

Kentucky Press Association
Statement of Opposition to RS BR 985

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The Kentucky Press Association strongly opposes RS BR 985, a bill that is in clear violation of the First Amendment of the United States Constitution and Section 1 of the Kentucky Constitution. The bill would have profound and detrimental effects on the operation of the Commonwealth's Open Records Act which has made Kentucky a national leader in governmental transparency.

The bill goes far beyond its purported goal of protecting the private information of certain public employees (police officers, prosecutors, judges, and administrative hearing officers). The bill will unconstitutionally criminalize the publication of even the most basic identifying information—like someone's name—even if that information is already widely publicly available. The bill will also reverse the incentives in place encouraging compliance with the Open Records Act because for the first time ever, RS BR 985 will subject records custodians to criminal prosecution and personal financial liability for disclosing certain public records.

The Kentucky Press Association takes threats to public employees seriously. But this bill is not a serious response to those threats. The bill's sponsors have not, and cannot, offer a single example of when a public employee was harmed because of information that was released under the Open Records Act. Of course, public information—such as a person's name and address—has been publicly available for decades in numerous forums such as The White Pages, state tax records, property titles, and political contribution records to name a few.

Put simply, this bill is a solution in search of a problem. The law is so broadly written as to go far beyond its supposed purpose. It can only be described as an assault on transparency and Kentuckians' right to know what their government is doing in their name. KPA is firm in its conviction that no legislator can support such a draconian bill and call themselves a champion of government transparency.

What is RS BR 985?

RS BR 985 is a bill proposed under the guise of protecting the personal information of some (but not all) public employees. But the Open Records Act has provided such protections since its enactment in 1976. If passed, RS BR 985 will go far beyond protecting private information. It would violate the free speech protections enshrined in the United States and Kentucky Constitutions by criminalizing almost any speech related to certain public employees. It would create new uncertainty about longstanding interpretations of the Open Records Act; incentivize records custodians to deny requests for records (because publication will expose them to criminal prosecution and personal financial liability); and create a system that will be difficult—if not impossible—to administer.

What does RS BR 985 do?

RS BR 985 creates several new provisions that would dramatically alter the way the Open Records Act currently works.

Section 1 of the bill adds new definitions to the law that drastically narrow the scope of the Open Records Act. Most odious is **Section 1(1)(e)** which defines “personally identifiable information” to include, among other things: First and last name; Date of Birth; Home or physical address, including...property tax or property ownership records; Birth and marriage records; Electronic mail address, or other personal e-mail addresses; and Home, personal mobile, or direct telephone number to the individual.

Section 1(1) defines the categories of public employees the new rules would protect. They include judicial officers, prosecutors, law enforcement officers, and immediate family members of those public employees. The definitions include all current, former, and retired judicial officers, prosecutors, and law enforcement officers. In short, anyone who ever served in any of these capacities—or is related by marriage or blood to, and lives with, them—is covered by the act in perpetuity.

Section 1(2) of the bill exempts all “personally identifiable information” of judicial officers, prosecutors, and law enforcement officers from the Open Records Act.

Section 1(3) of the bill mandates that all “personally identifiable information” currently published under the control of a public agency must be redacted within 72 hours of the effective date of the Act.

Section 2 of the bill dramatically alters the current enforcement mechanisms of the Open Records Act. The law, for the first time, imposes criminal and civil liability on state officials who disclose information protected by RS BR 985. Alarming, it adds new sections to the Kentucky Penal Code Chapter governing Riots, Disorderly Conduct, and Related Offenses exposing not just records custodians but all Kentuckians to draconian prison sentences for publishing even the most benign publicly identifying information of judges, prosecutors, and others defined by the law as “law enforcement officers.” Key provisions include:

Section 2(2)(a) specifies the agencies and employees to which the new rules apply. Those include law enforcement officers, judicial officers, prosecutors, and family members of those public employees.

Section 2(3) renders the inadvertent dissemination of personally identifiable information a Class A misdemeanor (subject to imprisonment for up to 12 months). If the dissemination is intentional it is a Class D felony (subject to imprisonment for up to 5 years).

Section 2(4) requires any person that has published any personally identifiable information before the passage of this bill to remove the information within 7 days of the effective date of the Act or within 72 hours after receiving a written request from the law enforcement official or immediate family member affected by the publication, whichever occurs first.

Section 2(5) imposes personal civil liability for anyone who publishes personally identifiable information regardless of the outcome of any previous criminal prosecution, including actions for punitive damages, court costs, and attorney’s fees.

As written RS BR 985 criminalizes such broad categories of information that would inevitably produce absurd and unworkable results. The bill’s sponsor, Representative Blanton, is a retired Kentucky State Trooper and therefore can provide some instructive examples. Within 7 days of the passage of his bill, Representative Blanton would have to scrub all personal identifying information of himself and his family—including their names and any other information that could be used to identify them—from his campaign website, www.blantonforkentucky.com. The Legislative Research Commission would not be permitted to publish his name as a sponsor of this bill; indeed, it must take down his legislative biography from its server altogether, and cannot publish any information about votes that he takes. The Salyersville Independent, Representative Blanton’s local newspaper, would not be able to publish a story mentioning his support of this bill. In fact, it will no longer be able to publish any stories about him at all. Its failure to censor this information could result in a five-year prison sentence. For the same reason, members of the General Assembly could not tweet their support of, or opposition to Rep. Blanton’s bill using his name. Further, members of the public would be prohibited from requesting any records that even refer to Rep. Blanton from the KSP, including personnel records, salary information, or disciplinary files (if any).

