

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NO. 17-CI-00199**

KENTUCKY STATE UNIVERSITY

PLAINTIFF/APPELLANT

v.

THE KERNEL PRESS, INC.,
d/b/a THE KENTUCKY KERNEL

DEFENDANT/APPELLEE

** ** * ** * ** * **

NOTICE

Please take notice that the undersigned will make the following motion before the Franklin Circuit Court, Division II, on Wednesday, March 29, 2017, at 9:00 a.m.

**MOTION TO INTERVENE OF COMMONWEALTH OF KENTUCKY,
ex rel. ANDY BESHEAR, ATTORNEY GENERAL**

Comes now the Intervening Plaintiff, the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, by and through counsel, and moves this Court for leave to intervene as an Intervening Plaintiff in the above-styled action as a matter of right pursuant to CR 24.01 and KRS 418.075 and/or by permission pursuant to CR 24.02. The Attorney General provides the following Memorandum in Support of his Motion to Intervene.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

This Court should grant leave to the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General to intervene in this action. Under CR 24.01, the Attorney General may intervene as a matter of right. Further, the Attorney General may intervene in this action by permission under CR 24.02.

As the duly-elected Attorney General of the Commonwealth of Kentucky, Attorney General Andy Beshear is a constitutional officer and is the chief law officer of the

Commonwealth and all of its departments, commissions, agencies, and political subdivisions. See KY. CONST. §§ 91, 92, 93; KRS 15.020. The Attorney General is duly authorized to enforce Kentucky law, by bringing actions for injunctive relief and other relief, under the Kentucky Constitution, Kentucky statute, and the common law, including his *parens patriae* authority. In accordance with this authority, the Attorney General may bring an action for declaratory and injunctive relief against Kentucky state agencies such as Kentucky State University. See KY. CONST. § 91; KRS 15.020.

On behalf of the Commonwealth, the Attorney General seeks to exercise his authority and intervene in this action to protect the Commonwealth from the unlawful acts of Kentucky State University in failing to provide documentation, including the records involved, that the Attorney General lawfully requested pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3). The Attorney General requested the records in an attempt to substantiate Kentucky State University's denial of the open records request of The Kernel Press, Inc., d/b/a *The Kentucky Kernel*, through a confidential review of the records the University claimed were exempt from public disclosure. The University's refusal to provide the Attorney General with the records he requested for review severely impaired the Attorney General's ability to issue a reasoned open records decision in the matter. The Attorney General must protect the Commonwealth from the harm that the University's unlawful actions will cause.

FACTUAL BACKGROUND

On October 18, 2016, a reporter, Matthew Smith, with the Defendant/Appellee, *The Kentucky Kernel*, submitted an open records request to Kentucky State University relating to Title IX investigations into student complaints of sexual misconduct alleged against University employees. Specifically, *The Kernel* requested "... all investigative records for all Title IX

investigations into sexual misconduct allegations levied against University employees in the past five years.” (See *The Kernel* Open Records Request, Oct. 18, 2016, attached as Exhibit A to Intervening Complaint.) The University denied the open records request on October 24, 2016. (See University Response to Open Records Request, Oct. 24, 2016, attached as Exhibit B to Intervening Complaint.)

The University based its denial “on the grounds that it necessarily requires Kentucky State University (“KSU”) to disclose private information regarding victims of sexual assault, which would violate the Clery Act, the Violence Against Women Act, potentially FERPA, and victims’ fundamental rights to privacy.” (Exhibit B) (Emphasis added). In its denial, the University did not cite any of the statutory exceptions to disclosure of records under the Kentucky Open Records Act. (*See id.*)

On November 1, 2016, *The Kernel* appealed the University’s denial to the Office of the Attorney General. On November 15, 2016, the University responded to *The Kernel’s* appeal. (See University Response to Appeal, Nov. 15, 2016, attached as Exhibit C to Intervening Complaint) (hereinafter “November Response”).

In its response to *The Kernel’s* appeal, the University stated, among other things:

Mr. Smith’s request was denied because he sought information that would have required Kentucky State University ... to disclose information prohibited from disclosure by the Family Educational Rights and Privacy Act (“FERPA”), the CLERY Act, the Violence Against Women Act (“VAWA”) and would have otherwise unnecessarily invaded the privacy of the victims of sexual assault on Campus.

