

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION \_\_\_\_\_  
NO. \_\_\_\_\_

Commonwealth of Kentucky, Office of  
Governor Matthew G. Bevin,

Plaintiff/Appellant

v.

American Civil Liberties Union  
of Kentucky

Defendant/Appellee

Serve:

Michael Aldridge, Registered Agent  
American Civil Liberties Union of Kentucky  
315 Guthrie Street, Suite 300  
Louisville, Kentucky 40202

\* *Electronically Filed* \*

**COMPLAINT & NOTICE OF APPEAL**

The Commonwealth of Kentucky, Office of Governor Matthew G. Bevin (the “Governor’s Office”), for its Complaint and Notice of Appeal against the American Civil Liberties Union of Kentucky (the “ACLU”), states as follows:

**INTRODUCTION**

1. This is an appeal from an open-records decision in which Attorney General Beshear concluded that the Governor’s Office must provide the ACLU with the keywords that the Governor’s Office uses to screen comments on the Governor’s official Facebook page. These keywords are used by a keyword filter provided by Facebook to automatically screen the thousands of comments

posted on the Governor's Facebook page each week to make sure that the publicly viewable comments are not profane, obscene, or clearly off-topic. This keyword filter saves the Governor's Office multiple hours each day that otherwise would be spent reviewing comments. In concluding that the Governor's Office must turn over these keywords to the ACLU, Attorney General Beshear disregarded well-established principles of law, imposed unmanageable burdens on all public agencies, introduced irreconcilable conflicts into the Open Records Act, and tried to assume for himself the job of dictating how the Governor's Office best accomplishes the people's business. The Court should reverse the Attorney General's decision.

### **PARTIES**

2. Pursuant to KRS 11.040(1), the Governor's Office is a "[p]ublic agency" within the meaning of KRS 61.870(1). The Governor's Office is located at 700 Capital Avenue, Suite 100, Frankfort, Kentucky 40601.

3. The ACLU is a Kentucky corporation. Its principal office is located at 315 Guthrie Street, Suite 300, Louisville, Kentucky 40202. Its registered agent is Michael Aldridge.

4. The ACLU's then-legal director William E. Sharp made the open records request at issue on behalf of the ACLU. Amy D. Cubbage has since replaced Mr. Sharp.

5. Under KRS 61.880(3), Attorney General Beshear is not a party to this action.

### **JURISDICTION & VENUE**

6. Jurisdiction and venue are proper in this Court under KRS 61.882(1) because the Governor's Office's principal office is in Franklin County, Kentucky.

7. The Court has personal jurisdiction over the ACLU due to its making of an open records request in Kentucky and its status as a Kentucky corporation with its principal place of business in Kentucky.

### **FACTS**

8. On July 31, 2017, two plaintiffs, represented by the ACLU, sued Governor Bevin over the use of his official Facebook page and Twitter account. *Drew Morgan, et al. v. Matt G. Bevin*, 3:17-cv-00060-GFVT (E.D. Ky.). Not content to wait until the Federal Rules of Civil Procedure permitted discovery, the ACLU decided to use the Open Records Act to circumvent the Civil Rules.

9. On September 18, 2017, the ACLU submitted an open records request to the Governor's Office for "all keywords used by the Governor's office to filter comments from appearing on Governor Matt Bevin's official Facebook account (GovMattBevin)."

10. Days before making this open records request, the ACLU had tried, and failed, to get these keywords through premature discovery in the lawsuit.

11. Facebook has a keyword-filter feature that allows the Governor's Office to automatically screen comments on Governor Bevin's official Facebook page based upon keywords. If a comment contains a specified keyword, the

keyword filter ensures, without further action by the Governor's Office, that the comment does not appear publicly on the Governor's Facebook page.

12. The Governor's Office uses this feature to keep profane, obscene, and clearly off-topic comments off of the Governor's Facebook page without having to review each comment individually.

13. The keywords are input into a dialog box in the "Page Moderation" section of Facebook.

14. Facebook does not have an option for printing the keywords, and the Governor's Office does not maintain a list of the keywords separate from the dialog box on Facebook. The only way to print the keywords is to print a screenshot of the dialog box.

