

ORDINANCE NO. 15:2021

An Ordinance Amending Chapter 31B, Public Records to comply with the Revisions to Kentucky Revised Statutes Provisions on Open Records by including the Definition Resident of the Commonwealth, Amending the Procedure to Make a Request and the Time Limit to Respond

WHEREAS, the General Assembly amended the Open Records provisions contained in 61.870-61.884;

WHEREAS, the city is required to manage and maintain its records according to the requirements of said statutes;

NOW, THEREFORE, BE IT ORDAINED by the Board of City Council of the City of Morehead, Kentucky that Chapter 31B, Public Records of the City of Morehead Code of Ordinances be amended as follows:

CHAPTER 31B: PUBLIC RECORDS

General

31B.01 Definitions

Procedures for Requesting Public Records

31B.05 Initial request [~~with immediate inspection~~]

31B.06 Referral to proper custodian

31B.07 Public records [~~not immediately available~~] in active use, storage or not otherwise available

31B.08 Refusal of unreasonable requests

31B.09 Time limitation; denial of inspection

31B.10 Concealing or destroying records prohibited

31B.11 Access to records relating to particular individual

31B.12 Public records protected from disclosure

GENERAL

§ 31B.01 DEFINITIONS.

For purposes of this chapter the following words and phrases shall have the following meanings ascribed to them respectively.

"CITY." The city government of this city.

"COMMERCIAL PURPOSE." The direct or indirect use of any public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee.

"COMMERCIAL PURPOSE" shall not include publication or related use of a public record by a newspaper or periodical; use of a public record by a radio or television station in its news or other informational programs; or use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties.

"CUSTODIAN." The official custodian or any authorized person having personal custody and control of public records. The "CUSTODIAN" having personal custody of most of the public records of this city is the City Clerk.

"OFFICIAL CUSTODIAN." The chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care, and keeping of public records, regardless of whether the records are in his actual personal custody and control. The "OFFICIAL CUSTODIAN" of this city shall be the Mayor.

"MECHANICAL PROCESSING." Any operation or other procedure which is transacted on a machine, and which may include, but is not limited to a copier, computer, recorder or tape processor, or other automated device.

"MEDIA." The physical material in or on which records may be stored or represented, and which may include, but is not limited to paper, microform, disks, diskettes, optical disks, magnetic tapes, and cards.

"PERSON." A human being who makes a request for inspection of public records.

"PUBLIC AGENCY."

- (1) Every state or local government officer;
- (2) Every state or local government department, division, bureau, board, commission and authority;
- (3) Every state or local legislative board, commission, committee and officer;
- (4) Every county and city governing body, council, school district board, special district board and municipal corporation;
- (5) Every state or local court or judicial agency;
- (6) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution or other legislative act;
- (7) Any body created by state or local authority in any branch of government;
- (8) Any body which, within any fiscal year, derives at least 25% of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, any funds derived from a state or local authority in compensation for goods or

services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a "PUBLIC AGENCY" under this section;

(9) Any entity where the majority of its governing body is appointed by a "PUBLIC AGENCY" as defined in this section; by a member or employee of the public agency; or by any combination thereof;

(10) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council or agency, except for a committee of a hospital medical staff, established, created and controlled by a "PUBLIC AGENCY" as defined in this section; and

(11) Any interagency body of 2 or more public agencies where each "PUBLIC AGENCY" is defined in this section.

"PUBLIC RECORDS." All books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of, or retained by a public agency. "PUBLIC RECORDS" shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of KRS 61.870 that are not related to functions, activities, programs, or operations funded by state or local authority nor any records that may be excluded by § 31B.12

"REASONABLE FEE" or "FEE." The fair payment required by a public agency for making copies of non-exempt public records requested for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff. If ~~[a public agency]~~ the City is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.

"REQUEST." ~~[An oral or]~~ A written application by any person to inspect public records of the city.

"RESIDENT OF THE COMMONWEALTH."