The investigative records include personally identifiable information of victims and accused person, which the University may not disclose under FERPA. Although the Clery Act and VAWA require reporting of general statistics and information regarding sexual assault and domestic violence neither allow for disclosure of the personally identifiable information protected by FERPA. Kentucky’s Open Records law also recognize the important protections of FERPA.

Kentucky's Open Records laws do not require a public agency to disclose records that contain information of such a personal nature that the "public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." *See* KRS 61.878(1)(a). The disclosure of the investigative records in the sexual assault cases contains myriad intimate details of the traumatic events involved in sexual assaults.

In addition, the investigative records requested by the Kernel are comprised of preliminary drafts, notes and memoranda, which are exempted from disclosure under [KRS 61.878(1)(i) and (j)].

Also, in some cases, investigations may not be fully completed. In those cases, disclosure of investigative records would potentially harm ongoing investigation or reveal confidential witnesses prior to final adjudication. Public agencies are not required to make such disclosures. *See* KRS 61.878(1)(h).

(Exhibit C.)

Unable to resolve the issues on appeal based on the University's original denial letter and Response, by letter dated November 29, 2016 the Attorney General asked for copies of the requested records, as well as additional information, pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3), in an attempt to substantiate the University's basis for denying *The Kernel's* request. (*See* Attorney General's Request for Documentation, Nov. 29, 2016, attached as Exhibit D to Intervening Complaint.) As KRS 61.880(2)(c) provides:

On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. *The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation.* (Emphasis added).

In addition, 40 KAR 1:030(3) states:

Section 3. Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which the complaint is made. *If the documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.* (Emphasis added).

In an abundance of caution, and with profound respect for personal privacy interests, the Attorney General further offered that the University could redact the names and personal identifiers of the complainant and witnesses. The University failed to provide the requested records and additional documentation by the December 21, 2016, deadline. Eventually, the University did respond to the Attorney General's request, but only after prompting by the Attorney General by telephone.

On January 6, 2017, the University provided the Attorney General with a second response letter (hereinafter "January Response"), and a copy of a final agency action against a former University employee who was accused of sexual misconduct. (*See* University Response to Request for Additional Documentation, Jan. 6, 2017, attached as Exhibit E to Intervening Complaint.) The University asserted that the final agency action was not the result of a Title IX investigation, but was instead investigated under "general University policy against sexual harassment." (*Id.*) The University redacted the name of the student involved. (*Id.*)

However, based upon the inconsistencies in the University's denial letter, its November Response, and its January Response, the Attorney General was unable to determine whether the University was merely denying that it had conducted Title IX investigations into sexual misconduct allegations levied against its employees in the past five (5) years and, therefore, had no responsive investigative records, or whether the University was denying that it had records specifically categorized as "Title IX investigations in sexual misconduct allegations levied against University employees in the past five years." 17-ORD-011. As the Attorney General stated in his Open Records Decision, the lack of clarity would have been unnecessary had the University provided the records the Attorney General requested for *in camera* review. *Id.* Regardless, the University refused to provide records responsive to the Attorney General's

lawful request pursuant to KRS 61.880 and 40 KAR 1:030(3), including the University's policies and procedures for dealing with Title IX investigations into sexual assault allegations made by students against employees. The University's refusal severely impaired the Attorney General's ability to provide a reasoned open records decision.

On January 24, 2017, the Attorney General issued his Open Records Decision, *In re: Kentucky Kernel/Kentucky State University*, 17-ORD-011, finding the University failed to meet its burden in denying *The Kernel's* request. (See 17-ORD-011, Jan. 24, 2017, attached as Exhibit F to Intervening Complaint.) On February 23, 2017, the University filed the instant suit against *The Kernel*, appealing the Attorney General's Open Records Decision *In re: Kentucky Kernel/Kentucky State University*, 17-ORD-011.

ARGUMENT

Through intervention in this action, the Attorney General seeks to uphold the laws of the Commonwealth and prevent the unlawful refusal of Kentucky State University to abide by the the Kentucky Open Records Act, specifically, KRS 61.880(2)(c) and 40 KAR 1:030. The University's unreasonable and unlawful withholding of the requested documentation from the Attorney General, for the purpose of substantiating the University's denial of *The Kernel's* open records request, severely impairs the ability of the Attorney General to make a reasoned open records decision. As the chief law officer of the Commonwealth, the Attorney General has the common law and statutory right to intervene in this action. This Court should allow the Attorney General to intervene on behalf of the Commonwealth under CR 24.01 and KRS 418.075, or CR 24.02.

