

Kentucky Open Records Act: Analysis of Kentucky
Department of Fish and Wildlife Resources
Commissions v. Kentucky Open Government
Coalition, Inc., 2023-SC-0524 (Ky. Apr. 23, 2026)

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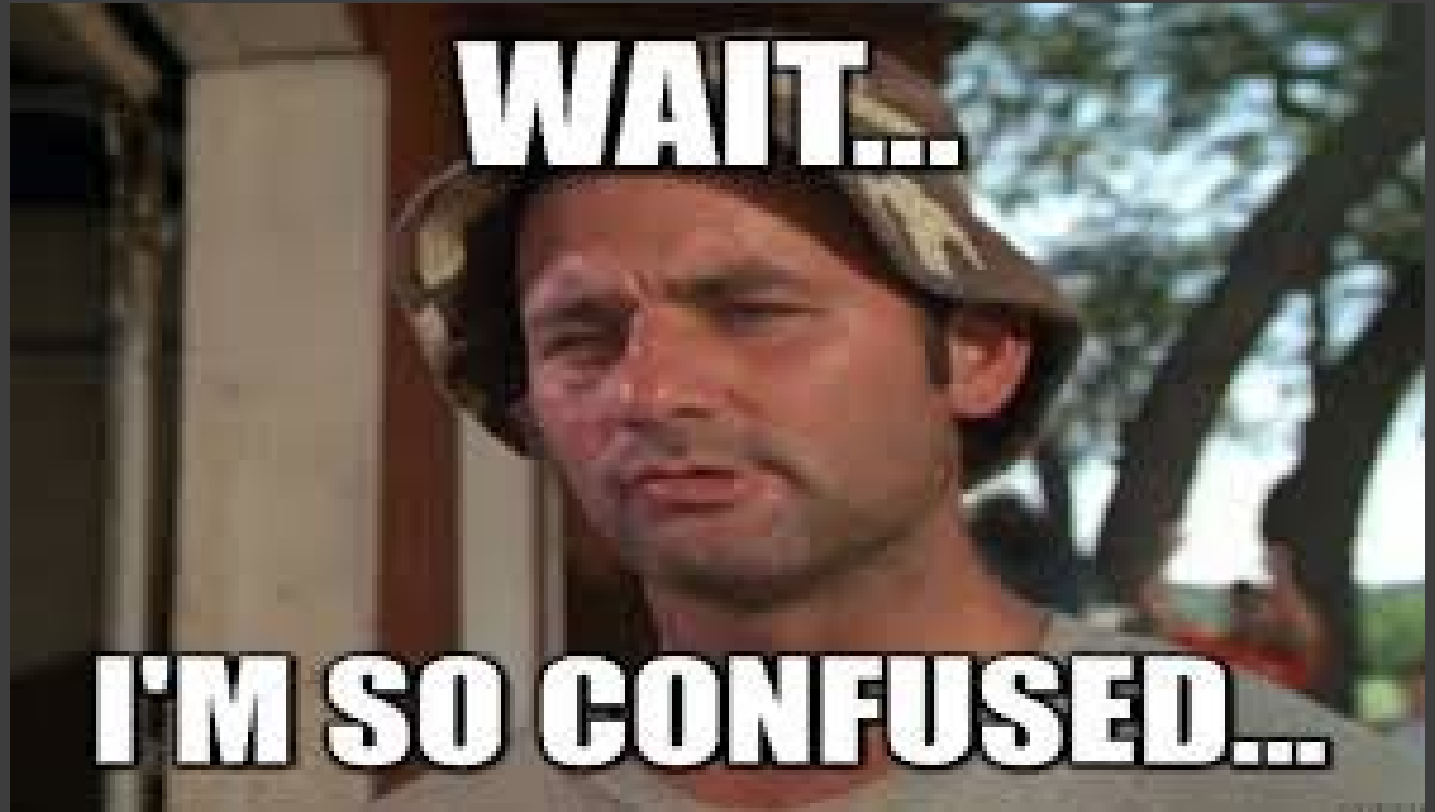


THE SEE SAW

- KYOAG finds that records contained on private cell phones and computers are not subject to production under the act regardless of whether the records pertain to public business. 15-ORD-226
- KYOAG finds that where a city council member used a private email account to shield communications from the public and is intentionally conducting public business, those records are public records under the ORA. 19-ORD-011
- KYOAG finds that for elected officials who have both a public and private device, a person seeking access to text records on a private device must produce prima facie evidence to show a reasonable belief that public business was conducted on a private device. 21-ORD-145
- KYOAG finds that appointed board members who are not provided with a public device, do not have to produce records created on or maintained on private devices regardless of the nature of the records. 21-ORD-127

SAY WHAT?