- (1) An individual residing in the Commonwealth;
- (2) A domestic business entity with a location in the Commonwealth;
- (3) A foreign business entity with a location in the Commonwealth;
- (4) An individual that is employed and works at a location or locations within the Commonwealth;
- (5) An individual or business entity that owns real property within the Commonwealth;
- (6) Any individual or business entity that has been authorized to act on behalf of an individual or business entity defined in paragraphs (1) to (5) of this subsection; or
- (7) A news-gathering organization as defined in KRS 189.635(8)(b)(1).a. to e..

"SOFTWARE." The program code which makes a computer system function, but does not include that portion of the program code which contains public records exempted from inspection as provided by KRS 61.878 or specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system. "SOFTWARE" consists of the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs; but does not include that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency.

PROCEDURES FOR REQUESTING PUBLIC RECORDS

§ 31B.05 INITIAL REQUEST [~~WITH IMMEDIATE INSPECTION.~~]

(A) As defined in § 31B.01, and subject to the limitations set forth in § 31B.12, any person desiring to inspect or copy the public records of the city shall make a ~~[request or complete a]~~ written application, signed by the applicant with his or her name and contact information printed legibly on the application/request, describing the records to be inspected, [for such records] at the office of the City Clerk during regular office hours, except during legal holidays or to be copied. Additionally, the applicant shall provide a statement, in the written application, of the manner which the applicant is a resident of the Commonwealth under KRS 61.870(10)(a) to (f) and Section 31B.01 herein. The application shall be hand delivered, mailed, [or] sent via facsimile, or sent via e-mail to:

(1) If via mail or hand delivery: City Clerk, City of Morehead, 314 Bridge Street, Morehead, KY 40351;

(2) If via facsimile: City Clerk, 606-784-2216; or

(3) If via email: City Clerk or City Attorney

(B) If the custodian determines that a person's request is in compliance with the open records law and the requested records are ~~[immediately]~~ available, the custodian shall ~~deliver~~ make the records available for inspection within five (5) days (excepting, Saturdays, Sundays and legal holidays) of receipt of the request. Suitable facilities shall be made available in the office of the City Clerk during regular business hours of the City for the inspection. No person shall remove original copies of public records from the offices of ~~[any public agency]~~the City without the written permission of the official custodian of the record. The applicant shall have the right to make abstracts of the public records and to obtain copies of public records not exempted from this ordinance, KRS, or federal law. Payment of the prescribed fee in Section 31B.01 shall be required for all copies.

(C) An applicant may request copies of said public records in lieu of inspection [inspect public records during the regular business hours of the city, or by receiving copies of the public records from the city through the mail if the applicant's residence or principal place

~~of business is outside of the county in which the city is located and he has precisely described public records which are available within the city]. If requested, [the person requesting the public records requests that the records be mailed,] the [official] custodian shall mail the copies upon receipt of all fees and the cost of mailing.~~

[~~(D) The applicant shall have the right to make abstracts of the public records and to obtain copies of all public records not exempted by this chapter. When copies are requested, [the custodian may require a written request and] advance payment of the prescribed fee as defined in § 31B.04.]~~

~~[(E)] (D)~~ Nonexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the [agency] city currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. ~~[Agencies are]~~ The City is not required to convert hard copy format records to electronic formats.

~~[(F)] (E)~~ The minimum standard format in paper form shall be defined as not less than 8½ inches x 11 inches in at least one (1) color on white paper, or for electronic format, in a flat file electronic American Standard Code for Information Interchange (ASCII) format. If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public records may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request.

~~[(G)] (F)~~ Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee. The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee. The fee may be based on the cost to the public agency of media, mechanical processing and staff required to produce a copy of the public record or records or the cost to the public agency of the creation purchase, or the acquisition of the public records.

~~[(H)] (G)~~ It shall be unlawful for a person to obtain a copy of any part of a public record for a:

(1) Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to subsection (G) of this section: or

(2) Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or

(3) Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television station shall not be held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast, unless it has also given its express permission for that commercial use.

(l) Online access to public records in electronic form, as provided under this section, may be provided and made available at the discretion of the ~~[public agency]~~ City. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, ~~[a public agency]~~ the City may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements. Fees shall not exceed:

(1) The cost of physical connection to the system and reasonable cost of computer time access charges;

(2) If the records are requested for a commercial purpose, a reasonable fee based on the factors set forth in subsection (G).