I. THE ATTORNEY GENERAL MAY INTERVENE AS A MATTER OF RIGHT.

Pursuant to CR 24.01, the Attorney General may intervene in this action as a matter of right. As CR 24.01(1) provides:

Upon timely application anyone shall be permitted to intervene in an action (a) *when a statute confers an unconditional right to intervene*, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

(Emphasis Added). The Attorney General has the right to intervene in this case based on his common law and statutory authority to protect the people of the Commonwealth.

A. The Attorney General has Common Law and Statutory Authority to Intervene to Maintain Actions on Behalf of the Commonwealth.

Under KY. CONST. § 91, the Attorney General is a constitutional officer. As the Supreme Court of Kentucky has recognized, “[T]he source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people.” *Beshear v. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016) (quoting *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973)). Further, KRS 15.020 mandates that the Attorney General, as the chief law officer of the Commonwealth, “shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law.”

“It is generally held that in the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public.” *Hancock*, 503 S.W.2d at 715 (quoting 7 Am. Jur. 2d *Attorney General* § 6). “The attorney general may intervene in civil actions and proceedings pursuant to constitutional powers, statutory powers, rules of court, or common

law powers. The attorney general may intervene as authorized for matters of compelling public interest or state interest” 7A C.J.S. *Attorney General* § 54.

In *Commonwealth ex rel. Conway v. Thompson*, the Court reiterated the powers of the Attorney General, writing:

It is unquestioned that “[a]t common law, [the Attorney General] had the power to institute, conduct[,] and *maintain* suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.” Or, in other words, “[u]nder the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce the state’s statutes.”

300 S.W.3d 152, 173 (Ky. 2009) (footnotes omitted) (emphasis added). As a constitutional officer and the chief law officer of the Commonwealth, the Attorney General has the common law powers to control and maintain all litigation on behalf of the state, and to intervene in all suits or proceedings which are of concern to the general public.

The Attorney General’s common law and statutory authority includes not only the power to initiate suits, but to maintain actions already commenced in the public interest. *See Thompson*, 300 S.W.3d at 173. In *Hancock*, 503 S.W.2d 710, the former Kentucky Court of Appeals held that the Attorney General’s powers extend to intervention under CR 24.01(1) whenever the public interest is concerned. There, the Court considered the Attorney General’s motion to intervene under CR 24.01 in an action involving load limits on highways. *Id.* at 715. The Court wrote:

The Attorney General, as chief law officer of this Commonwealth, charged with the duty of protecting the interest of all the people, the traveling public, the school children in the school buses, and the very existence of the roads, had such a vital interest in this litigation that he had a right to intervene at least insofar as the public issues advanced in the action were involved.

Id.

The Court should treat this action as one governed by the Kentucky Declaratory Judgment Act, KRS Chapter 418.040, *et seq.* Under KRS 418.045, “[a]ny person . . . whose rights are affected by statute . . . may apply for and secure a declaration of his right or duties.” As the chief law officer of the Commonwealth, the Attorney General has broad discretion to sue for declaratory and injunctive relief against state actors like the University whose actions he believes lack legal authority or are unconstitutional. *Beshear*, 498 S.W.3d at 366.

In this case, the Attorney General acknowledges receipt of the notification required by KRS 61.880 and 40 KAR 1:030, and respectfully wishes to exercise his discretion to protect the interests of the Commonwealth from the unlawful actions of the University in violating KRS 61.880(2)(c). The statute governing open records appeals, KRS 61.880, provides the Attorney General with the implied authority and discretion to join in actions such as the above-captioned matter. KRS 61.880(3) states the following:

(3) Each agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding the enforcement of KRS 61.870 to 61.884. The Attorney General shall not, however, be named as a party in any Circuit Court actions regarding the enforcement of KRS 61.870 to 61.884, *nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings.* (emphasis added).

The General Assembly’s use of the phrase “nor shall he have any duty to defend his decision,” leaves open to the Attorney General the authority to intervene in such actions. Further, 40 KAR 1:030(5) reinforces the Attorney General’s discretionary position on permissive intervention in such matters by expressly precluding other parties from joining the Attorney General in such appeals, without the Attorney General’s consent. Specifically, 40 KAR 1:030(5) states:

Each public agency against which an appeal to circuit court is filed shall notify the Attorney General of the appeal. The Attorney General shall not be made a party to an open meetings or open records appeal.

