

Emerging Trends in County Defense Litigation

This session will explore a few of the latest developments in county defense litigation, highlighting current trends and some key legal challenges counties face. Attendees will gain insight into how these evolving challenges impact insurance coverage, costs and claims, and learn strategies to better manage risks and protect county resources. Approved for CLE credit.



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**Jason E. Williams, Attorney,
Williams & Towe Law Group, PLLC**

**Jonathan C. Shaw, Attorney, Porter,
Banks, Baldwin & Shaw, PLLC**



United States v. Lee, 106 U.S. 196, 206 (1882)

[T]he doctrine is derived from the laws and practices of our English ancestors; and . . . is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country. . . . And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.

SOVEREIGN IMMUNITY IS ALIVE AND WELL

- **Morales v. City of Georgetown** No. 2023-SC-0248-DG, 2024 WL 4576332 (Ky. Oct. 24, 2024).
 - **Adkins v. Fields**, No. 7:22-CV-00007-REW-EBA, 2024 WL 4003332 (E.D. Ky. Aug. 28, 2024)
 - **New Alb. Main St. Props. V Watco Cos, LLC**, 75 F.4th 615 (6th Cir. 2023)
 - **Browder v Hopkins Cnty.**, 2024 U.S. App. LEXIS 23584 (6th Cir. 2024)
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Recent opinions addressing qualified immunity

- *General Standard - Yanero v. Davis, 65 S.W.3d 510 (Ky 2001)*

“When an officer or employee of a governmental agency is sued in his/her **representative** capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled But when sued in their **individual** capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment.” 65 S.W.3d at 521–22.

Morales v. City of Georgetown, No. 2023-SC-0248-DG, 2024 WL 4576332 (Ky. Oct. 24, 2024)

Paul v. Whitley Cnty., KY, Det. Ctr., No. 24-5142, 2024 WL 4362260 (6th Cir. Sept. 30, 2024)

Batton v Sandusky Cnty., 2024 U.S. App. LEXIS 8330 (6th Cir. 2024)

The district court properly denied **qualified immunity** to the officer at the pleading stage on the **deliberate indifference** claim because the administrator plausibly alleged that the inmate's behavior and medications were sufficient to make a strong likelihood of suicide obvious to the officer; The court found that the officer's failure to convey information about the inmate's mental state and medications to jail officials plausibly constituted deliberate indifference.

OPEN RECORDS ISSUES AND SOLUTIONS



**OPEN
RECORDS**

Kentucky's Open Records Law

Open Records

In 1976, the General Assembly enacted the Open Records Act, KRS 61.870 to KRS 61.884, which establishes a right of access to public records. The General Assembly recognized that free and open examination of public records is in the public interest. All public records, whether they are stored in a computer or on paper, must be open for inspection unless the records are exempted by one or more of the fourteen exemptions found in the Act. You may inspect any nonexempt public record regardless of your identity, and you may seek enforcement of the Act if you are denied this right.

What are public records?

The Open Records Act applies to public records maintained by state and local government agencies. The agencies covered by the Act include:

- State and local government officers, departments, and legislative bodies;
 - County and city governing bodies, school district boards, special district boards, and municipal corporations;
 - State or local government agencies created by statute or other legislative acts;
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Cont.

Bodies that receive at least 25% of their funds from state or local authority;

- An entity where the majority of its governing body is appointed by a public agency;
 - Boards, commissions, committees, etc., that are established, created, and controlled by public agencies; and
 - Interagency bodies of two or more public agencies.
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Cont.

Subject to fourteen exceptions, records that are prepared, owned, used, possessed, or retained by a public agency are public records, and must be made available upon request.

- The term "public records" includes all such records even if they are not subject to inspection under an exemption and therefore not "open records."
 - The term "public record" includes emails, databases, and other records electronically generated and/or stored.
 - The term "public record" may include public agency records that are not maintained on the agency's premises.
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Brief overview of recent open records act guidance.

KY Open Gov't Coalition, Inc. v. Dept. of Fish and Wildlife, --- S.W.3d ---, (Ky. App, 2023)

1. Court of Appeals found that text messages relating to or concerning Commission business and that were stored on personal cell phones were public records generally subject to disclosure under Open Records Act. E-mails concerning Commission business that were stored on members' private e-mail accounts were public records subject to disclosure under the Act. The appellate Court overturned the AG opinion. Discretionary Review Granted by Supreme Court August 14, 2024.
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Cont.

