decision within 30 days.



Enforcement/Penalties

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



KY Open Records Act (KRS 61.870-.884)

The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by 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. KRS 61.871.



Open Records: Things to Keep in Mind

- A public record is any documentation, regardless of physical form, prepared, owned, used, in the possession of or maintained by a public agency. KRS 61.870(2).
- Exemptions that may be claimed for requested documents include the following:
 - Personal information.
 - Test questions and answers.
 - Preliminary recommendations and memoranda in which opinions are expressed or policies formulated or recommended.
 - Documents made confidential by state or federal law.
E.g., Attorney/Client privileged materials and student records. KRS 61.878.
- Agency generally has 3 days to respond, but can extend time frame if it provides an explanation of delay to the requester. KRS 61.872.
- Denial of inspection can be appealed to the Attorney General. KRS 61.880.





REMEMBER THIS?





Eastern Kentucky University

Legal Issues for Boards:
New Board Member Training Part 2

Dana Fohl, General Counsel

Two General Points to Remember

- Revenues and Expenses
 - Risk is poised around the areas with the largest numbers
- Internal Resources
 - Direct correlation between underinvestment and legal risk

Fiduciary Duties of Board Members

- Duty of Care
 - Act in the best interests of the institution; be knowledgeable of the institution’s purpose, operations, and environment
- Duty of Loyalty
 - Place the interests of the institution above self or another person or organization
- Duty of Obedience
 - Ensure the institution is operating in furtherance of its stated purpose and in compliance with the law

Top Legal Issues



- Title IX
- Student Issues
- Employee Issues
- Premises Liability
- Compliance
- Transparency and Ethics

Title IX

- Know your Title IX Coordinator
- Ensure you receive appropriate briefings
- Know OCR's requirements for investigating and adjudicating Title IX complaints

Student Issues

- Alcohol
- Free Expression
- Accommodations
- Mental Illness/Self-Harm
 - Implications resulting from ADA Amendment Act of 2008

Employee Issues

- FLSA
- Faculty Issues
 - Contracts
 - Intellectual Property
- Terminations

Premises Liability

“The largest number of general liability claims reported to United Educators is for slips and falls. In fact, a recent claims analysis showed that 36 percent of all general liability claims incurred, and 20 percent of all claims dollars paid, resulted from such accidents...the dollar loss from such claims against institutions can reach seven figures.”

Janice Abraham

President, United Educators

The Chronicle of Higher Education, 2010



Compliance

- Best Practices – Centralized Program
- Federal guidelines for Compliance
 - Must already be in existence
 - Must be managed by a specific individual within the organization

Transparency and Ethics

Institutional Conflict of Interest Policy

- Federal funding agency requirements
- Sarbanes-Oxley Act of 2002
- IRS
- Accreditation standards

Transparency and Ethics (continued)

- New, Complex Landscape
 - Entrepreneurial alliances
 - P3s
 - Intellectual property

Source Material

White, Lawrence (2015). Top 10 Campus Legal Issues for Boards. *Association of Governing Boards of Universities and Colleges*. United States: AGB Press.

www.agb.org

Questions?
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