The absurdity does not end there. Governor Andy Beshear is a former Attorney General of the Commonwealth of Kentucky. This bill would make it a felony for anyone to publish the Governor’s name and address—which is, of course, 704 Capital Avenue, otherwise known as the Governor’s Mansion. Representative Blanton has on several occasions violated his own proposed bill. For example, on May 24, 2020 Representative Blanton tweeted a denouncement of protestors who burned Governor Beshear in effigy in front of the Governor’s mansion. That tweet is a felony under Representative Blanton’s bill.

Beyond the parade of absurdities RS BR 985 creates, the bill will have profound detrimental effects on transparency concerning even the most basic functions of government. The bill will make it a felony for a reporter to publish the happenings of routine court proceedings that are open to the public. For example, members of the Kentucky Press Association recently reported on open court proceedings in the prosecution of Louisville Metro Police Officer Brett Hankinson, who has been charged in the killing of Breonna Taylor. The article mentioned the defendant (Officer Hankinson), the presiding judge (Judge Ann Bailey Smith), Attorney General Daniel Cameron, and the Assistant Attorney General who argued the motion.¹ This article, and any reporting on a federal or state judicial proceeding which names the presiding judge, would be criminalized by this bill. In fact, courts across the Commonwealth will have to remove the names, photographs, addresses, phone numbers, and e-mail addresses of elected judges and sheriffs from their websites, depriving the public of crucial information necessary to bring claims to court.

Likewise, the Kentucky Registry of Election Finance (“KREF”) records the name, address, and occupation of all political donors in the Commonwealth of Kentucky. This is an important safeguard against corruption. Under this bill, KREF will be required to scour its entire database for political donations from current or former judges, prosecutors, law enforcement officials and their

¹ Kala Kachmar, *Officer’s records in Breonna Taylor shooting will be public with restrictions, judge rules*, The Courier-Journal, (Nov. 11, 2020).

families and remove all identifying information from public view. Many judges, prosecutors, and law enforcement officers in Kentucky are elected officials. Access to their political donations is important for the public to make informed decisions at the ballot box. This bill insulates these elected officials from public scrutiny.

The bill would conceal from public view any information concerning disciplinary records and investigations into law enforcement conduct. This information is vital to the public's oversight of a crucial civic institution. Recent reporting has exposed Louisville Police Detective Mark Handy's habitual perjury, resulting in the release of several wrongfully convicted Kentuckians;² Louisville Metro Police Department Officer's sexual abuse of children in the Explorer Scout Program;³ and the events leading to the shooting death of Breonna Taylor.⁴ Under RS BR 985, exposing these actions—some of which resulted in federal convictions of the officers involved—would be a crime punishable by up to five years imprisonment.

The bill will make it impossible to conduct routine business throughout the Commonwealth. For example, the public has always had access to information about recorded deeds and liens maintained in county clerk's offices. RS BR 985 purports to make those off limits if they contain personal information of a law enforcement officer or their family member, but it does not answer several basic questions about how that would work. For example, how would a county clerk even know which deeds or liens are held by law enforcement officers or their family members in order to redact that information from public records? How would 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?

Information about individual's name and address 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, private company, or individual could make all the required 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.

These examples are not a comprehensive list of the shortcomings of RS BR 985. The bill is inconsistent in its drafting and application. It does little more than use excessively broad, vague language to either reiterate current law, or deny access to records that are vital to ensuring accountability of some of the Commonwealth's most powerful public employees.

This is unacceptable, particularly since the current law already protects the private information of law enforcement officers and all other public employees. The Open Records Act 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. RS BR 985 not only

² Natalia Martinez, *Deputy's past brought back into question after 25 years of allegations*, Wave3 News, (December 18, 2017).

³ Mike Trautman, *A timeline of events in the Louisville Explorer Scout program sex abuse scandal*, The Courier-Journal, (Nov. 11, 2020).

⁴ Tessa Duvall, *Breonna Taylor shooting: A minute-by-minute timeline of the events that led to her death*, The Courier-Journal, (September 23, 2020).

needlessly itemizes a litany of exempted identifying information, but it also criminalizes publication of that information, even if it is benign and widely publicly available through other means.

Conclusion: RS BR 985 is Unconstitutional, Unnecessary, and Harmful.

RS BR 985 unconstitutionally criminalizes free expression. It is an unnecessary solution in search of a problem. The law already shields the legitimate privacy interests of law enforcement officers, and all Kentuckians, against unwarranted disclosures. This bill will introduce ambiguity and uncertainty into the law and forbid public employees from fulfilling their obligations under the Open Records Act for fear of criminal prosecution and exposure to civil liability.

“The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them.”⁵ RS BR 985 is nothing short of an unconstitutional assault on government transparency. It should be roundly rejected.

Where can I find additional information about the bill?

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⁵ Patrick Henry, Speech on the Expediency of Adopting the Federal Constitution, Delivered in the Convention of Virginia (June 9, 1788).