- Exactly!
- Kentucky Courts and the KYOAG are tasked with applying the Kentucky Open Records Act to public records and devices not contemplated by the original Act.



THE PLAYERS

KOGC



KDFWR



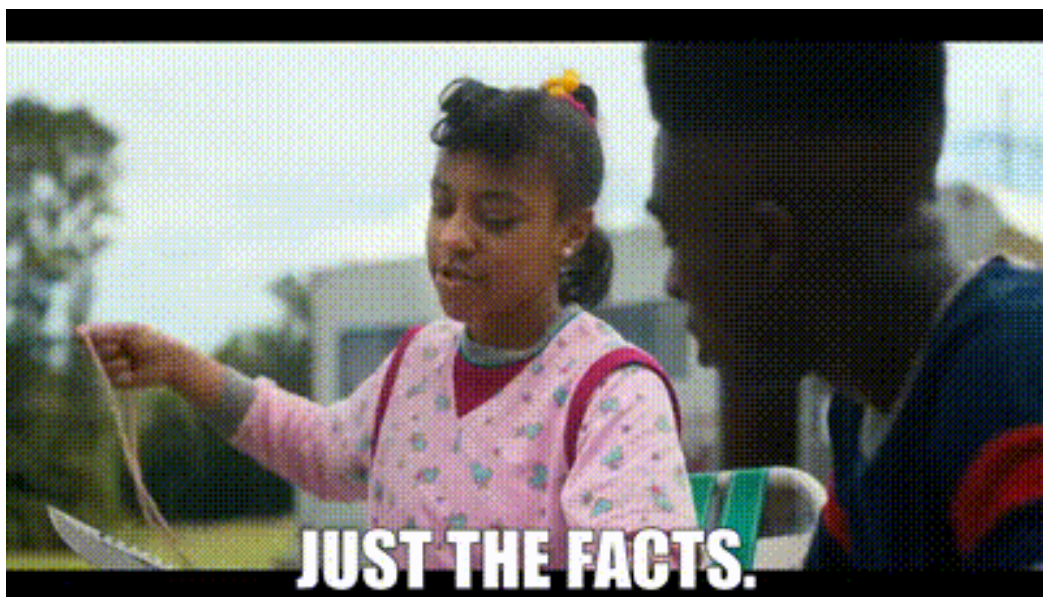
KDFWR
Commission
Members

KDFWR
Commissioner

Kentucky State
Representatives



FACTS



- In August 2021, KOGC submits an open records request to KDFWR asking for “emails and text messages” from June 2020 to date of request by and between KDFWR Commissioner Rich Storm, various members of the Commission, and Representative Ed Massey and Representative Matthew Koch.
- Request specifies that it is not limited to “communications that took place on government-owned email accounts and cell phones....”
- KDFWR responded producing copious documents in two separate batches.
- KOGC sends a letter asking KDFWR to verify that the search for records includes emails sent or received exclusively on private devices/addresses.

FACTS (CON'T)

-
- KDFWR issued final release of documents but relying on a previous AG opinion to deny responsibility to produce records on any Commission member's personal device.
 - KDFWR referenced the definition of public records including only those records owned by a covered agency.
 - KDFWR also stated that Commission members were provided with a copy of the request but did not provide any responsive records for production by the department.
 - KDFWR asserted that **Commission members cannot conduct public business unless properly convened in a quorum for a public meeting**, therefore personal emails and texts cannot be considered public records.

LOWER COURTS

Franklin Circuit Court

- KOGC alleged willful violation for failure to produce communications on Commission member's private phones and email accounts.
- Court held that the duty to produce public records is not contingent upon a "possession only" approach but if the records are used or prepared by an agency they are subject to production.
- Court ordered KDFWR to produce records maintained on Commission member's email accounts but not text messages.
- Found no willful violation by KDFWR.