As in *Beshear*, *Thompson*, and *Hancock*, the present action concerns the duty of the Attorney General to protect the public interest. The Attorney General seeks to exercise his statutory and common law authority to protect the interests of the Commonwealth from the University's unlawful action in withholding records from the Attorney General. The University's actions severely impaired the Attorney General's ability to render a reasoned open records decision to determine whether the University's bases for denying the open records request were substantiated.

The public interest in this action is indisputable. The General Assembly tasked the Attorney General with the issuance of decisions in open records appeals. KRS 61.880(2); 40 KAR 1:030(1). In carrying out his responsibility, the Attorney General may request additional documentation, including the records involved, in reviewing a public agency's denial of an open records request. KRS 61.880(2)(c). On appeal "[i]t has been, and remains, the [Attorney General's] practice, pursuant to KRS 61.880(2)(c) to conduct an *in camera* inspection of the records involved to determine if the agency, against which the appeal is brought, properly denied access to those records." 13-ORD-046 (citing 12-ORD-220 (quoting 08-ORD-052)).

In open records appeals, the public agency has the burden to prove its denial was lawful. KRS 61.880(2). When a public agency, such as Kentucky State University, refuses to comply with the Attorney General's lawful request for substantiating documentation, the Attorney General's office is "severely handicapped in conducting [its] review. 13-ORD-046. In addition, as the Court of Appeals observed in *Cabinet for Health & Family Servs. v. Todd County Standard, Inc.*, 488 S.W.3d 1, 8 (Ky. App. 2015):

By refusing to respond to the Attorney General's questions, the Cabinet certainly frustrated the Attorney General's statutory review under KRS 61.880... . The Cabinet cannot benefit for intentionally frustrating the Attorney General's review

of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General under KRS 61.880(5).

Further, relying on KRS 61.880(2)(c) and 40 KAR 1:030(3), the Attorney General has consistently determined that:

[T]he General Assembly has twice vested the Attorney General with the authority to require production of public records, for which a claim of exemption has been made, for in camera review. Without this authority, the Attorney General's ability to render a reasoned open records decision would be severely impaired. The Attorney General recognizes that he is bound to observe the confidentiality of the records, and does not share [the agency's] apparent view that disclosure to this office pursuant to KRS 61.880(2)(c) constitutes waiver as to any legitimate privilege [or exemption] asserted. Because he does not have authority to compel disclosure of the disputed records, his only recourse is to find against the public agency in the hope that the agency will more conscientiously discharge its duties under the Open Records Act in the future.

See 96-ORD-106; 04-ORD-031.

If the Attorney General is unable to review records that public agencies claim are exempt or privileged, the Attorney General will be unable to substantiate denials of requests. In those case where the agency refuses to comply with KRS 61.880(2)(c) and 40 KAR 1:030(3), the University contends that an agency's simple invocation of such exceptions or privileges precludes the Attorney General's review provided under KRS 61.880(2)(c) and 40 KAR 1:030(3). The University fails to recognize the difference between the Attorney General, acting as the adjudicator of open records appeals brought before him, and a requester in an open records request. Moreover, the practical application of the University's argument would yield disastrous results, and would be the "silver bullet" to any Attorney General review of an open records appeal. It would provide another barrier to public, allowing bad actors to conduct business in secret, and, in doing so, would negate the General Assembly's intent that the basic policy of the statute is that free and open examination is in the public interest, and that the exceptions

provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials and others. KRS 61.871.

Thus, the Attorney General has a right to intervene as the chief law officer of the Commonwealth, charged with the duty of protecting the interest of all the people of Kentucky.

B. The Attorney General's Intervention in this Action is Timely.

Moreover, the Attorney General timely seeks to intervene in this action. In *Hazel Enterprises, LLC v. Cmty. Fin. Servs. Bank*, 382 S.W.3d 65 (Ky. App. 2012), the Court specified the factors for when intervention as a matter of right is timely under CR 24.01:

(1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Id. at 68.

