March 1, 2021

Senator Robert Stivers and Members of the Kentucky Senate

702 Capital Avenue

Annex Room 236

Frankfort, Kentucky 40601

Re: Joint letter opposing HB 312, amending the Kentucky Open Records Act

Dear Senator Stivers and Senators:

The undersigned organizations, representing a cross section of constituencies and points of view, oppose the committee substitute to HB 312, "An act relating to public records."

We share a fundamental concern that HB 312 will create unneeded and unwanted impediments to public access, that it will not ease the burden on public agencies, and that it will work a hardship on the Commonwealth.

A summary of our objections follows.

1. **We object to the creation of a "resident-users only" requirement in the Open Records Act.** This requirement dramatically shifts the statutory presumption that the Act "is clearly intended to grant any member of the public as much right of access to information as the next." It erects barriers to access that ignore the fact that "the importance of state government information does not stop at state lines."

> Verification of residency poses enormous challenges for agency officials, delaying the process for both resident and nonresident requesters and tying up agency resources that could be used in fulfilling request.
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> Resident-only requirements take a human toll: the nonresident seeking information on a suitable nursing home for an aging parent in Kentucky; the nonresident victim of a crime or involved in an automobile accident in

Kentucky; the nonresident living just over the Kentucky state line who has a direct interest in local records. *All have a need for Kentucky's public records but will be turned away.*

This is to say nothing about genealogists, researchers from all disciplines, and data gatherers who provide employment background checks, consumer credit checks, and automobile history/safety information.

A resident-users only requirement will slam the door on nonresident journalists who are not affiliated with a news-gathering organization that has a location in Kentucky. We can provide you with examples.

Importantly, there is no known data confirming the effectiveness of resident-only users statutes as an agency resource/cost savings measures. Florida and Georgia have, for these reasons, eliminated earlier resident-user only requirements.

It is equally important to remember that Kentucky's Open Records Act already contains an "unreasonable burden/intent to disrupt essential functions" provision, KRS 61.872(6), that is an effective curative to the problem of nonresident abusers of our records access laws if legitimately invoked by public agencies. Bear in mind, too, that the commercial users copying fees embedded in our laws permit agencies to recover, by prepayment, actual costs postage costs incurred as well as the cost of "staff required to produce" copies and "the cost to the public agency of the creation, purchase, or other acquisition of the public records," thus offsetting the costs to public agencies.

Neither Kentucky's agencies nor its residents will benefit from a resident-users only requirement. We urge you to reject this measure.

2. We object to the required use of a standardized form for all requesters as a condition to records access. Kentucky's Open Records Act establishes requirements for a written open records request. KRS 61.872(2)(a) states that the records custodian may require "written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected." A request that the records be mailed, rather than inspected, must contain a "precise[ ]" description.

The Act currently authorizes permissive use of an agency standardized request, but it prohibits mandatory use of the agency request.

HB 312's "one size fits all" standardized records request form will impede, delay, and in some cases, deny access to public records based on the availability of the request form and the requester's reluctance, in some cases, to provide personal information that the Open Records Act does not currently require and to create a public record (the executed standardized request form containing that personal information as opposed to a simple signed request describing records).

KRS 61.872(2)(a) does not require requesters to provide mailing address (since some requesters prefer to review records onsite); email address; phone number; or a "certification that the person making the request" is not a party in a lawsuit or an appeal of a lawsuit with the Commonwealth and "is otherwise entitled to obtain or inspect the records requested." What is required to "certify" these facts; what are the penalties for falsely certifying these facts; how can a requester confidently "certify" that he or she is "entitled" to the records; by what standard is "entitlement' measured?

Mandatory submission of this additional personal information and certification of entitlement will discourage open records requests.

So, too, will the requirement that the requester identify "the exact nature of the documents requested."

The greatest challenge in filing an open records request is formulating the request that captures all responsive records and excludes those that are not responsive but is not so narrowly drawn that it omits some of the records sought. It is not easy.

HB 312 superimposes on the "description" requirement in KRS 61.872(2)(a) the additional requirement of a description of the "exact nature of the documents requested." The "description" requirement is met, the courts tell us, if the request is "adequate for a reasonable person to ascertain [its] nature and scope." The standard imposed under HB 312 is difficult, and in many cases, impossible to meet.

We urge you eliminate this measure. Alternatively, we ask that you eliminate the mandatory language and continue to make use of a standardized open records request form permissive. If these alternatives are unacceptable, we ask that you eliminate the requirement of a description of the "exact nature of the documents

requested" and/or the certification requirements relating to the requester's entitlement to the records.

3. We wholeheartedly endorse any effort made to ensure compliance with KRS 61.876, the often ignored legal requirement that public agencies "adopt and post rules and regulations in conformity with the provisions of KRS 61.870 to 61.884 to provide full access to public records," and with the HB 312 requirement that the rules and regulations be *displayed on the agency's website* in addition to the existing requirement that the rules and regulation be posted in a prominent location accessible to the public.

We do not, however, endorse the HB 312 approach to mandating public agency acceptance of emailed open records requests by cross-referencing KRS 61.876. That statute is regularly ignored, and there are no penalties for noncompliance. Making mandatory acceptance of emailed open records request dependent on the public agency's adoption of rules and regulations that include a designation of the email address.

The Kentucky Attorney General has been forced to construe the current law that was intended to require acceptance of emailed open records, but resulted in a widely held agency view that acceptance remained permissive, in this awkward fashion. If the agency's rules and regulations identifies email as an acceptable mode of transmitting a request, the agency must accept it. If it does not, acceptance is not required.

