January 24, 2022

Senator Robert Stivers and Members of the Senate
702 Capital Avenue
Annex Room 236
Frankfort, KY 40601

Re: Statement of Opposition to Senate Bill 63, amending the Open Records Act

Dear Senator Stivers and Members of the Senate:

The Kentucky Open Government Coalition opposes Senate Bill 63, "An act relating to personal information" and amending the Open Records Act.

The Coalition is a nonpartisan Kentucky nonprofit corporation founded in 2019. We are one of 39 citizen-driven state, territory, and district members of the National Freedom of Information Coalition.

From our inception, the Coalition has identified transparency and accountability as core principles. Our purpose is to enhance public understanding of, and preserve existing public rights under, the Kentucky open records and meetings laws. We serve as a citizens' voice for open government.

It is our position that Senate Bill 63 -- however well-intentioned -- is an ill-conceived, poorly drafted, largely unworkable, and wholly unnecessary proposal. SB 63's unintended consequences will adversely affect both the public and public officials by creating additional burdens on each and eliminating few, if any, of the ills it targets.

Our objections to SB 63 focus on its failure to acknowledge or address the challenge of implementation and resulting chilling effect on public access, the redundancy of the protections it purports to extend, and the fundamental shift from the open records law as a disclosure law to a nondisclosure law.

Before Senators cast their votes on SB 63, the Coalition urges them to ask the following questions.

1. **Does this bill provide clear guidance to public agencies and the public on implementation and enforcement?**

   The primary impetus for SB 63 is the legislative finding that "personal information is easily published over the Internet and social media and there has been an increase in death threats and death of judges and other public officials." It is loosely modeled on a New Jersey law, "Daniel's

Law," enacted in 2020 following the fatal attack on the son of a federal judge, at the judge's home, by an assailant who obtained the judge's home address from the internet.

The New Jersey law prohibits disclosure of the home addresses and unpublished telephone number of active and retired judges, prosecutors, and law enforcement officers as well as their immediate family members. It permits them to request removal of the information from a government agency's website. Removal must be accomplished within 72 hours of the request. The law creates a civil process for violations and criminalizes the publication, sharing, or reposting of the information.

Within a year of its enactment, New Jersey municipal officials recognized a need for guidance in handling "routine business" and "records normally released to the public in the name of transparency." "Perhaps more challenging," municipal officials noted, "will be sifting through records to find out not only who is defined as an officer of the court or a law enforcement officer but who constitutes an 'immediate family member.'"

As a result of these "implementation challenges," legislation was introduced in New Jersey (A-6171/S-4219) in late 2021 "and is fast-tracked." The New Jersey bill would:

- Create an Office of Information Privacy in the Department of Community Affairs to establish a secure portal for those covered under Daniel's Law to submit or revoke a request for the redaction or nondisclosure of their home address;
- Require a public agency to redact or cease to disclose the home address no later than 30 days following the approval from the Office of Information Privacy;
- Require the person making the request to acknowledge that certain rights, duties, and obligations are affected as a result of the request;
- Enumerate exceptions to the requirement to redact and the prohibition against disclosure of home addresses;
- Exclude specifically identified documents from the requirements of Daniel's Law:
- Require "reasonable efforts" to hide addresses from documents that, because of their characteristics or properties, are only available to be viewed in person;
- Clarify that local governments are not required to redact any information in any document, record, information, or databased shared with any other government and that any information required to be redacted can be unredacted upon a judge's order; and
- Contain an emergency clause and a retroactivity clause to December 10, 2021.

In a recent report, the Owensboro Messenger Inquirer quoted two property valuation administrators who expressed concern about their ability, as well as the ability of county clerks, to conduct "a lot of regular business." William "Mack" Bushart, executive director of the Kentucky

Property Valuation Administrators Association, noted that much of the "protected" information is, in all likelihood, already available elsewhere.

New Jersey's experience with "Daniel's Law" should be a cautionary tale for Kentucky law. SB 63 is more extensive in its coverage. It defines "public officer" far more broadly, including, but not limited to, first responders, social workers, law enforcement experts/technicians who testify at trial, jailers and jail staff. It is also broader in scope, defining "personally identifiable information" to include, among other things, birth and marriage records tax or property records, email addresses, vehicle information, employment locations, and financial information.