24-OMD-007

1. The Board violated the Open Meetings Act (“the Act”) when it entered closed session without a motion and vote and without notifying the public of the exemption on which it relied to enter closed session.
 2. If a public agency intends to rely on one of the exceptions to discuss public business in closed session, it must comply with KRS 61.815(1).1 As such, it must give notice “in regular open meeting of the general nature of the business to be discussed in closed session, the reason for the closed session, and the specific provision of KRS 61.810 authorizing the closed session.” KRS 61.815(1)(a). It must also approve a motion by majority vote to enter closed session. KRS 61.815(1)(b).
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Cont.

24-ORD-038

1. KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from inspection public records protected by the attorney-client privilege. *Hahn v. Univ. of Louisville*, 80 S.W.3d 771 (Ky. App. 2001). However, when a party invokes the attorney-client privilege to shield documents in litigation, that party carries the burden of proof. That is because “broad claims of ‘privilege’ are disfavored when balanced against the need for litigants to have access to relevant or material evidence.” *Haney v. Yates*, 40 S.W.3d 352, 355 (Ky. 2000) (quoting *Meenach v. Gen. Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995)). So long as the public agency provides a sufficient description of the records it has withheld under the privilege in a manner that allows the requester to assess the propriety of the agency’s claims, then the public agency will have discharged its duty. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848–49 (Ky. 2013).
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Cont.

24-ORD-058

1. The Oldham County Board of Education (the “Board”) did not violate the Open Records Act (“the Act”) when it issued a response within five days, excluding Saturdays, Sundays, and legal holidays, of receiving a request to inspect records.
 2. Relevant here, President Abraham Lincoln’s Birthday is officially a “legal holiday” in the Commonwealth, celebrated on February 12 each year, and is a day “on which all the public offices of this Commonwealth may be closed,” KRS 2.110(1), even if many state agencies remain open for business on that day. Thus, regardless of whether the Board was in fact closed in recognition of President Lincoln’s Birthday, KRS 61.880(1)(a) excludes from the computation of time all “legal holidays,” which includes all the holidays established by KRS 2.110. *See Watkins v. Ky. Ret. Sys. Bd. of Trs.* 276 S.W.3d 812, 813 (Ky. 2009).
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Cont.

24-ORD-122

1. Appellant submitted requests to the District for various records related to two school employees. At issue in this appeal are the Appellant's requests for all "employment records" of the two employees, including "investigative file[s]" and "statements" related to any investigations. District provided 196 pages of records, but Appellant claims he was denied access to "investigative information". **Held:** The Oldham County School District ("the District") did not violate the Open Records Act ("the Act") when it could not provide records that do not exist.
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Cont.

24-ORD-141

1. Jerry Grooms (“Appellant”) submitted a request to Fayette Co Pub Schools which asked, “How many FCPS personnel were hired from the 8-person PR recruitment trip in April 2024?” In response, FCPS stated that it was “not in possession or aware of any record with the requested information.”
 2. FCPS states it does not possess a record responsive to the Appellant’s request because he did not request a record. Rather, the Appellant submitted a “request for information.”
 3. “The [Act] does not dictate that public agencies must gather and supply information not regularly kept as part of its records.”
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24-ORD-190

Summary: The Jail did not violate the Act when it denied a request for records posing a security threat under KRS 197.025(1).

“The Jail cites KRS 197.025(1) and KRS 61.878(1)(l), by which the former is incorporated into the Act. Under KRS 197.025(1), “no person shall have access to any records if the disclosure is deemed by the commissioner of the department or his designee to constitute a threat to the security of the inmate, any other inmate, correctional staff, the institution, or any other person.” The Office has historically deferred to the judgment of correctional facilities in determining whether the release of certain records would constitute a security threat under KRS 197.025(1). In particular, the Office has consistently upheld the denial of security camera footage inside a detention center. *See, e.g.*, 24-ORD-154; 21-ORD-197; 18-ORD-074; 13-ORD-022; 10-ORD-055. The security risk in connection with surveillance footage is that the footage would reveal “methods or practices used to obtain the video, the areas of observation and blind spots for the cameras.” *See, e.g.*, 22-ORD-038; 17-ORD-211; 15-ORD-121; 13-ORD-022. Because the Jail offers the same rationale here, the Jail did not violate the Act when it denied access to the security footage”.