Here, the Attorney General meets the factors pronounced in *Hazel*. This action is in its early stages, as the University commenced this action on February 23, 2017 and the Attorney General received notice pursuant to KRS 61.880 shortly thereafter. *The Kernel* filed its answer three (3) days ago on March 14, 2017. Discovery has not commenced in the action. As such, the Attorney General's intervention in this action is timely.

II. ALTERNATIVELY, THE ATTORNEY GENERAL MAY INTERVENE BY PERMISSION OF THE COURT.

Even if the Attorney General did not have authority to intervene in this action as a matter of right – which he does – this Court should allow his intervention under CR 24.02. In pertinent part, CR 24.02, which governs permissive intervention, provides:

Upon timely application anyone may be permitted to intervene in an action: ... (b) when an applicant's claim or defense and the main action have a question of law or

fact in common ...In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Accordingly, CR 24.02 allows intervention by permission whenever the applicant for intervention has a claim in common with the main action. “Permissive intervention requires that the intervenor have an interest or claim *in common* with the litigants in the underlying action.” *Bailey v. Bertram*, 471 S.W.3d 687, 691 (Ky. 2015).

In this case, the University seeks to determine whether it may refuse to provide documents requested by the Attorney General pursuant to KRS 61.880(2)(c), on the basis of certain claims of privilege and exception. Specifically, the University contends in its Complaint and Notice of Appeal that the Attorney General’s authority to review documents pursuant to open records Act appeals is limited and subject to attorney-client privilege, other privileges, and federal law.

However, there is a notable absence of any such explicit or implicit limitation on the Attorney General’s authority to review under KRS 61.880(2)(c) and 40 KAR 1:030(3). To the contrary, the statute and regulation support the Attorney General’s continued assertion that the Attorney General may request additional documentation from the agency in question, to be reviewed *in camera*, to substantiate whether the agency’s refusal to disclose records was proper, including the applicability of any statutory exceptions, with the burden of proof resting on the agency. KRS 61.880(1)-(2)(c); 40 KAR 1:030(2)-(3). Thus, this action is central to both the University’s action and the matter for which the Attorney General seeks to intervene.

Further, the Attorney General’s right to seek relief for the improper and unlawful actions of the University shares common questions of law and fact with the underlying action. The University refused to provide records to the Attorney General, pursuant to KRS 61.880(2)(c),

including the University's policies and procedure relating to Title IX investigations. The University impliedly acknowledges that the Attorney General has the authority to review records to substantiate the University's claimed exemptions, including records involving a sexual assault investigation leveled by a student against a University employee.

Through these actions, the University has explicitly recognized that the Attorney General interest shares common questions of law and fact with both parties in this action. Moreover, the University's assertions that the Attorney General's authority to confidentially review records pursuant to KRS 61.880(2)(c) is qualified by certain exceptions directly effects the Attorney General's ability to fulfill his legal obligation to adjudicate open records appeals and issue open records decisions.

As such, this Court should resolve the Attorney General's Intervening Complaint and the Plaintiff/Appellant's action together. Allowing the Attorney General to intervene in this action will not unduly delay or prejudice the adjudication of the rights of the original parties. This Court should allow the Attorney General to intervene in this action.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, respectfully requests that this Court grant its Motion to Intervene in this action.

Respectfully Submitted

ANDY BESHEAR
ATTORNEY GENERAL

/s/La Tasha Buckner

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene, the Memorandum of Law in Support, and the Proposed Order, and all attachments, were filed electronically with the Court's electronic filing system, and were served on the following individuals by U.S. Mail, postage prepaid, on this the 17th day of March, 2017:

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**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NO. 17-CI-00199**

COMMONWEALTH OF KENTUCKY,
ex rel. ANDY BESHEAR, ATTORNEY GENERAL

INTERVENING PLAINTIFF

v.

THE KERNEL PRESS, INC.,
d/b/a THE KENTUCKY KERNEL

DEFENDANT/APPELLEE

Serve: Thomas W. Miller
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and

KENTUCKY STATE UNIVERSITY

INTERVENING DEFENDANT

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**INTERVENING COMPLAINT FOR DECLARATION OF RIGHTS
AND A PERMANENT INJUNCTION**

Comes now the Intervening Plaintiff, the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General (hereinafter “Attorney General”), by and through counsel, and brings this action for a declaration of rights and a permanent injunction against the Plaintiff/Appellant and Intervening Defendant, Kentucky State University (hereinafter “the University”).