Like 2019 SB 250, sponsored by Senator Wil Schroder, HB 312 will not achieve its stated goal: mandating public agency acceptance of emailed open records requests.

This goal can be easily achieved by simply eliminating the language added to KRS 61.872(2)(a) in 2019, restoring the old language, and adding one word, "email." The law would then unambiguously state:

> "The official custodian may require a written application (request), signed by the applicant (requester) and with his name printed legibly on the application (request), describing the records to be inspected.
>
> "The written application, shall be hand delivered, mailed, *emailed*, or sent via facsimile to the agency." (Emphasis added.)

Problem solved.

4. **We are, of course, concerned with the decision to eliminate judicial review of the LRC's denials of open records requests**. A proper system of checks and balances requires review and does not represent an encroachment on the legislative prerogative. The legislature, through LRC, retains custody and control of its records, and determines whether a record is exempt or nonexempt. Determining whether the exemption relied upon in denying an open records request applies to the record withheld "is the very essence of judicial duty." *Marbury v. Madison,* 5 U.S. 137, 177-78 (1803).

> Here, it is important to note that the legislature has and always will retain control of its public records. It decides whether communications, electronic or hardcopy, with constituents will be disclosed. If, as was suggested in the House Floor Debate on HB 312, constituent communications are being, or have been, disclosed, the decision to disclose them was made by the LRC. Of course, those communications have not been disclosed. The LRC has, presumably, withheld constituent communications under the existing exception to the Open Records Act for "correspondence with private individuals other than correspondence intended to give notice of final agency action" KRS 61.878(1)(i) as well as other legal justifications. Respectfully, these claims made by some House members in the debate of HB 312 have no basis in fact.
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> It is also important to note that the case now pending in the appellate courts between the LRC and The Lexington Herald-Leader does not relate to an open records request for constituent communications, as suggested on the House Floor debate of HB 312. Instead, that case involves access to records relating to allegations of sexual harassment leveled against a representative in 2015.

The suggestion that submitting the LRC denial of open records requests to judicial review is tantamount to surrendering control of its records, and opening the floodgates to unfettered access to constituent communications, is an exaggeration that borders on hyperbole.

We urge the Senate to eliminate the language from HB 312, Section 6, Subsection (4), making the decision of the Legislative Research Commission in an appeal of the denial of an open records request "final and unappealable."

5. **We object to the measures that appear in HB 312 that are aimed at preventing parties to a lawsuit from using the Open Records Act in addition**

to or in lieu of discovery. The Act currently states that "no court shall authorize the inspection by any parties of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery." KRS 61.880(1). "The gist of this wording," the courts have held, "is not to terminate a person's right to use an open records request during litigation, but to limit a court on an open records request on excluded records, to those records that could be authorized through a court order on a request for discovery" under the civil rules. Stated simply, parties to litigation cannot get through an open records request, records that they cannot get through discovery. The litigant cannot circumvent discovery by means of an open records request.

Section 2, Subsection (7) of HB 312 flips the script, stating that a person in a civil lawsuit cannot obtain any public records under the Open Records Act that "are obtainable through the civil discovery process," In short, a litigant cannot access any public records under the Open Records Act during the pendency of the litigation.

> The Kentucky Attorney General has spoken to this issue on several occasions, recognizing that "[t]he presence of litigation, and the availability of records through discovery does not relieve a public agency of its open records duties. A litigant, or an attorney representing a litigant, 'stands in relationship to the agency under the Open Records Law as any other person.'" This position is based on the recognition that "[r]equests under Open Records provisions to inspect records held by public agencies are founded upon a statutory basis independent of the rules of discovery."
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> Nevertheless, the Attorney General has admonished that "Open Records provision should not be used by parties to litigation as a substitute for requests under discovery procedures associated with civil litigation" and recognized "the potential pitfalls of using the Act in lieu of discovery." He has declined to substitute his judgment for that of a a court in open records appeals involving access to records that are the subject of discovery disputes.

We see no value in disturbing this well-settled area of open records law.

In closing, we recognize that HB 312 effects some positive change. Certainly, we have no objection to the newly created exception for client or case files maintained

by the Department of Public Advocacy. This, we understand, will level the playing field with county and Commonwealth's Attorneys whose litigation files have enjoyed protection under KRS 61.878(1)(h) since 1992.

Nor do we object to the extension of the deadline for public agency response to an open records request from three business days to five business days. We recognize that a five business day turnaround for records request is in line with the national standard and does not do violence to the spirit of the law. We are greatly concerned about the persistent failure of public agencies to meet the three business day, five business day, or, during the state of emergency, the ten day statutory deadline for agency response. We welcome any legislative action aimed at stricter enforcement of these statutory deadlines.

In general, we propose that the discussion of major changes to the Kentucky Open Records Act, like discussion of HB 312, be openly, thoughtfully, and methodically conducted in an atmosphere that acknowledges the importance of public oversight and participation. Our greatest concern is the manner in which HB 312 was "sprung" on the public with no meaningful notice or opportunity to be heard. These Discussions about the bill should, instead, be conducted under the sanitizing light of public scrutiny.

"Transparency is foundational to a government of the people, by the people, and for the people."

Kentuckians deserve the right to make their voices heard on HB 312. This bill directly affects rights that the public has enjoyed for 45 years. The public should not be divested of those rights in a matter of a few days.

Thank you for your consideration of our letter in opposition to HB 312. As the Senate moves forward on HB 312, the undersigned stand ready to assist.

Respectfully,

Kentucky Open Government Coalition