Notify County attorney and/or KACo





Commonwealth of Kentucky
Office of the Attorney General

Daniel J. Cameron
Attorney General

Capitol Building, Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601
(502) 696-5300
Fax: (502) 564-2894

OPEN RECORDS POLICY

Effective: September 25, 2023 (last revised April 7, 2022)

Purpose

Public policy requires the "free and open examination of public records." KRS 61.871. Accordingly, the Office of the Attorney General ("Office") must respond effectively and efficiently to records requests in a consistent and coordinated manner. Therefore, this Open Records Policy ("Policy") sets forth the standards for all Office employees when a records request is received and ensures compliance with all applicable open records laws.

Applicability

This Policy supersedes any relevant policy that previously existed. All employees shall read this policy and complete the Policy Acknowledge Form to indicate that they have read, understand, and will comply with this Policy.

Policy

Records Custodian

The Office shall designate an employee as its Records Custodian. The Records Custodian shall review the Kentucky Open Records Act, 200 KAR 1:020, and "Your Duty Under the Law – The Kentucky Open Records Act and Open Meetings Act," published by the Office of the Attorney General. The Records Custodian shall ensure compliance with the Kentucky Open Records Act, 200 KAR 1:020, this Policy, and all relevant requests. The Records Custodian shall not participate in the adjudication of an appeal under the Act.

**Prior presentation of contracts or claims to the
fiscal court for review and approval.**



Contract disputes

Whitley Cnty. Fiscal Ct. v. King-Crete Drilling, Inc., 2024 Ky. App. Unpub. LEXIS 258 (Ky. App. 2024)

Likewise, counties are immune from suits for breach of contract. *George M. Eady Co. v. Jefferson County*, 551 S.W.2d 571, 572 (Ky. 1977). There is no statutory waiver of immunity from suits on contracts for counties as there is for the Commonwealth.² *Id.* A different panel of this Court so held in *Trace Creek Construction, Inc. v. Harlan Cnty. Fiscal Court*, No. 2007-CA-000328-MR, 2008 Ky. App. Unpub. LEXIS 1087, 2008 WL 1991647 (Ky. App. 2008)

Under an unjust enrichment theory, **King-Crete's** claims for extra-contractual relief are similarly barred by sovereign immunity. *Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 28 (Ky. App. 2018).

WHITBLEBLOWER CASES

- KRS 61.101-61.103

(1) "Employee" means a person in the service of the Commonwealth of Kentucky, or any of its political subdivisions, who is under contract of hire, express or implied, oral or written, where the Commonwealth, or any of its political subdivisions, has the power or right to control and direct the material details of work performance; **(2)** "Employer" means the Commonwealth of Kentucky or any of its political subdivisions. Employer also includes any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions, with respect to formulation of policy or the supervision, in a managerial capacity, of subordinate employees; and **(3)** "Official request" means a request from members of the Kentucky General Assembly and its employees; members of the Legislative Research Commission and its committees and employees; the Auditor of Public Accounts and his employees; the Attorney General and his employees; the Governor and employees of the Governor's office; and members of the press.

Kearney v Univ of Ky 638 S.W. 3d 385 (Ky. 2022) -

Under the KWA, any covered disclosure must be shown by a preponderance of the evidence to be a contributing factor in the personnel action. [KRS 61.103\(3\)](#). [KRS 61.103\(1\)\(b\)](#) defines "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision." [KRS 61.103\(1\)\(b\)](#) further provides that "[i]t shall be presumed there existed a 'contributing factor' if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action."

