

October 26, 2011

Richie D. Farmer  
Commissioner  
Kentucky Department of Agriculture  
Capitol Annex, Room 188  
Frankfort, KY 40601  
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Dear Commissioner Farmer:

Because you are the presiding officer of the Department of Agriculture's Livestock Care Standards Commission,<sup>1</sup> I am submitting to you this complaint detailing significant violations of the state Open Meetings Act ("OMA") by the Kentucky Livestock Care Standards Commission ("Commission"). The responses to recent requests for records related to the Commission and its advisory groups reveal that the Commission has by and large failed to include the public in its most important policy development processes, in violation of the legislative statement of policy that "the formation of public policy is public business and shall not be conducted in secret." KRS 61.800. These violations have occurred for over a year and include failures to hold even a single open meeting by the Commission-created species groups, failures to prepare records of decisions and actions of those groups, and failures to publish schedules or provide sufficient agendas for Commission meetings.

Due to these violations, as detailed below, the Commission has effectively shrouded in secrecy a policy development process that the law requires to be public. The willfulness of this secrecy is exemplified by your very own statement at the first Commission meeting: "In Kentucky we're blessed with the structure of our government that does not allow for the voter referendum and voter influence on a *public that really has no idea about what we're trying to do*. And I think that certainly allows us to take our time and to do it right and *not have to worry with someone looking over our shoulder or telling us what we should or should not be doing*." Because informing the public about what a public agency is doing is the entire purpose of open meetings as put forth in the OMA, and because of the significance of both the violations and the animal care policies at issue, immediate action is necessary to avoid further violations and to remedy the damage already done. We therefore request that the Commission take no further action until remedies are fully

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<sup>1</sup> A copy of this letter is being simultaneously delivered to Dr. Stout, who has served as the Chair Designate in your place at several of the meetings.

implemented that address the harm caused by the unlawful exclusion of the public from critical aspects of the standards creation process.

### **No Publicly Scheduled Meetings or Records of Advisory Groups**

#### **a) Species Groups are Public Agencies Subject to OMA**

**Requirements:** A recent response to a request made to your agency seeking all records related to meetings and actions taken by the Commission and its consulting groups included drafts of proposed regulations formulated by various species consulting groups (including swine, poultry, veal/beef/bison), yet conspicuously did not include any meeting notices, minutes, etc. from meetings of these groups. Such sub-groups are themselves public agencies under the OMA because a public agency is “any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency . . . established, created, and controlled by a ‘public agency’.” KRS 61.805(2)(g). As these sub groups were clearly formed and controlled by the Commission, a public agency created by KRS 257, they are themselves public agencies and subject to the same requirements as the full Commission.<sup>2</sup> Assuming that the species groups actually did the work they were directed by the Commission to do--formulating and recommending species-specific standards for adoption by the full Commission—they violated the OMA by carrying out this policy development process without establishing a schedule of regular public meetings. We know from the audio tapes and released records that each group privately deliberated to develop and reach consensus on proposed drafts, but the fact remains that none of these groups met as the OMA requires--pursuant to a publicly available schedule. KRS 61.820 (public meetings must “be held at specified times and places which are convenient to the public, and all public agencies shall provide for a schedule of regular meetings by ordinance, order, resolution, bylaws, or by whatever other means may be required for the conduct of business of that public agency. The schedule of regular meetings shall be made available to the public.”); KRS 61.810.

#### **b) Species Groups Held No Open Meetings (No published schedule of regular meetings, no noticed special meetings):** Audio clips from the taped meetings of the Commission make it abundantly clear

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<sup>2</sup> See also Ky. Atty. Gnrl Op. 10-OMD-118: Committees that “owe their existence” to public agencies are themselves public agencies, a conclusion that is not altered by “the fact that they are not empowered to take action but instead operate in an advisory capacity.”

that the various species groups have been formulating the policy standards that the Commission tasked them with. The audio is replete with references to the creation by these groups of multiple drafts of species-specific standards and multiple individuals discuss bringing input from the Commission “back to my group.” In fact, the tapes reflect that the bulk of Commission meetings are spent on cursory reviews of what the species groups have already done in private and what Commission members have often already reviewed prior to the Commission meetings. For example, a dairy group member noted at the second Commission meeting that her group “*has met a couple of times*” and was told that there was “no need” to go over her group’s whole species-specific draft at this full meeting, when she asked. Such discussions not only reveal clear violations of the OMA, but highlight the harm from those violations, as the essence of the species-specific policy standards are formulated at meetings the public is not given access to and about which the Commission feels “no need” to go over in detail at its full meetings.

- c) **Academic Review Committee:** In addition to these species consulting groups, the meeting tapes make several references to an “academic review committee” headed by Nancy Cox. The Commission is certainly authorized to create such a group, but as an “advisory committee” under the control of the Commission, it is a “public agency” subject to the same OMA requirements as the species consulting groups. KRS 61.805(2)(g). The tapes reveal the Commission’s directions to this committee to review the currently proposed standards, however, there has been no published schedule of regular meetings and no notice of special meetings by the academic review group to date. If the academic review committee has been proceeding with the work requested by the Commission, it has done so in violation of the meeting and record-keeping requirements of the OMA. KRS 61.805(2)(g); KRS 61.810.
- d) **Failure to Prepare Required Meeting Records:** Had the consulting groups and academic review groups held the open meetings that were required of them, they would have had to “promptly” record minutes of each one and make such records open to public inspection. KRS 16.835. Such minutes would include records of the specific groups and all actions taken, as that term is broadly defined in KRS 61.805. By failing to hold publicly-scheduled meetings or prepare minutes, the species and academic review groups exclude both the public that would have been in attendance and those who would otherwise have been able to review the recorded “collective decisions” of such groups that are ultimately intended to provide the basis for regulatory policy.