15. The Governor's Office timely denied the ACLU's open records request.

16. The ACLU appealed this denial to Attorney General Beshear.

17. The Governor's Office timely responded to this appeal. A copy of that response as well as the accompanying affidavit of Amanda Stamper, Governor Bevin's Communication Director, is attached as Exhibit 1.

18. The Governor's Office provided three reasons to uphold its denial of the ACLU's open records request.

19. First, the keywords used in the keyword filter are not a "public record" under KRS 61.870(2). Instead, they are information.

20. Requests for information, as opposed to requests for a public record containing information, are outside the scope of the Open Records Act.

21. In addition, under the Open Records Act, a public agency need not compile a list or create a record in response to an open records request.

22. There is no public record in the possession of the Governor's Office that contains the keywords used in the Facebook keyword filter. Instead, those keywords are only contained in a dialog box on Facebook. As such, the keywords are information, not a public record, and therefore are not subject to the Open Records Act.

23. The Attorney General has previously held that the Open Records Act does not require a public agency to print screenshots of information. See 14-ORD-124 (holding that the Open Records Act does not require a public agency "to create a screen shot of each stop's coordinates").

24. Second, the keywords are not a "public record" because they do not qualify as "software" under KRS 61.870(3).

25. Under the Open Records Act, the term "public record" includes "software." KRS 61.870(2). The term "software," however, excludes "specific addresses of files, passwords, access codes, user identifications, or any other mechanism for controlling the security or restricting access to public records in the public agency's computer system." KRS 61.870(3)(a).

26. The keywords used in the Facebook keyword filter fall squarely within this exclusion from the definition of "software."

27. The keywords restrict a commenter's ability to post profane, obscene, or clearly off-topic comments on the Governor's Facebook page.

28. The keywords therefore are “access codes” under KRS 61.870(3)(a) because they determine which comments appear publicly on the Governor’s Facebook page. In other words, the keywords play a gatekeeping function on the Governor’s official Facebook page.

29. The keywords also “control[] the security” and “restrict[] access” for commenters under KRS 61.870(3)(a). With the keywords in hand, a commenter could post profane, obscene, or clearly off-topic comments at will merely by intentionally misspelling a keyword (by, for example, changing an “s” to “\$”). The Open Records Act does not require the Governor’s Office to educate commenters on how to bypass the Governor’s Facebook keyword filter.

30. Third, the Open Records Act does not require the Governor’s Office to turn over the keywords because doing so would place an “unreasonable burden” on and would “disrupt other essential functions” of the Governor’s Office, both in violation of KRS 61.872(6).

31. Ms. Stamper’s attached affidavit establishes as much by clear and convincing evidence, as required by KRS 61.872(6).

32. Ms. Stamper avers that the keyword filter serves a crucial function: it automatically screens profane, abusive, or clearly off-topic comments, thereby saving the Governor’s Office significant time—literally several hours each day.

33. The amount of time that the Governor’s Office spends screening Facebook comments each day would increase dramatically if commenters knew how to circumvent the keyword filter.

34. If the keyword filter is no longer effective, as would be true if the keywords were publicly disclosed, the Governor's official Facebook page would need to be constantly monitored at all times of the day and night, lest it be overrun with profane, obscene, or clearly off-topic comments.

35. According to Ms. Stamper's affidavit, this real-time monitoring of the Governor's official Facebook page would require the Governor's Office to hire additional full-time staff or to divert meaningful attention from other essential functions of the Governor's Office.

36. New posts are placed on the Governor's official Facebook page numerous times each week, often twice in the same day.

37. Each post is received by more than 120,000 followers.

38. To get a flavor of the volume of comments received on the Governor's official Facebook page, consider the following: As of October 3, 2017, the Governor's posts from August 21-27, 2017 had already prompted over 4,000 comments. For posts from August 28-September 3, 2017, that number is over 10,000.

39. This volume of comments on the Governor's official Facebook page establishes by clear and convincing evidence that publicly disclosing the keywords used in the filter would create an unreasonable burden and would disrupt other essential functions of the Governor's Office, in violation of KRS 61.872(6).

