# ISSUES CONFRONTING THE 1976 GENERAL ASSEMBLY

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# Open Records

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The democratic system of government is founded on the principle of citizen selection of public officials. For the system to work effectively, citizens need to know what government is doing and how it is being done in order to make intelligent selections. Many people feel this need carries with it an implied right of citizens to have access to public records as tangible evidence of government operations. President James Madison once said, "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps both."

Over the years, citizens have shown little desire to delve into public records. In the 1960's, efforts to get access to records increased as part of a broader movement for openness and accountability in government. The movement was spearheaded by news media and various public interest and student groups. These groups reasoned that because decisions of public officials affect people's lives in very fundamental ways, the officials should be held accountable for their actions.

Efforts to obtain public records generally met resistance from public officials. This seemed to erode citizen confidence in government. A 1973 poll by Louis Harris showed that 71 per cent of the public was convinced that a lot of the problems connected with government could be solved if there were not so much secrecy on the part of public officials.

On the other side, many public officials said basically they were not opposed to opening records, but were concerned about the types of records to be open. They feared that records containing personal information might be opened, thereby creating an invasion of privacy. They were concerned that sensitive national security documents might be opened, which would compromise the position of the United States in foreign affairs. Another concern was that businesses would use information contained in public records against their competitors.

Public officials also expressed apprehension over possible negative side effects on the operation of government. They felt that a great demand for records might disrupt government routine. They were concerned that broad requests might require agencies to spend considerable time in costly research for records. Finally, some public officials were concerned that disclosure of internal communications would stifle the honest exchange of ideas and opinions and pre-empt the decision-making process.

## Federal Freedom of Information Act

Congress determined that the need for citizens to have access to public records outweighed potential problems, and, in 1966, passed the federal Freedom of Information Act. Since passage of the act, the problems envisioned by public officials have not materialized substantially.

While the Freedom of Information Act clearly established the right of citizens to inspect public records, federal agencies still balked at making them available. Agencies employed a number of tactics to take advantages of certain loopholes and weaknesses in the law. Tactics included long delays in answering requests, prohibitive charges for copying records and sheltering of records under broad exemptions for investigatory and national security information.

In 1974, Congress passed amendments to the Freedom of Information Act in an effort to plug the loopholes. The revisions call for in camera (in private) review by the courts of records refused on the grounds they were investigatory or national security records. Duplicating charges were limited to the actual cost of reproducing records, and agencies were required to respond to any request for records within 10 working days.

## Kentucky Law

Kentucky's current open records law is found in the Library and Archives chapter of the Kentucky Revised Statutes. KRS 171.650, enacted in 1958, requires that, unless otherwise provided by law, all papers, books and other records required by law to be kept by an agency, shall be open to inspection by any interested person, subject to reasonable rules as to time and place. It also provides that a copy of the record shall be furnished upon request.

KRS 171.650 has been given a narrow interpretation since its enactment, which has restricted public access to records. In determining who constitutes an "interested person" public officials have employed the common law definition that interest is present only when the records requested are necessary to support a law suit. Until recently, this definition was upheld by the courts. Public officials also have interpreted that "agency," as used in the statute, pertains only to a state agency and not to units of local government.

## State Laws

An analysis of state laws published by the Freedom of Information Clearinghouse, a public interest group, based in Washington, D.C., shows that 44 states have some type of public records law. Of these, 23 states define "public record." Sixteen states require agencies to promulgate

procedures for making records available but only two require such procedures to be displayed publicly. Four states provide a system for administrative adjudication of cases in which records are denied, while 17 provide for judicial review. In eight states, the burden of proof in such cases is on the agencies which house the records. The remainder do not specify where the burden is placed. Seventeen states provide a penalty for violations, ranging from fines to imprisonment and removal from office. Most states classify this type of violation as a misdemeanor.

State public records laws vary tremendously from one sentence statutes to laws of considerable detail. They also vary significantly in content. Generally, those recently enacted are patterned after the federal Freedom of Information Act and emphasize public access to information. Older laws are concerned more with management and preservation of public roads. The Freedom of Information Clearinghouse considers only 14 state laws to be adequate. Generally regarded as having the most comprehensive laws in terms of access are Oregon, Washington and Texas.

## House Bill 22

In the 1974 session of the General Assembly, an attempt was made to amend KRS 171.650. Sponsors of House Bill 22 had two basic objectives in mind when they drafted the legislation. One was to extend coverage to local governments to insure accessibility of records at all levels. The second was to broaden the right to inspect public records to "any member of the public" rather than limiting it to "interested persons."

House Bill 22 was passed by the General Assembly but subsequently vetoed by Governor Wendell Ford. The Governor's veto message cited absence of exemptions in the act for certain types of records he felt needed protection, specifically, school pupil records, certain tax and financial statements required of individuals and businesses and negotiation records necessary for economic development in Kentucky.

## The St. Matthews Decision

On November 22, 1974, the Kentucky Court of Appeals issued an important decision in the area of open records. In a case involving the City of St. Matthews and the Voice of St. Matthews, a newspaper, the high court struck down the use of the common law definition of "interest" as a prerequisite for inspecting public records. This decision had the effect of implementing the intent of House Bill 22.

