Kentucky Press Association
Statement of Opposition to SB 193

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The Kentucky Press Association continues to strongly oppose SB 193, a bill that would change the operation of the state's Open Records Act in troubling, untested, and unmanageable ways. KPA opposed this bill's precursor, BR 821, as an unwise and dangerous bill that would have rolled back decades of significant precedent that made Kentucky a national leader in government transparency. While we were pleased to have an opportunity to meet with the bill's sponsor to discuss our concerns, and appreciate some of the changes made in this version, we continue to oppose this bill as unnecessary and unworkable.

The bill goes far beyond its asserted goal of supposedly protecting the private information of certain public employees (police officers, prosecutors, judges, investigators, etc.). This bill would profoundly change the incentives for complying with existing rights under the Open Records Law. For example—and for the first time ever—this bill would subject public employees to *personal financial liability* for disclosing certain public records.

Neither the bill's sponsors nor its still-unnamed authors have offered even a single example of when a public employee was harmed because of information that was released under the Open Records Act. Of course, such information has been readily available for decades or more online or through state tax, property, and political contribution records.

Simply put, this bill continues to be a dangerous solution in search of a real problem. The law goes so far beyond its asserted purpose—to shield information that already is subject to withholding under the Open Records Law—that it can only be seen as a direct assault on transparency and Kentuckians' right to know what their government is doing in their name. KPA remains firm in its conviction that no legislator can support this bill and call themselves a champion of transparency.

What is SB 193?

SB 193 is a bill proposed by Kentucky State Senator Danny Carroll that threatens to eviscerate the Open Records Act. Senator Carroll has said the bill is intended to shield the personal information of some (but not all) public employees, despite the fact that the Open Records law has contained such protections since its enactment in 1976. If enacted, however, this bill would do much more than protect private information. It would create new uncertainty about longstanding interpretations of the Open Records Act; incentivize records custodians to deny valid requests for records; and enact a system that will be difficult—if not impossible—to administer.

What Does SB 193 Do?

SB 193 creates several new provisions of Kentucky law that would dramatically alter the way the Open Records Act currently works.

Section 1 of the bill adds new definitions to the law, including definitions of "public record" and "public agency" that are different from and arguably in conflict with those already contained in the Open Records and Open Meetings laws. KPA believes it is unwise to have two separate definitions of these terms in the same Act, and that the narrow definitions contained in SB 193 risk seriously undermining the public's right to obtain information from a wide array of agencies and officials who have been subject to transparency mandates for over 40 years.

Section 2 of the bill contains several provisions that dramatically restrict the public's right to access information about its agencies and employees. Key provisions include:

> **Section 2(2)** specifies the agencies and employees to which the new rules apply. Those include, but are not limited to, police officers and other "sworn public peace officers," public safety officers, first-responders, judges, Commonwealth and United States Attorneys, corrections and parole officers, and emergency call center workers. The bill also covers employees of the Cabinet for Health and Family Services who are involved in investigating allegations of child abuse and neglect.
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> **Section 2(1)** defines the information that is no longer accessible to the public upon request of one of the individuals specified in Section 2(1). That litany of information includes, but is not limited to, basic contact or identifying information about an employee or their family members, financial information, photographs, and any information otherwise publicly available from a county clerk, such a lien and permit information.
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> These broad categories of information are troubling and will be difficult—if not impossible—to administer. For example, the public has always had access to public information about recorded deeds and liens maintained in county clerk's offices. SB 193 purports to put those off limits upon request, but it does not answer several basic questions about how that would work. For example, if a county clerk received a request from a covered employee (including a former government official), how would they verify that person qualifies for protection? And how would they seal the relevant portions of the deed book or lien documents that are otherwise open for public inspection? Similarly, how could title companies and mortgage lenders perform routine tasks essential to the basic functioning of commerce if that kind of information is hidden from the public? More importantly, how would anyone know that the employee has requested such protection?
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> Other categories of information are equally troubling. Information about employees' address and other information is publicly available in a wide range of information, including voter registration records, campaign finance contribution records, and even the white pages. The bill does not explain how an agency could make this

information private again when it is already public in myriad ways. Moreover, having basic address or birthdate information about an individual is often essential when it is not otherwise clear whether a public record is referring to a particular person with a common name.

Other categories of exempt information are so vaguely defined that it is impossible to identify exactly what types of information would fall into them, or how a court would choose to define them. For example, the bill prohibits disclosure of "financial information" but does not elaborate on exactly what type of information falls into this broad category. Would that cover information about a public employee's salary or accusations that senior officials were paid well above the typical range for their position (another issue that was disclosed multiple times in recent years thanks to the Open Records law)?

Another poorly-defined category of records that SB 193 exempts is "personal photographs not publicly released by the person on social media." Here again, the bill doesn't explain what counts as a "personal photograph." For example, law enforcement and others have body cameras which often contain images of law enforcement personnel. Would the release of these images be prohibited despite the fact that the 2018 General Assembly enacted a law specifically dealing with body cameras? Moreover, would this new exemption extend to a screen shot of a text message in which a public official was conducting agency business?

Many of the remaining categories of exempted records are already covered by the Open Records Act. For example, the Open Records Act currently exempts records if disclosure "would constitute a clearly unwarranted invasion of personal privacy." This is a standard that has been interpreted in the courts and in practice to limit disclosure of social security numbers, personal telephone numbers, and other personal identifying information. BR 821, however, needlessly itemizes a litany of exempted identifying information.

These examples are not a comprehensive list of the shortcomings of SB 193. The bill is inconsistent in its drafting and application. This bill does little more than use broad, vague language to either reiterate current law, or deny the public access to records that would ensure accountability by some of the most powerful public employees.

Section 2(6) delineates the narrow circumstances in which the information described above can be released: (1) with the "express written consent of the person or recipient" named in the record; (2) in a medical emergency; (3) with a court order obtained with a showing of good cause; and (4) upon a request by another state agency.

Section 3 of the bill governs the disclosure of social security numbers and allows for the commercial use of social security numbers in certain purposes. This commercial use seems inconsistent with the bill's asserted purpose of limiting the disclosure of sensitive personal information.

Sections 4 and 5 of the bill create new rules for obtaining information about "third party contractors." These provisions appear to be designed to upend existing law, which renders any entity that receives at least 25% of its funding in a given year from state revenues subject to the act (with limited exceptions). This bill would appear to prohibit making Open Records requests to such contractors and instead requires the requests to be directed to the agencies with which those parties have contracted.

Section 6 dramatically alters the current enforcement mechanisms of the Open Records Act. For the first time, the law imposes personal liability on state officials who disclose information protected by SB 193, making them liable for up to $500 per violation of the law. This provision appears designed to encourage records custodians to err on the side of redacting and withholding information. Conversely, there is no penalty imposed on individual workers who wrongfully deny requests under the Open Records Act.

The bill also provides a private right of action to covered employees to challenge disclosure of applicable records directly in the courts.

Section 7 of the bill provides that its provisions are retroactive to information held on or before the effective date of the statute.

Conclusion: SB 193 Is Harmful and Unnecessary.

The bottom line is that SB 193 is unnecessary. The law already shields the legitimate privacy interests of all Kentuckians against unwarranted disclosures. This bill would introduce ambiguity and uncertainty into the law, and risk discouraging public employees from fulfilling their obligations under the Act on threat of personal liability. The bill should be rejected.

Where can I find additional information about the bill?

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