40. Attorney General Beshear nevertheless ruled against the Governor's Office, finding that the keywords are subject to disclosure under the Open Records Act. The Attorney General's decision is attached as Exhibit 2.

41. The Attorney General rejected the Governor's Office's straightforward argument that the keywords are not a "public record." In so doing, the Attorney General backtracked on his previous conclusion that information on a computer that can only be printed through screenshots is not a public record.

42. The Attorney General reasoned as follows: "It is common knowledge that any web page displayed in a web browser can be printed from the browser. Accordingly, complying with Mr. Sharp's request would only require the Governor's Office to print a copy of the settings page . . . ."

43. This holding transforms virtually any piece of information stored on a computer or the internet into a public record. Under the Attorney General's logic, so long as a screenshot of the information can be printed, the information is now a public record.

44. Under this expansive rule, it is hard to imagine what information on a computer or the internet is not a "public record." Any information entered into a website qualifies. So does any information generated by the website. The same goes for information entered into and generated by software.

45. To give two of many examples, under the Attorney General's logic, every state computer's browsing history and list of browsing cookies apparently are subject to the Open Records Act.



46. To state the obvious, sustaining the Attorney General's holding would create unmanageable burdens for public agencies.

47. In addition, the well-defined line between information and public records exists for a reason. It should not be collapsed just so that the Attorney General can rule against the Governor.

48. The Attorney General essentially ignored the Governor's Office's argument that the keywords are not "software," as that term is used in the Open Records Act. According to the Attorney General, even if this is true, the keywords fall within the catch-all provision for the definition of a "public record." See KRS 61.870(2) (defining a "public record" to include "other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency").

49. This conclusion does not follow. If the keywords are excluded from the definition of "software," they cannot become a "public record" through operation of the catch-all provision. To conclude otherwise would be to find that the Open Records Act is inherently contradictory—*i.e.*, it excludes the keywords by operation of the software exception but nevertheless encompasses the keywords by virtue of the catch-all provision.

50. The Attorney General's decision also rejected the Governor's Office's argument that disclosing the keywords would create an "unreasonable burden" or "disrupt other essential functions" of the Governor's Office.

51. The Attorney General, however, did not contest the undeniable burden established by Ms. Stamper's affidavit.

52. Instead, the Attorney General concluded—in *ipse dixit* fashion—that how the Governor’s Office uses Facebook is “entirely a matter of discretion.” According to the Attorney General, an official Facebook page purportedly is not a “fundamental dut[y] under the law,” which somehow means that the Governor’s Office is not entitled to raise concerns about the burden of disclosing the keywords.

53. No meaningful authority exists for the arbitrary line drawn by the Attorney General between “discretionary” and “fundamental.” This is a line that the Attorney General invented so that he could rule against the Governor’s Office.

54. In any event, under no circumstances does the Attorney General get to decide which functions of the Governor’s Office are “discretionary” or “fundamental.” That determination is left to the Governor’s Office and to the Governor’s Office alone. The Governor’s Office decides for itself how best to accomplish the people’s business.

55. For the foregoing reasons, the Governor’s Office acted consistently with the Open Records Act in denying the ACLU’s open records request for the keywords used in the keyword filter on the Governor’s official Facebook page.

56. Under KRS 61.882(3), the Court must conduct a *de novo* review of this matter to determine whether the Governor’s Office complied with the Open Records Act. That is to say, the Court must decide for itself—without any deference to the Attorney General’s decision—whether the keywords are exempt from disclosure under the Open Records Act.

**DEMAND FOR JUDGMENT**

WHEREFORE, for the above reasons, the Commonwealth of Kentucky, Office of Governor Matthew G. Bevin demands:

- a.) That the Court enter a briefing schedule to facilitate its review of this matter;
- b.) That the Court review this matter *de novo* with no deference given to the Attorney General's decision;
- c.) That the Court enter judgment reversing the Attorney General's decision and concluding that the Governor's Office complied with the Open Records Act in all respects; and
- d.) Any other relief to which the Governor's Office is entitled.

Respectfully submitted,

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Dated this 9th day of January 2018