Because of this violation, the public is excluded from ever accessing what the law expressly states is public business.

While the Commission's review of the work of the species and academic groups is an important part of the development of standards, such review is not a substitute for ensuring the standards are developed through a publicly open and recorded process. When, as here, a Commission repeatedly makes clear that it is not within its "mission or authority" to change the recommendations of the species groups (as repeatedly noted in the audio tapes), the sub-groups are clearly just such a stand-in for the Commission and OMA violations are repeatedly established.

### **No Schedule of Regular Meetings**

In addition to the violations of the advisory groups detailed above, the Commission itself is in violation of several of OMA's most basic requirements, beginning with its own failure to create a schedule of regular meetings that "shall be made available to the public." KRS 61.820. Absent this necessary schedule, all of the meetings held by the Commission are effectively "special meetings," subject to the notice requirements of KRS 61.823. The nature of the Commission meetings as "special" is further confirmed from audio records: Commission meetings begin with a question from the chair asking the secretary whether the media has been notified and media notice to such groups as have requested it is only required for special meetings. KRS 61.823(4)(a). Moreover, there are multiple references to the fact that Commission members will be notified when the next meeting is—something that would not be necessary were there a regular schedule of meetings. As explained below, the Commission has fallen short of several OMA mandates concerning special meetings.

### **Deficiencies in Notice and Conduct of Special Meetings**

- a) **Special Meetings Notice Deficiencies:** The special meetings provision requires that an agency "provide written notice of the special meeting" to include "date, time, and place of the special meeting and the agenda." KRS 61.823(3). No such notices were contained in the ORA response for meetings on 10/19/10 and 3/29/11. Moreover, no agendas exist for full Commission meetings on 10/19/10 and 3/29/11. No advance agenda was issued with the notice for the special meeting on October 11, 2011, either, and the one that was eventually

distributed at the meeting itself was legally deficient, as detailed more fully below. *Id.*

- b) **Special Meetings Agenda and Conduct Deficiencies:** Although an agenda was eventually distributed at the recent October 11<sup>th</sup>, 2011 meeting, it is so woefully lacking that it does not fulfill the OMA requirements at all. The October 11<sup>th</sup> agenda lists 8 bullet points, including: “Welcome”, “Roll Call”, “Approval of Minutes”, “Presentation of revised drafts”, “Discussion of timelines and future meeting dates”, “Old Business”, “New Business”, and “Adjournment.” Although the Open Meetings Act itself does not specify what must be contained in the agenda, it does note that “Discussions and action at the meeting shall be limited to items listed on the agenda in the notice.” 61.823(3). Without a properly noticed agenda for this meeting, as well as the several others for which agendas were either similarly vague or missing altogether, the public has no mechanism with which to track whether the meeting was conducted within its proper scope and therefore conducted with the confines of the OMA. The Attorney General has addressed this issue directly, advising that “fair notice cannot be imputed from vaguely worded descriptions of agenda items such as ‘old business’, ‘new business’, ‘open to the floor’” and that “...such vaguely worded descriptions invite discussions and actions on any topic without the limitations envisioned by the statute in a special meeting.” Ky. Atty. Gnrl Op 01-OMD-175. Thus, the Commission’s general agendas were unlawfully deficient, as was its failure to include an agenda at all for several of its special meetings. Any actions taken at such special meetings without legally sufficient agendas defining the scope of business is done in violation of the OMA and should be revisited at properly noticed and defined meetings to protect the public interest that is supposed to be safeguarded by the statute.

### **Conclusion and Proposed Remedy**

In willful violation of the OMA’s most basic prohibition of secrecy in public policy formulation,<sup>3</sup> the Commission’s repeated and significant failures to comply with the OMA reflect a pattern of public exclusion and a violation of an express public right. As explained above, the Commission has been thwarting the public drafting process by holding non-compliant public meetings that simply rubber-stamp the work of its various subgroups, who

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<sup>3</sup>KRS 61.800; *See also, Floyd County Board of Education v. Ratliff, Ky.*, 955 S.W.2d 921, 923 (1997): “The express purpose of the Open Meetings Act is to maximize notice of public meetings and actions. The failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good.”

have themselves been unlawfully deliberating entirely outside of the public eye. The Commission has thereby subverted legislative intent that “public policy is public business and shall not be conducted in secret...” KRS 61.800. Given that the species groups have been developing standards for more than a year now without legally required and publicly scheduled meetings or records, and given the full Commission’s failures to follow OMA requirements, I recommend the Commission take immediate and significant action to remedy the violations and prevent the process from proceeding further until such remedies are completed. Pursuant to KRS 61.846, I recommend the following remedial action:

1. The Commission takes no further action based on proposals or policies of the species or academic review groups until each of those groups has held open meetings that revisit in open and recorded meetings all matters considered or actions taken in violation of OMA requirements;
2. The Commission revisit any matters considered during special meetings that were conducted in violation of notice and agenda requirements (as detailed above);
3. Pursuant to 61.820, the Commission publishes a schedule of regular meetings for itself and the species and academic review groups for the remainder of the process, including any remedial meetings.
4. All further action of the Commission be taken in strict compliance with the requirements of the OMA.

Please provide your written response within the time frame provided by KRS 61.846, in order that these violations may be remedied and the process properly opened to the public without the need for further action.

Sincerely,



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