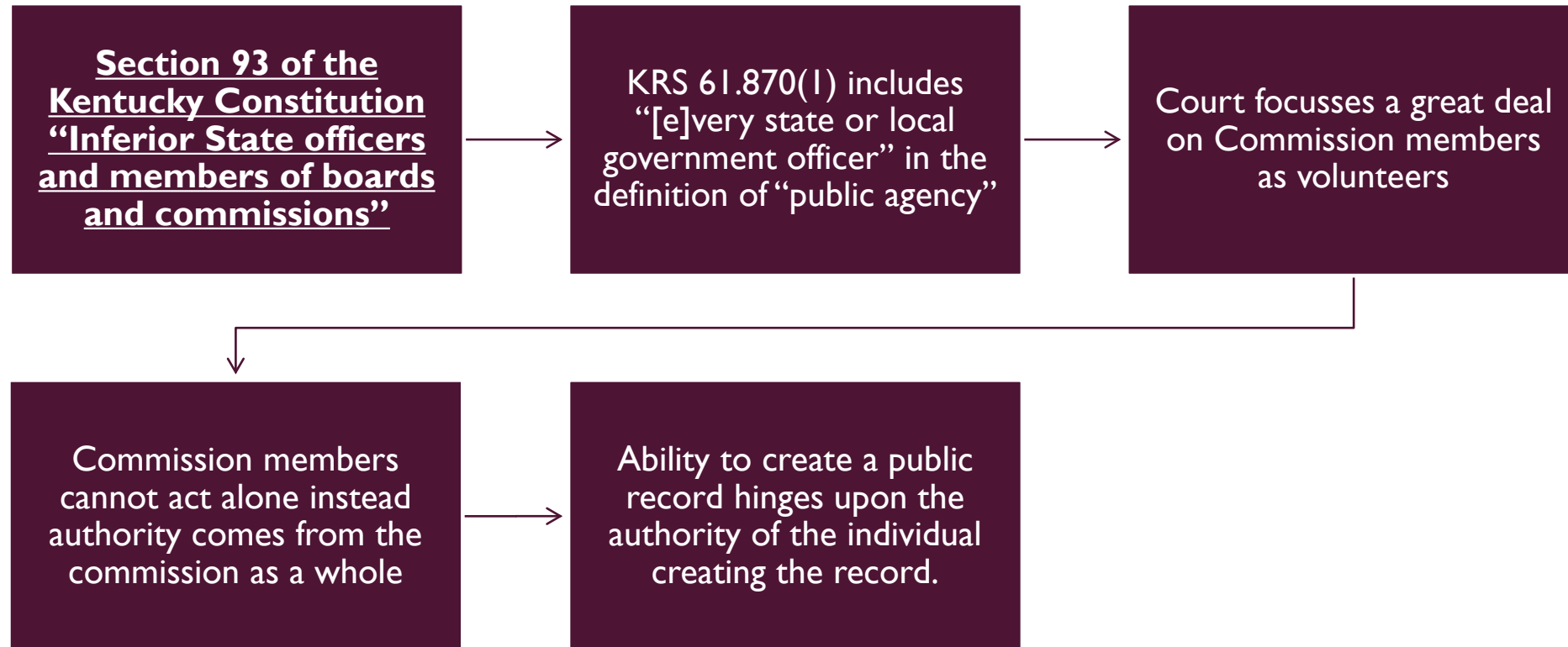
Court of Appeals

- Agreed with Franklin Circuit that because the ORA favors disclosure, all records prepared and used by a public agency are subject to production.
- Found that the Court erred in holding that the requirement to produce text messages would constitute an unreasonable burden on KDFWR.
- Held that the court erred in relying upon general privacy interests and "clearly unwarranted invasion of privacy" to determine texts were outside of ORA.
- Agreed that KDFWR did not commit a willful violation.

SUPREME COURT OF KENTUCKY

- “[D]ocuments of a personal nature or held in the custody of private individuals need not be disclosed”. pp. 8
- The Court first determined that the individual Commission members do not fall under the definition of “public agency” pursuant to KRS 61.870.
- In that analysis, the court determined that public records can only be created by a public agency and for Commission members, they can only create public records while seated as a body of the whole.
- Finally, the Court recognized that use of private devices and emails can allow persons to subvert the purpose of the Act but the General Assembly must address that issue through amendment to the law.

COMMISSIONERS: PRIVATE CITIZEN VS. “PUBLIC AGENCY”



BUT THIS DOESN'T CHANGE ANYTHING FOR LOCALS

State Government

- Court went to great lengths referencing the constitutional provision to explain how the Commission is not an “officer” under the Act.
- Individual “inferior officers” under Section 93 will still be required to produce public records on private devices.