The "implementation challenges" associated with New Jersey's "Daniel's Law" are therefore compounded in Kentucky. To properly vet a Kentucky bill modeled on "Daniel's Law" requires meetings at which representatives of all stakeholders – including affected public officials, the public, the media, and the officials and employees to whom the protection extends – are present and engaged in a measured and meaningful discussion. Kentucky lawmakers must not act in haste, lest we – like New Jerseyans -- repent in leisure.

2. **Does existing law provide adequate protection for the information identified in SB 63 or is an amendment to the Open Records Act necessary to extend privacy protection?**

The starting point for the Senate's discussion should focus on whether the Kentucky Open Records Act already provides adequate protection for the "personally identifiable information" SB 63 targets. If so, the superimposition of this complex statutory mechanism for extending additional privacy protection is, at best, redundant, and at worst, an "implementation challenge" that will bring the nearly half century old law and standard business operations to a grinding halt by forcing the public as well as public agencies to double guess each request, use, and disclosure.

Kentucky's open records law includes, and has always included, an exception for "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" at KRS 61.878(1)(a). "Judging by order, if nothing more," the Kentucky Supreme Court opined in 1992, "one might say that (1)(a) is the foremost exception to the disclosure rule." In the referenced 1992 case, the Supreme Court established the test by which access to records containing personal information is reviewed:

"Given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance."

The personal privacy interest in information appearing in a public record is premised on "[o]ne of our most time-honored rights, the right to be left alone." The public's interest is premised on the right "to be informed as to what their government is doing."

The “personally identifiable information” that SB 63 targets, including “health, medical data, insurance information; birth and marriage records; date of birth; financial account number or credit or debit card number; home address; home, personal mobile, or direct personal telephone number; children/dependents; personal email addresses; Social Security number; and vehicle registration,” has consistently been deemed excepted from public inspection under the personal privacy exception founds at KRS 61.878(1)(a). The public officer’s substantial privacy interest in nondisclosure is superior to the negligible public interest in disclosure since “disclosure of the information would do little to further the citizens' right to know what their government is doing and would not in any real way subject agency action to public scrutiny.”

This is the litmus test.

Only in the rarest of cases would the open records law require a different outcome. The addition of a new exception for “personally identifiable information in records that would reveal the address or location of a public officer if that officer has notified the public agency responsible for those records that he or she does not want the information to be made public” is therefore redundant and an impediment to the public’s right to know in those rare cases where, for example, a public official’s mandatory residency has been questioned. In vetting information for public facing websites, public agencies are aware of this tension and charged with ensuring adequate protections.

3. **Is the problem which SB 63 seeks to remedy actually remedied by this fundamental shift in the Kentucky Open Records Act from a disclosure law to a nondisclosure law?**

This, finally, is the question that Senators must answer before they cast their votes. In the final analysis, that answer turns on the extent to which the Senate is prepared to abandon nearly fifty years of open government law, and the legislative recognition that “free and open examination of public records is in the public interest,” in favor of a new law that will fundamentally shift the Open Records Act from a disclosure law to a nondisclosure law with no appreciable benefit to public officers, public agencies, or the public.

The Open Records Act is wrongly scapegoated for the death of a New Jersey judge’s son in 2020, the death of a local prosecutor in 2000, and the rise in threats against judges, prosecutors, and law enforcement officers. The information used to target these individuals was not obtained through the very public process of a statutorily regulated open records request to a public agency and the agency’s statutorily regulated response.

As Kentucky Property Valuation Administrators Association executive director William “Mack” Bushart, is quoted as having observed in the January 10 Messenger Inquirer report, much of the information that would be excluded under the bill is likely already available elsewhere.

“My thought is if you Google someone’s name, a lot of time that stuff pops up.”

> The Open Records Act nevertheless recognizes that personal information, though "often publicly available through [other] sources . . .is no less private simply because that information is available someplace." That personal information is, and always has been, treated circumspectly under the Act.

We ask Senators to carefully consider upending the forty-seven year old Open Records Act in the faint hope of eradicating a far more pervasive societal malaise.

The Kentucky Open Government Coalition welcomes the opportunity to discuss SB 63 with its sponsor, other lawmakers, and all stakeholders.

Respectfully submitted,

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