§ 31B.06 REFERRAL TO PROPER CUSTODIAN.

If the City Clerk does not have custody or control of the public record or records requested, the City Clerk shall so notify the applicant and shall furnish the name and location of the custodian of the public record, if known to the City Clerk.

§ 31B.07 PUBLIC RECORDS ~~[NOT IMMEDIATELY AVAILABLE]~~ IN ACTIVE USE, STORAGE OR NOT OTHERWISE AVAILABLE.

If the public record is in active use, in storage, or not otherwise available, the official custodian shall immediately so notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed ~~[three]~~ five (5) days (excepting Saturdays, Sundays, and legal holidays) from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection or duplication.

§ 31B.08 REFUSAL OF UNREASONABLE REQUESTS.

If the application places an unreasonable burden in producing public records, or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the ~~[public agency]~~ City, the official custodian may refuse to permit inspection of the public records or mail copies of public records. However, refusal under this section must be sustained by clear and convincing evidence.

§ 31B.09 TIME LIMITATION; DENIAL OF INSPECTION.

(A) The official custodian, upon any request for records made under this chapter, shall determine within [~~three (3)~~] five (5) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any request whether to comply with the request and shall notify in writing the person making the request within the [~~three-day~~] five (5) day period of its decision. Any agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under the official custodian's authority and shall constitute final agency action.

(B) If the requesting party wants the Attorney General to review the denial of a request for inspection of a public record, he shall proceed under the provisions of KRS 61.880 and 61.882. Upon the Attorney General's request, the agency will provide additional documentation.

(C) If upon request by the person seeking inspection, the Attorney General reviews the denial and issues a written opinion upholding, in whole or in part, the request for inspection, the requesting party may institute appeal proceedings within thirty (30) days for injunctive or declaratory relief in the circuit court. In addition, if the Attorney General disallows the request, or if the city continues to withhold the record notwithstanding the Attorney General's opinion, and the person seeking disclosure institutes proceedings in circuit court, the city shall notify the Attorney General of such action. (KRS 61.880, 61.882)

§ 31B.10 CONCEALING OR DESTROYING RECORDS PROHIBITED.

No official or employee of the city shall willfully conceal or destroy any record with the intent to violate the provisions of this chapter or these rules and regulations.

§ 31B.11 ACCESS TO RECORDS RELATING TO PARTICULAR INDIVIDUAL.

Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of this chapter. (KRS 61.884)

§ 31B.12 PUBLIC RECORDS PROTECTED FROM DISCLOSURE.

(A) The following public records are excluded from the application of this chapter and these rules and regulations, and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

(1) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

(2) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by other statute.

(3) (a) [~~Upon and after July 15, 1992,~~] records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if [~~opened~~] openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.

(b) [~~Upon and after July 15, 1992,~~] records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained (i) in conjunction with an application or the administration of a loan or grant; (ii) in conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154; (iii) in conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or (iv) for the grant or review of a license to do business. These exemptions shall not, however, apply to records the disclosure or publication of which is directed by other statutes.

(4) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within, or expanding within the Commonwealth. This exemption shall not include those records pertaining to applications to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in division (A) (3) above.

(5) Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods.

(6) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made by or for a public agency relative to the acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision.

(7) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again.

(8) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations, if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of this chapter, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action. The exemptions provided by this subdivision shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this chapter.

(9) Preliminary drafts, notes, or correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.

(10) Preliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended.

(11) All public records or information the disclosure of which is prohibited by federal law or regulation.

(12) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly, including any information acquired by the Department of Revenue in tax administration that is prohibited from divulgence or disclosure under KRS 131.190.

(13) (a) Public records the disclosure of which would have a reasonable likelihood of threatening the public safety by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act and limited to:

(1) Criticality lists resulting from consequence assessments;

(2) Vulnerability assessments;

(3) Antiterrorism measures and plans;

(4) Counterterrorism measures and plans;

(5) Security and response needs assessments;

(6) Infrastructure records that expose a vulnerability referred to in this subparagraph through the disclosure of the location, configuration, or security of critical systems, including public utility critical systems. These critical systems shall include but not be limited to information technology, communication, electrical fire suppression, ventilation, water, wastewater, sewage, and gas systems.