INTRODUCTION

On January 6, 2017, Kentucky State University refused the Attorney General's lawful request for a confidential, in camera review of documents involved in the University's denial of an open records request by the The Kernel Press, Inc. d/b/a *The Kentucky Kernel*. The University's refusal to obey Kentucky law allowing for such a review severely impaired the Attorney General's ability to provide a reasoned decision in *The Kernel*'s appeal.

The underlying open records request sought documents related to Title IX investigations into University employees, not students. Moreover, in making his request for a legally confidential review, the Attorney General allowed the University to redact the names and personal identifying information of any student complainant and witnesses.

The University refused to comply with the request and review, thereby violating KRS 61.880(2)(c).

The Attorney General has a legal duty to uphold the Kentucky Open Records Act. The University's position would severely impact that duty, creating a "silver bullet" whereby a bad actor could falsely claim open records are exempt, and, without the Attorney General's review, could successfully evade the law. Here, it would allow a University to hide virtually all information about how well it does or does not respond to sexual assault, information students, parents, and taxpayers deserve to know.

Through this action for declaratory and injunctive relief, the Attorney General seeks to uphold the laws of the Commonwealth, and respectfully asks that this Court do the following:

- A. Declare the University's refusal to provide the additional documentation that the Attorney General's requested for confidential review pursuant to KRS 61.880(2)(c) to be unlawful; and

- B. Enjoin the University from any further refusal to comply with the Attorney General's request for additional documentation and order the University to comply with any future requests for additional documentation pursuant to KRS 61.880(2)(c).

NATURE OF ACTION

1. This Verified Complaint for a Declaration of Rights and Permanent Injunction is governed by the Kentucky Declaratory Judgment Act, KRS 418.010, *et seq.*, CR 57, and CR 65, and is initiated by the Attorney General pursuant to his authority under the Kentucky Constitution, KRS Chapter 15, and the common law.

2. KRS 418.040 provides this Court with the authority to "make a binding declaration of rights, whether or not consequential relief is or could be asked" when a controversy exists. An actual and justiciable controversy regarding violations of state law clearly exists in this action.

3. CR 65 permits this court, in a final judgment, to issue a permanent injunction which may restrict or mandatorily direct the doing of an act.

4. In addition, this justiciable controversy is capable of repetition but evading review as evidenced by the University's belief that it can continue to violate the laws of the Commonwealth in failing to provide additional documentation and a copy of the records involved to the Attorney General for confidential review pursuant to KRS 61.880(2)(c). Specifically, the University refused to provide the additional documentation that the Attorney General requested for confidential review pursuant to KRS 61.880(2)(c). The University's refusal to comply with the Attorney General's requests for substantiating documentation and a copy of the records involved violates Kentucky law, KRS 61.880(2)(c).

5. The Attorney General requests an expedited review pursuant to KRS 418.050 KRS 61.882(4), and CR 57. Time is of the essence, and this justiciable controversy presents an

immediate concern that must be promptly resolved to so that the University will not unlawfully refuse future requests for substantiating additional documentation for the Attorney General's *in camera* review in an open records appeal.

PARTIES

6. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

7. The Intervening Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, is the duly elected Attorney General of the Commonwealth of Kentucky, and is a constitutional officer pursuant to Sections 91, 92, and 93 of the Kentucky Constitution. Under KRS 15.020, the Attorney General is the chief law officer of the Commonwealth and all of its departments, commissions, agencies, and political subdivisions. The Attorney General is duly authorized by the Kentucky Constitution, Kentucky statutes, and the common law, including under his *parens patriae*, to enforce Kentucky law. The Attorney General has the authority to bring actions for injunctive relief to enforce the Kentucky Constitution and Kentucky statutes and regulations, including the authority to bring an action against the University of Kentucky and other state agencies for injunctive relief. *See* KY. CONST. § 91; KRS 15.020.

8. The Plaintiff/Appellant and Intervening Defendant, Kentucky State University, is a state university and agency of the Commonwealth of Kentucky that exists and operates pursuant to the applicable provisions of KRS 164.290 and KRS Chapter 164, *et seq.*

9. The Defendant/Appellee, the Kernel Press, Inc. d/b/a *The Kentucky Kernel*, is a newspaper publication operating in Lexington, Kentucky. *The Kernel* is a proper party to this action pursuant to 61.880(5) and KRS 61.882.

