

March 15, 2021

Honorable Andy Beshear
Governor
Commonwealth of Kentucky
The Capitol
Frankfort, Kentucky 40601

Re: Request for Veto on House Bill 312

Dear Governor Beshear:

The Kentucky Open Government Coalition, and signatories representing a cross section of constituencies, respectfully request that you veto HB 312.

The Legislative Backstory of HB 312

Introduced on February 2 as "An act relating to financial institutions," HB 312 advanced through the House under that title until February 25 when its sponsor, hoping to avoid detection, quietly filed a committee substitute in the House State Government Committee.

This was two days after the deadline for filing new bills had expired.

Until February 25, HB 312 was an innocuous bill mandating the use of gender neutral language in laws relating to financial institutions. After February 25, HB 312 threatened core principles in Kentucky's Open Records

Law.

HB 312 passed out of the House by a vote of 71-27 within a day.

Under pressure from various groups, the Senate amended HB 312 to address some, but by no means all, of its offensive provisions and the underlying threat to the public's right to know. The Senate passed HB 312 on March 11 by a vote of 22-11 and it was returned to the House for concurrence.

On March 12, the House concurred in the Senate changes and gave final passage to HB 312 by a vote of 70-26.

HB 312 is now on your desk, awaiting your signature.

Arguments in Support of Vetoing HB 312

1. The addition of a "resident-users only" requirement in HB 312 dramatically shifts the statutory presumption that the Open Records Act "is clearly intended to grant any member of the public as much right of access to information as the next."

Even as amended by the Senate to permit broader access to the national media, the requirement will burden public agencies with new statutory obligations, erect absolute barriers to Kentucky's records for nonresidents with critical needs, and create delays and obstructions to Kentucky's records for its residents.

Embedded in Kentucky's Open Records Act is the solution to the problem HB 312 purports to resolve. The Act contains an "unreasonable burden/intent to disrupt essential functions" provision that is an effective cure to the problem of nonresident abusers of our records access laws if legitimately invoked by public agencies. Commercial users copying fees also embedded in the Act permit agencies to recover fees commensurate with the value of the records.

We believe that Kentucky will learn only after it is too late that the residency requirement which is a central feature of HB 312 will benefit neither our public agencies nor our residents and that the importance of our public records extends beyond the state line.

2. Provisions in HB 312 aimed at shielding LRC denials of open records requests from judicial review strike at the heart of our system of checks and balances.

Under existing law, specifically KRS 7.119, LRC exercises its legislative prerogative by retaining custody and control of its records and determining whether a requested record is subject to disclosure or not subject to disclosure. This includes constituent communications. Any claim to the contrary has no basis in fact.

But review of LRC's determination, if disputed, "is the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803). Abdication of this hallowed principle is inimical to transparent and accountable

government.

In addition, HB 312 reverses the statutory presumption that all public records are open records unless an agency can prove that the records are exempt.

Under new language found at Section 6 sub (4), HB 312 declares only those records expressly identified in Section 6 sub (2) subject to disclosure. All other records not specifically enumerated in that section are "not subject to disclosure."

Although LRC's denial of a request for records not specifically enumerated in Section 6 sub (2) may be appealed, that appeal is taken to the LRC and LRC's final decision is unappealable.

The General Assembly's decision to insulate itself from public oversight comes at a time when mistrust of government is at an historic high. We can conceive of no legislative maneuver more likely to spawn greater public mistrust than HB 312.

Summary

Even as amended, HB 312 ignores the foundational principle of the Open Records Act recognizing that "free and open examination of public records is in the public interest."

For these reason, the Kentucky Open Government Coalition, and

signatories, respectfully request that you veto HB 312. We stand ready to discuss our concerns with you.

Respectfully submitted,

The Kentucky Open Government Coalition Board Members

Amye Bensenhaver, Frankfort

Jennifer P. Brown, Hopkinsville

Austin Horn, Frankfort

Tom Kiffmeyer, Morehead

Jeremy Rogers, Louisville

Martha White, Hopkinsville

Along with the following organizations:

Kentucky Public Retirees, Frankfort

Kentucky Government Retirees, Frankfort

The Lexington Herald-Leader, Peter Baniak, editor

Progress Kentucky, Cynthiana

Kentucky Center for Economic Policy, Berea

The Associated Press

Scripps Media Inc., owner of 61 television stations in 41 markets as well as Court TV and Newsy

Illinois News Broadcasters Association

National Freedom of Information Coalition, David Cuillier

Bryant Law Center, Mark Bryant

The State Journal, Steve Stewart, publisher

Forward Kentucky, Bruce Maples

WPSD Local 6, Perry Boxx and Shamarria Morrison

Radio Television Digital News Association

Center for Rural Strategies, Whitesburg

Common Cause, Richard Beliles

The Paducah Sun, John Mangalonzo, managing editor

Bobbie Foust, Paducah Sun reporter (retired)

Molly Jirazek, News Nation, Zone Manager Chicago