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Kentucky Press Association Statement in Opposition to HB 509

For nearly 50 years, Kentucky has been a national leader in allowing its citizens to access government records. That legacy is due in large part to the broad—and prescient—definition of “public records” that has appeared in Kentucky’s Open Records Act since its inception. In one fell swoop, HB 509 would eviscerate that legacy and leave Kentucky’s citizens largely unable to access records created by the public officials and employees who serve them. This bill can only be described as an all-out assault on transparency, and any person that cares about the power of the people to know what their government is up to must oppose this bill. The Kentucky Press Association strongly denounces it as unwise, unnecessary, and anti-democratic.

The bill’s sponsors have been quoted as saying that it does not exempt from disclosure anything that is currently available to the public, but that is simply false. Nor is the bill wise simply because it requires agencies to provide e-mail accounts to employees, board members, and commissioners. No one should be fooled by these Trojan Horse arguments; this bill is a wolf in sheep’s clothing.

By redefining what a “public record” is, HB 509 would place large swathes of agency records off limits to the public. Kentuckians would no longer have access to the kinds of records they have had for decades, including but not limited to: routine emails and communications about agency business, documents showing who was lobbying officials for favorable treatment, and what response they received; agency budgets and projections; records revealing employee misconduct and how it was investigated; and countless others.

Moreover, the bill would create a massive loophole by exempting any communication sent or received on a personal device or email account from disclosure—something legislators tried to sneak through years ago, before public outcry forced them to abandon this end-run around transparency.

Simply put, HB 509 would eviscerate government transparency in Kentucky. KPA encourages all citizens to contact their legislators to oppose this backward-looking legislation.

ANALYSIS OF KEY PROVISIONS

Most of the mischief of HB 509 is found in Section 2, which makes sweeping changes to the Open Records Act. Worst of all are the changes to the basic definition of “public record.” Under current law, the Act broadly defines “public record” to include any paper or electronic record prepared, owned, used, possessed, or retained by a public agency, regardless of its purpose. It then creates a series of exemptions in a separate section that an agency may (but need not) invoke to withhold certain categories of records. By law, those exceptions must be narrowly construed. And when an agency asserts them, that is subject to administrative and/or judicial review. This system makes perfect sense: everyone understands what a public record is, and agencies, requesters, the Attorney General, and courts are left only to decide whether some exemption applies.

HB 509 would replace that well-functioning system with chaos and confusion. It muddies the clear definition of public record by smuggling into it various limitations and exemptions whose scope is anything but clear. This will open the door to uncertainty and mischief. These are not minor, technical changes. They will place off-limits forever certain things that have always been available to the public.

For example, HB 509 would, for the first time limit the definition of a “public record” to include only “documents, records, memorializes, or gives notice to a person outside the public agency of a transaction or final action.” Public agencies and employees perform tasks and communicate about countless things that are not “transactions” or “final actions.” To take just a few examples, this could put off limits:

- Agency budgets and other forecasts
- Emails and correspondence that does not announce a “final action” —which is *virtually all emails* sent or received by public employees and officials
- Personnel records of public employees
- Consulting or investigative reports paid for with public funds
- Routine police records, including body camera footage, arrest, and/or incident reports
- Records created or reviewed during an investigation by a public agency, including law enforcement agencies
- Records showing donations to public agencies, such as university foundations

The problems with HB 509 don’t stop there, either. The bill also would, for the first time, specifically carve certain categories of records out of the definition of “public record.” For example, the bill would exclude “preliminary drafts,” “notes,” or “preliminary recommendations or discussions” from the definition of public records. Under current law, these kinds of records are available to the public once a final decision has been made. Under HB 509, however, they would be forever exempt. It will be routinely invoked to refuse disclosure of things like:

- Emails or memoranda sent between agency employees, leaders, and/or board members or commissioners on virtually every subject
- Records showing why an agency did or did not take action against a public employee accused of misconduct, including underlying evidence relied upon in making those decisions
- Records related to a pending civil or criminal investigation by non-government officials, which currently are subject to disclosure except in narrow circumstances

By itself, this change would massively erode the public’s right to understand what their elected officials and public servants are doing in their name. The existing “preliminary” records exemptions are routinely abused by agencies to try to hide damaging or embarrassing information about their operations from the public. HB 509 will empower agencies to go even further and claim that no “public records” of these things even exist. This is not a hypothetical concern; it is exactly what happened when the Cabinet for Health and Family Services falsely denied possessing “public records” related to the tragic death of Amye Dye, a child under its supervision. The resulting litigation was one of the most important Open Records cases in Kentucky history, and led to substantial sanctions against the agency and important legal reforms to the child welfare system.

Finally, the bill would enact a brand-new exemption that was previously proposed, but rejected, in the General Assembly. It would exempt from the definition of public record “Information or documents stored or retained on a device or email account that is the personal property of a current or former employee, officer, board member, or commission member.” This would create a glaring loophole that would make it simple for any public official or employee to avoid scrutiny just by using their “personal” phone or email account to do the public’s business. Indeed, board members or commissioners could flagrantly violate the Open Meetings Act by conducting their substantive discussions by email or text, and reaching consensus on how to proceed, and the evidence of those violations would be completely off limits to the public because they were not done on “government” devices.

As the Kentucky Court of Appeals recently observed when rejecting a claim that records stored on “personal” devices were not “public records”: “To categorically exclude all text messages on personal cell phones from the scope of the Open Records Act would surely operate to encourage the use of personal electronic devices and place vital public records beyond the reach of citizens.” That is exactly right.

CONCLUSION

The KPA strongly opposes HB 509, which would spell the end of meaningful government transparency in Kentucky. It strongly encourages all citizens to speak out against this bill and to contact their legislators to express their opposition.

Citizens can call the Legislative Hotline at 1-800-372-7281 or 1-502-564-8100.