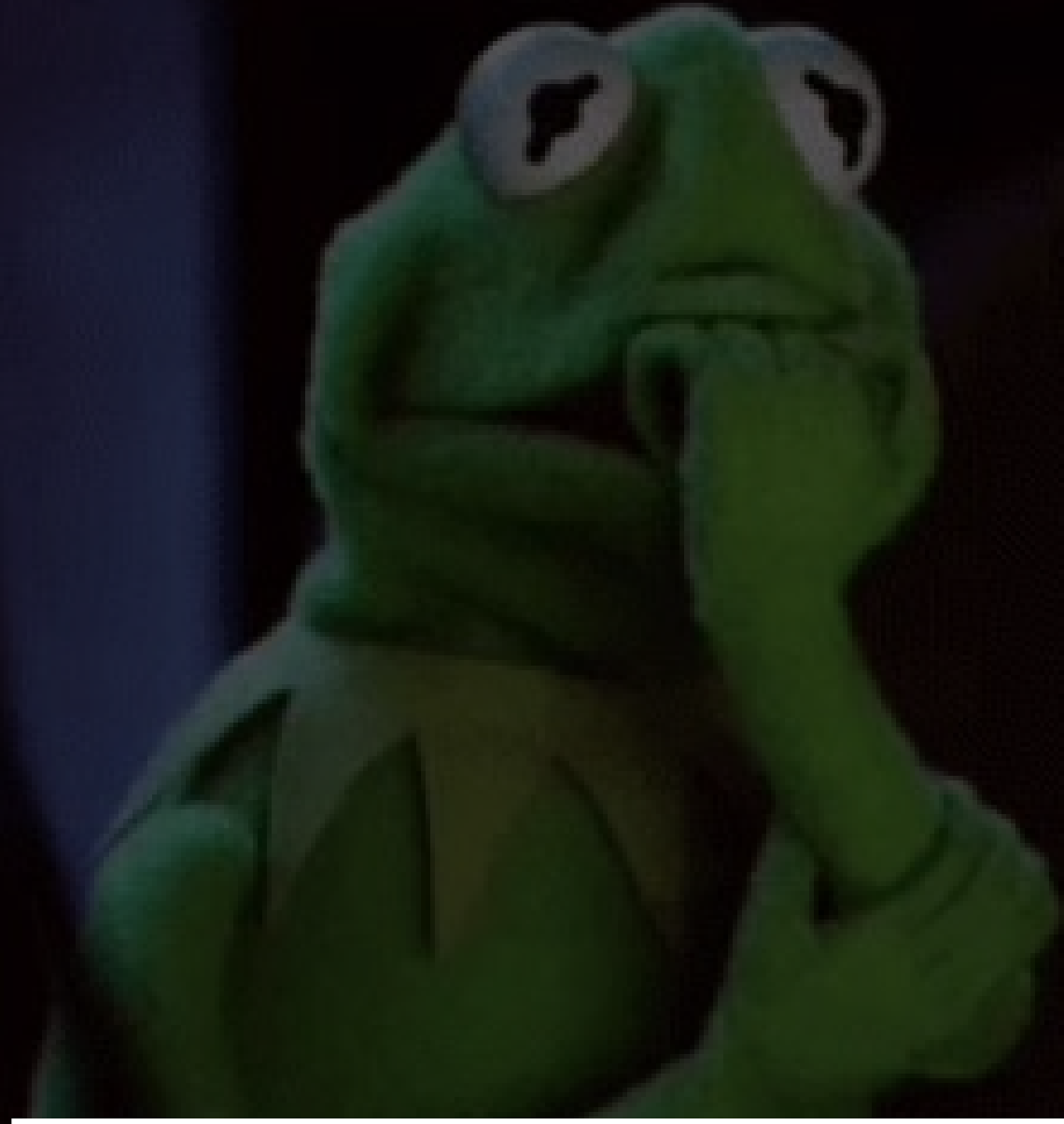
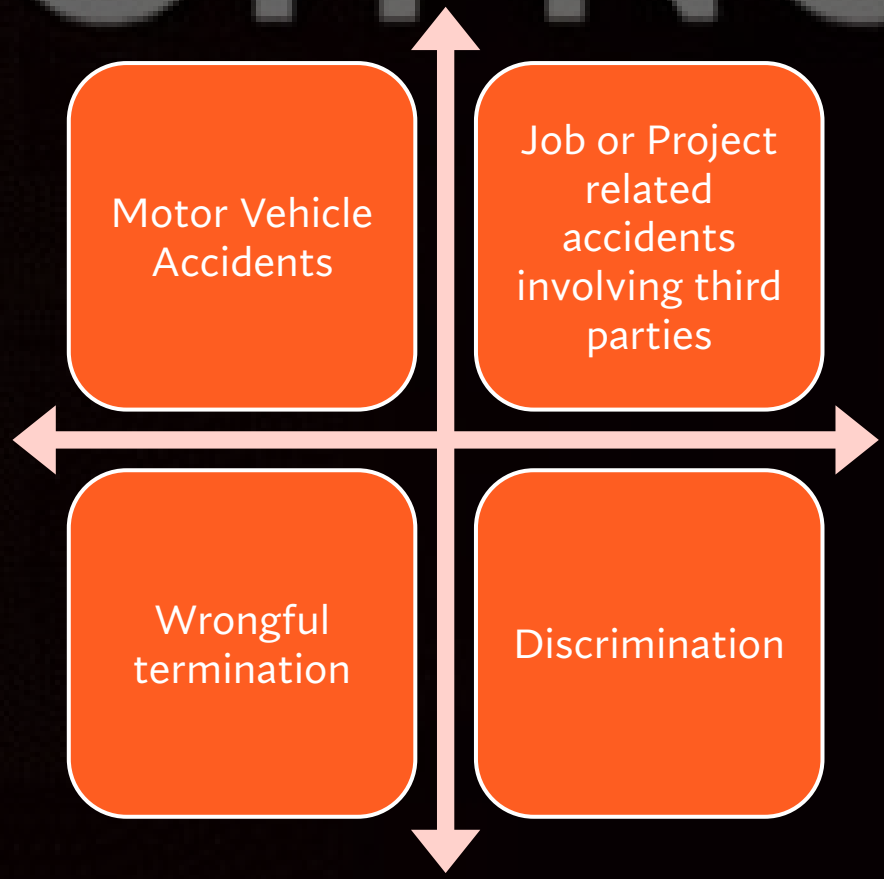
***Eversole v Commonwealth* 2024 Ky. Unpub. LEXIS 489 (Ky App. 2024)**