(7) The following records when their disclosure will expose a vulnerability referred to in this subparagraph: detailed drawing, schematics, maps or specifications of structural elements, floor plans, and operating, utility or security systems of any building or facility owned, occupied, leased or maintained by the City.

(8) Records when their disclosure will expose a vulnerability referred to in this subparagraph and that describe the exact physical location of hazardous chemical, radiological or biological materials.

(b) As used in this paragraph, "terrorist act" means a criminal act intended to:

(1) Intimidate or coerce the city or a public agency or all or part of the civilian population;

(2) Disrupt a system identified in subparagraph 13(6) of this paragraph; or

(3) Cause massive destruction to a building or facility owned, occupied, leased or maintained by the City.

(c) On the same day the City denies a request to inspect or copies of a public record for a reason identified in this paragraph, the City shall forward a copy of the written denial of the request referred in KRS 61.880(1), to the executive director of the Kentucky Homeland Security and the Attorney General.

(d) Nothing in this paragraph shall affect the City with respect to disclosure and availability of public records under state environment, health and safety programs.

(e) The exemption established in this paragraph shall not apply when a member of the General Assembly seeks to inspect a public record identified in this paragraph under the Open Records Law.

(14) Public or private records, including books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, having historic, literary, artistic, or commemorative value accepted by the archivist of a public university, museum, or government depository from a donor or depositor other than a public agency. This exemption shall apply to the extent that nondisclosure is requested in writing by the donor or depositor of such records but shall not apply to records the disclosure or publication of which is mandated by another statute or by federal law.

(15) Records of a procurement process under KRS Chapter 45 or 56. This exemption shall not apply after:

(a) A contract is awarded; or

(b) The procurement process is canceled without award of a contract and there is determination that the contract will not be resolicited.

(16) Client and case files maintained by the Department of Public Advocacy or any person or entity contracting with the Department of Public Advocacy for the provision of legal representation under KRS Chapter 31.

(17) Except as provided in KRS 61.168, photographs or videos that depict the death, killing, rape, or sexual assault of a person. However, such photographs or videos shall be made available by the City to the requesting party for viewing on the premises of the City, or a mutually agreed upon location, at the request of:

(a) (1) Any victim depicted in the photographs or videos, his or her immediate family or legal representative;

(2) Any involved insurance company or its representative; or

(3) The legal representative of any involved party.

(b) Any state agency or political subdivision investigating official misconduct; or

(c) A legal representative for a person under investigation for, charged with, pled guilty to, or found guilty of a crime related to the underlying incident. The person under investigation for, charged with, pled guilty to, or found guilty of a crime related to the underlying incident or their immediate family shall not be permitted to have access to the photographs or videos.

(16) Communications of a purely personal nature unrelated to any governmental function.

(B) No exemption under this section shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person. In addition, if any public record contains material which is not excepted under this section, the city shall separate the excepted and make the nonexcepted material available for examination, subject to the possible applicability of § 31B.08.

(C) The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function.

(D) No exemption under this section shall be construed to deny, abridge, or impede the right of a municipal employee, an applicant for employment, or an eligible person on an employment register to inspect and copy any record, including preliminary and other supporting documentation, that relates to that person. Such records shall include, but not be limited to work plans, job performance, demotions, evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores, and preliminary and other supporting documentation. A municipal employee, applicant, or eligible person on an employment register shall not have the right to inspect or copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency.


INTRODUCED, SECONDED, AND GIVEN FIRST READING at a duly convened meeting of the Board of City Council of the City of Morehead, Kentucky held on this 12th day of July 2021.

INTRODUCED, SECONDED AND GIVEN SECOND READING at a duly convened meeting of the Board of City Council of the City of Morehead, Kentucky held on this 9th day of August 2021.

APPROVED:


Laura White-Brown, Mayor

ATTESTED:


Crissy Cunningham, City Clerk