

By Amye Bensenhaver

Jennifer Brown and I were scheduled to testify on behalf of the Kentucky Open Government Coalition before the Joint Interim Committee on Judiciary at this Friday's meeting. At the invitation of Co-Chairman Senator Whitney Westerfield, we were to share our concerns about SB 193, introduced by Senator Danny Carroll in the 2019 regular session of the General Assembly.

The bill was not voted out of committee but is expected to be re-filed in the next regular session. (The version of SB 193 that appears on the LRC website is the "placeholder" for the multi-page bill that failed to pass out of committee. A copy of that version of the bill is not available on the LRC website.)

This morning we learned that discussion of SB 193 has been removed from the agenda for Friday's legislative committee meeting. To his credit, Senator Carroll is working with representatives of the Kentucky Press Association to address widely held concerns about the bill's impact on rights guaranteed by the open records law.

While we would welcome the opportunity to participate in these discussions, we have not been included.

However, we wish to make our position known. We are posting the comments we intended to share with the Interim Committee this Friday. We remain hopeful that we will be included in the discussion and will continue to make efforts toward that end.

Here are our prepared comments:

Our thanks to Chairman [Whitney] Westerfield and Chairman [Jason] Petrie for permitting the Kentucky Open Government Coalition to present our concerns about Senator [Danny] Carroll's bill [SB 193] to the [Interim Joint Committee on Judiciary].

Our purpose here today is twofold. First, our purpose is to dispel the belief that there is an existing problem with Kentucky's open records law that necessitates a legislative fix. Second, and just as important, our purpose is to identify the problem that this bill will actually create.

We speak on behalf of Kentuckians, your constituents, many of whom, regardless of political party affiliation, share our commitment to open government and to preserving the public's rights under the open records and meetings laws. These are rights Kentuckians have enjoyed for well over 40 years. This bill poses a threat to those rights.

For 25 of those 40 years, I served as an assistant attorney general. I worked exclusively in the area of open records and open meetings. My chief duty was writing open records and open meetings decisions, but I also responded to questions about the open records and meetings laws from public agencies and officials, members of the public, and the media. I regularly made presentations on our open government laws to public officials, records custodians, and citizens across the state.

I know this law. I know its strengths and its weaknesses. I know where improvements are needed. I know the challenges public agencies face in fulfilling their duties under the law, and I know the challenges the public faces in enforcing its rights under the law.

An unnecessary fix

The problem this bill is intended to address simply does not exist. Twenty-five years of mediating open records disputes taught me that Kentucky's public agencies do not release personal information about their employees. Public agencies are more apt to withhold unprotected information about their employees than they are to disclose protected information.

Under the privacy exemption to the open records law, the analysis is very simple.

If a record, or information in the record, is unrelated to a public employee's qualifications for public employment, the nature of his public duties, or the discharge of his public duties, it is exempt. It is NOT accessible to the public. The employee's privacy interest in his personal life is superior to the public's right to know. Disclosure of personal information tells the public nothing about how the employee, or the agency that employs him, discharges their public duties.

If, on the other hand, the record, or information in the record, is related to a public employee's qualifications for public employment, the nature of his public duties, or the discharge of his public duties, it is not exempt. The public has a right to know that the employee qualified for the position he holds, what his duties are, and that he is faithfully performing those duties. The employee's privacy interest, if any, must yield to the public's right to know.

That right is premised on the public's right to expect a public agency to properly execute its statutory duties and to confirm that the agency's employees are indeed serving the public.

It is a simple and workable formula that has been tested over time and survived legal challenge. The public and public agencies understand and apply it.

Home address, home and personal telephone numbers, birthday, personal financial information, social security number, medical information, personal email address, marital status, and number of dependents, have always been protected from public inspection with respect to all public employees, state and local.

Records confirming that the employee is qualified for the position he holds, what his duties are, whether he has been recognized for outstanding performance or disciplined for failure to perform them, have always been available to the public because they advance the public's ability to monitor how the agency conducts the public's business. This includes pertinent parts of a job application, job description, commendations, disciplinary actions, timesheets, letters of resignation, and in some cases performance evaluations. These records are accessible to the public.

Respectfully, SB 193 addresses a problem that does not exist. I know of no case in Kentucky in my now 28 years of working in this area of law in which protected personal information about a public employee has been disclosed. SB 193 is, as has been stated, a solution looking for problem.

And, the bill creates its own problems

This leads us to our second point: SB 193 actually creates a problem in interpretation and application of the open records law that threatens the public's right to know.

The most remarkable feature of Kentucky's law is its simplicity. It is a "user friendly" law that is written in a such a way as to make it easily understandable to a lawyer or a layman, regardless of education or income. Every person can use it and with few exceptions every person stands in the same shoes under the law.

SB 193 establishes a separate and competing body of law that cannot be reconciled with the existing open records law. It establishes narrower definitions of terms as basic as "public agency," "public record," and "commercial entity/activity" that are at odds with the definitions of those terms in the open records law.

It imposes layers of additional regulation that will create impediments for the public and public agencies where there is no need, and it may come at additional cost to the public as well as public agencies.

It is unclear whether SB 193 has proceeded to a point where its fiscal or regulatory impact has been analyzed, but the burden on public agencies which it imposes will almost certainly manifest itself in additional agency costs that may in turn be passed on to the public.

Under the current open records law, the personal information identified in Section 2 Sub 1 of SB 193 is already protected from public inspection as it relates to ALL public employees and not just those identified in Section 2 Sub 2.

Under an existing provision of the current open records law, KRS 61.878(5), public agencies exchange protected information, under term of confidentiality, if the exchange serves a legitimate governmental need or is necessary in the performance of a legitimate governmental function. The sharing of personal information, including social security numbers, by a third-party contractor, or for any purpose other than advancing the public's right to know how its public agencies function, does not belong in the discussion of a law aimed at securing the public's right to know.

The responsibility for ensuring that a public employee's personal privacy is not breached rests with the public agency. It is the agency — and ultimately the public — that will bear the costs of improper disclosures under the proposed body of complex and competing law SB 193 seeks to impose.

Because there is no demonstrated need for it and because it will create an additional burden on public agencies and the public at the expense of the public's right to know, the Kentucky Open Government Coalition opposes SB 193 in its current form.

(Amye Bensenhaver is a retired assistant attorney general who, for twenty-five years, specialized in Kentucky's open records and meetings laws. She is the co-founder of the Kentucky Open Government Coalition and serves as the coalition board's secretary.)