In the St. Matthews decision, the court ruled that the common law definition of "interest" was developed under a monarchic form of government and it had no valid basis in a democratic society. The court further felt that the

need to show interest was an "unwarranted impediment" in the way of citizens exercising their right to acquire information about the operation of their government.

The St. Matthews decision did not, however, grant carte blanche access to records. The court established the general policy that inspection should be for a purpose which advances "wholesome public interest or a legitimate private interest." The decision further specified that a person does not have the right to inspect records "to satisfy idle curiosity or for the purpose of creating a public scandal." In addition, the court recognized that public records can be exempted by law or by other "countervailing public policy."

## Interim Activity

After the veto of House Bill 22 during the 1974 session, several members of the General Assembly still felt the need for legislation to make public records more accessible. The Interim Joint Committee on State Government, in response to this concern, appointed a subcommittee to study the matter. The subcommittee felt the St. Matthews decision did not adequately address three major questions:

What is a "public record"? While the St. Matthews decision removed the impediment of "interest" in order to inspect public records, it did not specifically define what constitutes a "public record." Members of the subcommittee agreed that the term should be defined statutorily.

What public records should be exempt from disclosure? The court identified several which currently are exempted, but its list was not, nor was it intended to be, all-inclusive. The subcommittee recognized as one of its major responsibilities drawing the fine line between those records which should be open and those which should, justifiably, be kept confidential.

Under what guidelines will public officials operate in allowing citizens to inspect public records? In this regard, the St. Matthews decision said only that inspection shall be conducted at "reasonable times and places and in such manner as not to unduly interfere with the proper operations of the office of the custodian of the records." The subcommittee felt this

was not a sufficient safeguard in light of documented attempts by federal agencies to circumvent the Freedom of Information Act. Specifically lacking in the St. Matthews decision were definite time limits, standard procedures, and an appeal process for resolving conflicts.

The subcommittee devoted its efforts to answering these questions and developing appropriate legislation. In the process, the subcommittee scrutinized open records laws from other states, the federal Freedom of Information Act, and model acts. Careful attention was given to states which had enacted comprehensive open records legislation within the past three years, particularly Oregon, Washington and Texas.

## Proposed Legislation

The subcommittee's draft of an open records act was distributed for review and comment to more than 300 public officials, public interest groups, representatives of the news media, and anyone expressing an interest in open records. Responses were reviewed and suggested changes incorporated in the bill draft when the subcommittee felt the need for a proposed revision had been adequately substantiated.

Subsequently, the Interim Joint Committee on State Government voted unanimously to prefile the bill for the 1976 session and recommend its passage.

The bill is patterned after a model act drafted by the Freedom of Information Clearinghouse. It includes several provisions of the laws in Oregon, Washington and Texas, as well as those in California, Colorado, Indiana, Maryland and New York.

"Public record" is defined in the bill to mean "all books, papers, maps, photographs, cards, tapes, discs, 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."

The right of any person to inspect and copy public records is statutorily affirmed. A public agency must respond to a request for information within three days and each agency is required to publish rules and regulations for administering the act. These rules must include a list of records maintained, procedures for requesting records and procedures for appealing denials, and they must be publicly displayed.

The bill exempts nine categories of public records, including those mentioned in the message accompanying the veto of House Bill 22, except for school pupil records. These were exempted from disclosure by a provision of the

federal Education Amendments of 1974. The bill allows exemption by federal law or regulation or other state statute.

The bill establishes an appeals process through which disputes over access to records can be fairly and expediently resolved. The Attorney General is designated as the administrative adjudicator and is required to report annually on all cases. In all cases the burden of proof is on the agency that denies a record. The Attorney General's decision may be appealed to circuit court and the courts are allowed in camera review of documents withheld.

## Privacy Issues

The open records bill exempts records of a personal nature from disclosure so as to avoid an invasion of privacy. It also allows an individual to inspect records maintained on him or in which he is mentioned. These provisions point out a potential area of conflict between open records and individual privacy.

It was apparent to the Open Records Subcommittee that the privacy issues were too complex and sensitive to be covered extensively in the open records bill. Although the subcommittee included the provision regarding a person's own records, it deferred other privacy issues until further study could be made. The chairman of the subcommittee indicated that he would sponsor a resolution calling for a comprehensive study of privacy with an objective of drafting appropriate legislation for the 1978 General Assembly.

## Support for Open Records

No major opposition to the open records bill had surfaced by the end of interim committee activities. Objections to the proposed legislation have been limited to technical points and wording, and most of these were effectively negotiated and resolved in the review and revision process. The Department of Human Resources has raised some objection to the provision allowing an individual to see his own records. The Secretary of Human Resources has expressed concern that this would allow clients to see adoption records, child abuse records and mental health records. This has the potential to become an area of major controversy.

On the other hand, the open records bill draft has received support and endorsement from several groups. Common Cause of Kentucky gave its support after the draft was reviewed and approved by its national office in Washington. The President of the Kentucky Press Association publicly announced his organization's endorsement at the August 28, 1975, meeting of the Joint Interim Committee on State Government.