Local Government

- KRS 61.870 (1)(a-c) includes local government officers in the definition of public agency.
- City: KRS 83a.010 (10) defines officer as “any person elected to a position by the voters...”
- County: Fiscal Court and County Judge Executive are constitutional officers.
- 24-ORD-246 “[t]he definition of ‘public agency’ under the Act includes ‘[e]very state or local government officer.’ KRS 61.870(1)(a). Thus the Councilwoman is a “public agency by virtue of her office.”

TAKE AWAYS

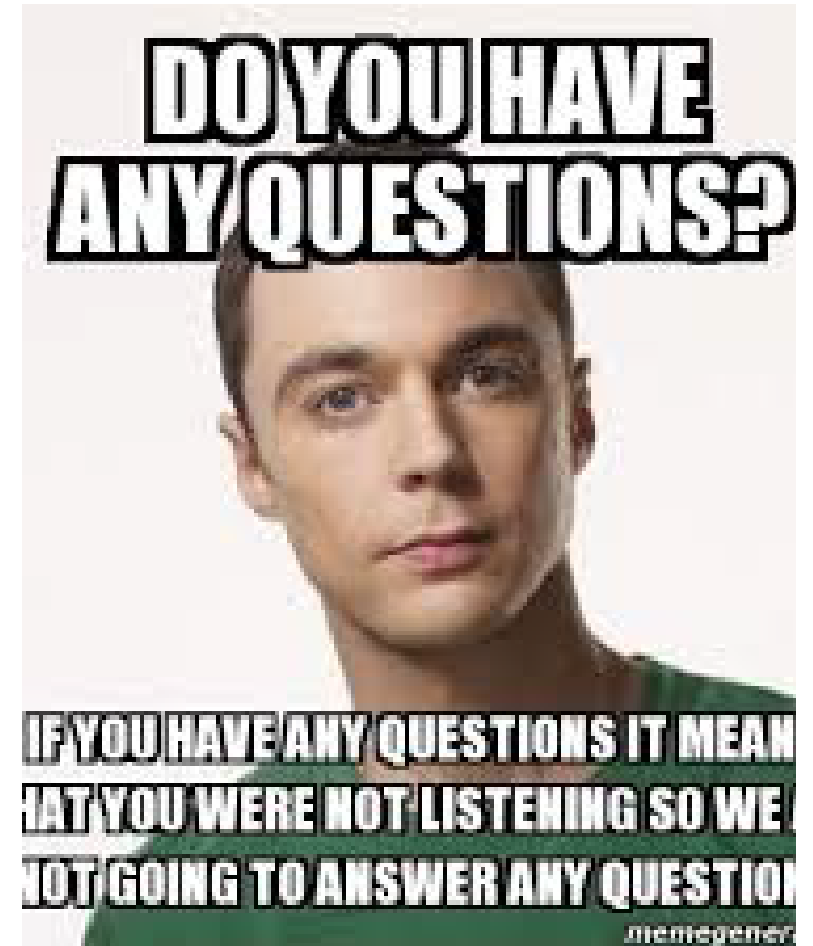


"What did you take away from the meeting?"

- No distinction between emails and texts on private devices for volunteers of state boards and commissions.
- Analyzing whether records on a private device should be produced is a two-step process:
 - (1) is the person in possession of the records someone who meets the definition of a “public agency” and if so,
 - (2) is the record a public record not subject to exclusion?
- The dissent argues that the majority adopts a possession-only approach so unless public records are on a public device they aren’t covered by the ORA and proposes an alternative to analyze whether the records implicate public business.

QUESTIONS GOING FORWARD

- The Court analyzes the Commission members' ability to create public records according to whether they are properly convened in a body of the whole to conduct business. Will the Court apply this analysis to other boards and commissions regardless of whether they meet the “public agency” definition under the ORA?
- The Court emphasizes that the Commission members are volunteers for the commission. Will the court later make a distinction between volunteer vs. paid boards in analyzing whether records created and maintained on private devices must be produced.
- Are we back to excluding production of text messages produced on private devices by officers unless a person provides prima facie evidence that public business is being conducted?



I LOVED YOUR PRESENTATION



**ESPECIALLY
THE PART YOU
ENDED IT.**

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LAW

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