

A local board of education does not have to disclose any documents used in the preliminary discussion of the superintendent summative evaluation if they don't end up as part of the final summative evaluation documentation and are not otherwise subject to disclosure under the Open Records Act. Any documents, which are not otherwise subject to disclosure under the Open Records Act, which are created for and reviewed by the local board of education in their preliminary discussions for the summative evaluation of a superintendent are **not** required to be disclosed under the Open Records Act's "preliminary" exceptions to disclosure. This includes documents that are used in the preliminary discussion of the superintendent's summative evaluation that are NOT included in the final documentation of the summative evaluation.

Is the document part of the preliminary discussion but not part of the summative evaluation documentation?

Is the document NOT otherwise disclosable under the Open Records Act (i.e., correspondence with the public on non-confidential matters)?

If the answer to BOTH of these is "yes", then the document can be withheld from disclosure in an Open Records response.

There is another situation where the local board of education, pursuant to the certified personnel evaluation statute, KRS 156.557, may choose to include a formative evaluation of the superintendent in their superintendent evaluation policies and procedures. If the local board decides to have a formative evaluation and has preliminary documents the board reviews prior to finalizing a formative evaluation document, then the preliminary documents would not be subject to disclosure under the Open Records Act unless they are otherwise disclosable under the Open Records Act or are incorporated into the final version of the formative assessment documentation. A local board of education does not have to disclose any documents used in the preliminary discussion of any superintendent formative evaluation if the documents don't end up as part of the final formative evaluation documentation and are not otherwise subject to disclosure under the Open Records Act.

Is the document part of the preliminary discussion for the formative evaluation but not part of the final formative evaluation documentation?

Is the document NOT otherwise disclosable under the Open Records Act (i.e., correspondence with the public on non-confidential matters)?

If the answer to BOTH of these is "yes", then the document can be withheld from disclosure in an Open Records response.

See the full discussion of these issues below.

The current version of the statute, KRS 156.557 <http://www.lrc.ky.gov/Statutes/statute.aspx?id=42137> provides the superintendent evaluation requirements in Subsection 6:

- (a) Each superintendent shall be evaluated according to a policy and procedures developed by the local board of education and approved by the department.
- (b) The **summative evaluation** of the superintendent shall be in writing, discussed and adopted in an open meeting of the board and reflected in the minutes, and made available to the public upon request.

(c) Any **preliminary discussions relating to the evaluation** of the superintendent by the board or between the board and the superintendent **prior to the summative evaluation** shall be conducted in closed session.

So, under this statute, local boards evaluate their superintendent according to a policy and procedure that the board develops and that is approved by KDE. The summative evaluation has to be **in writing**, has to be discussed and adopted in an **open board meeting** and reflected in the meeting minutes, and the summative evaluation has to be **available** under the **Open Records Act** to the public upon request. Finally, the board's **preliminary** discussions (internally or with the superintendent) on evaluation of the superintendent, prior to the summative evaluation itself, are in **closed session**. Subsection 5(c)6. of KRS 156.557 clarifies that the training requirements for evaluators, set forth in the statute, do not apply to local board of education members.

While the preliminary discussions mentioned in the statute appear to be relating to the superintendent's summative evaluation and not an actual formative evaluation, any documents in the preliminary discussions would be exempt from Open Records release, if not otherwise releasable under OR law, pursuant one of the following exceptions to Open Records Act release requirements contained in KRS 61.878(1):

- (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;
- (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;
- (k) All public records or information the disclosure of which is prohibited by federal law or regulation;
- (l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly;

By the statute's own terms, the discussion at that point is preliminary and any documents not included in the summative would be regarded under OR law as preliminary. Again, if these documents are otherwise discoverable (e.g., his time sheets or his written correspondence with the public on non-confidential matters), inclusion of their review and the preliminary discussion would not shield them from disclosure under OR law.

As well, if there is an actual formative evaluation of the superintendent, as part of the local board's superintendent evaluation pursuant to their policies and procedures, the AG would probably find that the final formative evaluation document would be the final document and not preliminary for that function of the evaluation process and disclosable under the OR law, especially given this is a final (not preliminary) relative to the performance of the superintendent of an entire school district. See 92-ORD-1145 attached.