- “The purpose of the Kentucky Whistleblower Act is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information.” “Here, the material facts as plead in Eversole’s Complaint are that Eversole discovered allegedly concealed, confidential, and not-publicly-known wrongdoing by the Cabinet as it relates to alleged contravention of Father’s constituent rights; violations of local and state rules, laws, and regulations; as well as fraud and abuses of power; all pertaining to the Cabinet’s alleged failure to notify Father of the emergency of temporary proceedings”.
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LAWSUITS: Pathways to Success



OH NO...



Jails

- *Helphenstine v Lewis Cnty.*, 60 F. 4th 305

The grant of summary judgment to several defendants was reversed because one correction officer neither placed a call to a doctor nor asked another defendant to call the doctor, despite knowing that the deceased detainee had vomited twice and was moved from general population to the detox cell; [2]-As to another corrections officer, despite the officer's admission that she would have taken a family member or a loved one in the deceased detainee's condition to the hospital, she took no action to help him beyond faxing the doctor, which she knew would not result in a response for at least several hours; as such, a reasonable jury could find that she acted with deliberate indifference.

Law enforcement claims

Anderson v. Knox Cnty., 2023 U.S. App. LEXIS 17970, 2023 FED App. 0314N (6th Cir.), 2023 WL 4536078

Defendant's claim of malicious prosecution under 42 U.S.C.S 1983 based on allegedly fabricated evidence failed because there would have been probable cause to prosecute defendant absent that evidence based on defendant's possession of the victim's coat and hat, defendant's pocketknife as the potential murder weapon, and another witness' testimony.

Outcome

Judgment affirmed.

If an injury or incident occurs



Preserve evidence

Interview witnesses

Prepare reports

Notify county attorney and/or KACo

Respond to open records requests



If a letter of representation is received take it seriously

- Notify county attorney
and / or KACo



It Summons and Complaint are received

- Notify KACo
- Notify County attorney
- and/or incident Be aware of dates
- Cooperate
- Ask questions
- Attend meetings, depositions, and court as requested



"Hello. My name is Jerome and I will be your summons server this evening."
