As Chairman of the House State Government Committee, and in anticipation of House Bill 509 being placed on the March 7 Committee Agenda, I am submitting the Kentucky Open Government Coalition's Statement of Opposition to House Bill 509.

I request that you ask Committee staff to place a copy of our statement in each committee members' meeting folder.

Thank you in advance.

Jennifer P. Brown

Amye Bensenhaver

(Co-founders and co-directors)

Kentucky Open Government Coalition

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﻿**The Kentucky Open Government Coalition opposes HB 509 as introduced.**

We oppose the bill because:

• redefining "public record" to exclude any record except a record "which documents, records, memorializes, or gives notice to a person outside the public agency of a transaction or final action" dramatically reduces the scope and application of the open records law, and the availability of public records for "free and open examination" to the detriment of the "public interest" recognized in the statement of legislative policy found at KRS 61.871;

• redefining "public record" to exclude eight categories of records, most of which are currently codified at KRS 61.878(1)((i) and (j) and referred to as the "preliminary documents exceptions" (for example, "drafts, notes, correspondence with private individuals"), ignores the statement of legislative policy recognizing that "the formation of public policy is public business" found at KRS 61.800;

• including new exclusionary language for "Information or documents stored or retained on a device or email account that is the personal property of a current or former employee, officer, board member, or commission member" ignores the longstanding recognition that it is the nature and content of the record, not the place where it is stored, that determines its status as a "public record" and destroys existing public rights.

**Arguments in support of this bill are false.**

• Public officials and employees personal cellphones and email accounts are not now, nor have they ever been, subject to involuntary surrender or seizure to fulfill an open records request on the same legal principle that a public official or employee is not required to involuntarily surrender a home file cabinet on suspicion that public records may be stored in the home file cabinet. No open records requester can successfully demand the surrender or seizure of a public official's employee's personal electronic device or personal accounts.

• In Kentucky Open Government Coalition v. Kentucky Department of Fish and Wildlife Resources Commission, the Kentucky Court of Appeals Ieft no room for doubt on this issue:

"While I concur with the majority’s Opinion, I write separately to assuage any concerns the Kentucky Open Records Act ('the Act') requires public agencies to turn over private cell phones

or that today’s holding will impose an extreme burden on agencies to identify and produce all public records generated on private cell phones or private email accounts. Our Opinion merely holds that 'text messages [or emails] related to Commission business and stored on personal cell phones [or personal email accounts] of its members are public records generally subject to disclosure under the Open Records Act absent an applicable exception.' Majority Opinion at 22, 28 (emphasis added).

Thus, only those public records not covered by an exemption would be subject to disclosure." <https://cases.justia.com/kentucky/court-of-appeals/2023-2022-ca-0170-mr.pdf?ts=1698415497>

• Imposing a statutory duty on public agencies to assign public email addresses to public officials and employees, restricting their conduct of public business to those accounts, and threatening them with possible discipline is a good step, but it will not eliminate the underlying problem.

Bad actors will continue to act badly, regardless of any statutory measures taken to discourage them from surrendering to the inevitable and cynical temptation to evade public accountability by using private electronic devices and personal accounts.

Kentuckians of all political views support the Open Records Act. They do not support HB 509.

**HB 509 must be revised/amended to:**

• eliminate the sections on pages 4 and 5 (redefining "public record) by restoring the original definition of "public record" (with no amendment);

• return the original exceptions, in their original form, to their original location at KRS 61.878(1)(a) through (s); and

• eliminate altogether the new exclusion for "Information or documents stored or retained on a device or email account that is the personal property of a current or former employee, officer, board member, or commission member."

Unannounced revisions to the bill in a committee substitute that reflect any of these changes are a welcomed starting point for discussion. A representative of the Kentucky Open Government Coalition, retired Assistant Attorney General Amye Bensenhaver, is available for these discussions and to address your concerns. Amye can be reached at (503)330-1816.

Respectfully,

Jennifer P. Brown

Amye Bensenhaver

(Co-founders and co-directors)

Kentucky Open Government Coalition