



**KENTUCKY PRESS
ASSOCIATION**

Statement of Opposition to House Bill 387

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Introduction – What is House Bill 387 and Why Has it Been Introduced?

House Bill 387 is a bill sponsored by Kentucky State Representative Jason Petrie that threatens to severely limit the access to public records pertaining to economic development, procurement, and business dealings between the Commonwealth and private businesses. The bill was written by members of Governor Matt Bevin's administration in the Cabinet for Economic Development and is a direct attempt by the administration to undermine two recent court decisions ordering disclosure of public records. Those cases, described below, are both still pending on appeal.

1. Braidy Industries – At the direction of Governor Matt Bevin, The Kentucky Cabinet for Economic Development invested \$15 million of taxpayer funds to purchase an ownership interest in Braidy Industries and also awarded the company \$4 million in grants to finance the construction of an aluminum mill. The Commonwealth now owns at least 20% of Braidy Industries, and the Courier-Journal requested public records disclosing the other shareholders of the business (essentially now business partners of the people of Kentucky). The Cabinet of Economic Development refused to disclose the information, even after ordered to do so by the Franklin County Circuit Court, arguing that any disclosure would harm the Commonwealth's ability to attract business to the state, and that the identity of the shareholders should be considered a trade secret.
2. Amazon Proposal – Louisville Metro coordinated the local response to Amazon, Inc.'s highly publicized request for proposals for its second headquarters. The city spent \$140,000 on an unsuccessful multi-media presentation to entice Amazon to locate the headquarters in the Louisville area, reportedly by offering \$2.5 billion in tax incentives. After Louisville was eliminated from consideration by Amazon, the Courier-Journal requested a complete copy of the city's proposal. Louisville Metro refused to disclose the proposal, even after ordered to do so by the Jefferson Circuit Court. Louisville Metro and the Cabinet of Economic Development continue to argue that, as with Braidy Industries, any disclosure would prevent the Commonwealth from engaging in development efforts in the future.

Currently the law requires our government agencies to turn over records related to business investments and development activities that are part of a final agency action, including incentive packages that have been definitively rejected or are part of final proposals, such as the one submitted to Amazon. The proposed bill would shield virtually every record pertaining to economic development from public disclosure, and permit the Kentucky Economic Development Finance Authority to use its administrative powers to declare records exempt from public disclosure. These changes would diminish the power of the Open Records Act to promote a transparent and accountable government, and would increase the likelihood of self-dealing, mismanagement, and short-sightedness by all public agencies engaged in economic development.

What Does House Bill 387 Do?

The bill would amend two sections of KRS 61.878, which outlines the narrow categories of public records exempted from disclosure. The proposed amendments would expand existing exemptions, create broad new exemptions, and empower a state agency to designate its own exemptions through the use of regulatory power:

KRS 61.878 (1)(c)

- **Expands** current exemptions for records that have been confidentially disclosed to an agency by adding an exemption for trade secrets.
- **Defines** “trade secret” to include “financial information, information regarding the identity or investment interest of shareholders, and present or future business plans.”
- **Expands** the current exemption to permit withholding public records if disclosure would permit an “unfair commercial advantage to *any person*,” rather than the current exemption, which is limited to commercial advantage from “*competitors of the entity that disclosed the records*.”
- **Creates** an exemption for records which are compiled or maintained for the grant or review of a license to participate in any “activity that is regulated by a public agency.”
- **Creates** a new exemption, permitting the Kentucky Economic Development Finance Authority to declare records confidential through administrative regulations, rather than through the general assembly.
- **Redefines** final action for records that pertain to proposed economic development incentives, permitting disclosure only after “acceptance by the grantee and approval by the relevant public agency.”

KRS 61.878(1)(d)

- **Expands** current exemptions pertaining to a prospective business location within the Commonwealth by also exempting records pertaining to a prospective location “within states, territories, or countries with whom the Commonwealth had a reciprocal economic development agreement at the time of the creation or receipt of the records.”

The definition of “trade secrets” proposed in the bill is at odds with how that term is currently defined in Kentucky law, how it is commonly understood, and how it has been applied in judicial precedent. Currently, trade secrets refers to “information, including a formula, pattern, compilation, program, data, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.” The bill, however, would shoehorn a new definition into the Open Records Act that protects the identity of shareholders, with no purpose other than to circumvent the court order requiring disclosure of that information. The purpose of refusing to disclose records relating to the other shareholders of Braid Industries, and now attempting to amend the law to avoid disclosure, is to shield elected officials from public scrutiny. When the Governor can unilaterally order the allocation of \$15 million to a private industry, the public has a right to understand the nature of that investment.

The other revisions are designed to codify the position of the Cabinet for Economic Development that all development activities, tax incentive packages, and business attraction efforts should be exempt from disclosure to the public until the business has accepted a finalized package.

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The public would never have a right to know what tax incentives were offered to private corporations until those offers were enacted. Preliminary documents created during unsuccessful negotiations would never be available for public disclosure. Again, these actions can only be understood as an attempt to shield elected officials from public scrutiny, and to stifle public debate around the appropriate use of tax incentives or tax giveaways to private businesses.

Most troublingly, the bill would grant an agency the sole power, through administrative action, to exempt any records, with no limitation of any kind imposed by the General Assembly. This is a breathtakingly broad grant of authority to a single agency, and a surprising display of hypocrisy from an administration that prides itself on revoking regulations and limiting regulatory power. It also runs counter to the spirit of the Open Records Act, which mandates disclosure of all records unless expressly exempted by the General Assembly. When the power to decide which records are exempt resides within a public agency, the mandates of the Act are merely illusory. The public has a right to know what its public agencies are doing, particularly when it involves the allocation and collection of tax dollars, as is generally the case with economic development activities. The Cabinet has repeatedly refused to disclose records which the law requires should be made available to the public, now the legislature proposes to arm the Cabinet with the authority to bend the law to its own whims.

Conclusion: House Bill 387 is Harmful and Unnecessary.

The bottom line is that House Bill 387 is a continuation of a blatant and troubling campaign to create special rules for economic development activities. As companies, like Braidy and Amazon, become more direct in their attempts to secure tax incentives and public funds, the law must respond by affording the public with enhanced oversight of its public officials. Instead, the state's political leaders chafe at the prospect of being held accountable to the public and attempt to rewrite the law to permit them to operate in the dark in the future. Economic development is a highly political and politicized activity; it has the potential to alter the make-up of a community and to reallocate significant public funds to private enterprise. In order to avoid the likelihood of mismanagement, short-sighted decision making, and self-dealing; economic development activities must continue to be subject to disclosure under the Act.

Those that support the bill will employ scare tactics, suggesting that employers will eschew Kentucky in favor of other states that provide less strenuous oversight protections to the public. These arguments are disingenuous. From the Yum! Center, to Amazon's NYC headquarters, to Foxconn, there is no shortage of stories about ill-conceived incentive programs that failed to deliver the promised benefits to the public. The public interest is best served by a continued commitment to accountability and transparency. This bill runs counter to that promise, and it must be opposed.