JURISDICTION AND VENUE

10. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

11. An actual, justiciable controversy exists and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 23A.010, KRS 61.880(5), KRS 61.882, CR 57 and CR 65.

12. Venue is proper in this Court pursuant to KRS 61.880(5) and KRS 61.882, because Kentucky State University has its principal place of business in Franklin County, Kentucky, and because the withheld records are maintained, in whole or in part, in Franklin County, Kentucky. Furthermore, this action generally relates to violations of various Kentucky statutes either determined or accomplished in Frankfort, Franklin County, Kentucky.

13. Pursuant to KRS 418.040, *et seq.*, this Court may properly exercise *in personam* jurisdiction over the Plaintiff/Appellant and Intervening Defendant.

FACTUAL BACKGROUND

14. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

15. On October 18, 2016, Matthew Smith, a reporter with *The Kentucky Kernel*, submitted an open records request to the University for “all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years.” (*See The Kernel Open Records Request*, Oct. 18, 2016, attached as Exhibit A.)

16. The University denied the request on October 24, 2016. (*See University Response to Open Records Request*, Oct. 24, 2016, attached as Exhibit B.) The University based its denial “on the grounds that it necessarily requires Kentucky State University (“KSU”)

to disclose private information regarding victims of sexual assault, which would violate the Clery Act, the Violence Against Women Act, potentially FEPPA, and victims' fundamental rights to privacy." (Exhibit B.)

17. On November 1, 2016, *The Kernel* filed an open records appeal with the Attorney General. The University responded to the appeal by letter dated November 15, 2016. (See University Response to Appeal, Nov. 15, 2016, attached as Exhibit C.) In its response, the University stated, in part:

Mr. Smith's request was denied because he sought information that would have required Kentucky State University ... to disclose information prohibited from disclosure by the Family Educational Rights and Privacy Act ("FERPA"), the CLERY Act, the Violence Against Women Act ("VAWA") and would have otherwise unnecessarily invaded the privacy of the victims of sexual assault on Campus.

The investigative records include personally identifiable information of victims and accused person, which the University may not disclose under FERPA. Although the Clery Act and VAWA require reporting of general statistics and information regarding sexual assault and domestic violence neither allow for disclosure of the personally identifiable information protected by FERPA. Kentucky's Open Records law also recognize the important protections of FERPA.

Kentucky's Open Records laws do not require a public agency to disclose records that contain information of such a personal nature that the "public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." See KRS 61.878(1)(a). The disclosure of the investigative records in the sexual assault cases contains myriad intimate details of the traumatic events involved in sexual assaults.

In addition, the investigative records requested by the Kernel are comprised of preliminary drafts, notes and memoranda, which are exempted from disclosure under [KRS 61.878(1)(i) and (j)].

Also, in some cases, investigations may not be fully completed. In those cases, disclosure of investigative records would potentially harm ongoing investigation or reveal confidential witnesses prior to final adjudication. Public agencies are not required to make such disclosures. See KRS 61.878(1)(h).

(Exhibit C.)

18. By letter dated November 29, 2016, the Attorney General requested additional documentation and a copy of the records involved from the University pursuant to his authority under KRS 61.880(2)(c) and 40 KAR 1:030(3). (*See* Attorney General’s Request for Documentation, Nov. 29, 2016, attached as Exhibit D.)

19. In pertinent part, KRS 61.880(2)(c) provides: “On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.”

20. As 40 KAR 1:030(3) provides: “Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which the complaint is made. If the documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.”

21. After the December 21, 2016, deadline for providing the additional documentation passed, the Attorney General contacted the office of the University’s General Counsel, prompting a response to the request for additional documentation, which the Attorney General received on January 6, 2017. (*See* University Response to Request for Additional Documentation, Jan. 6, 2017, attached as Exhibit E.)

22. In its response, the University stated that it did not have any records specifically categorized as “Title IX investigations into sexual misconduct allegations levied against University employees in the past five years.” (*Id.*) However, the University did provide records

related to a final action against a former University employee accused of sexual misconduct, with the involved student's name redacted, and stated that the University investigated the allegations under the "general University policy against sexual harassment," not Title IX. (*Id.*)

23. On January 24, 2017, the Attorney General issued the Open Records Decision, *In re: Kentucky Kernel/Kentucky State University*, 17-ORD-011 (attached as Exhibit F.)

24. In his decision, the Attorney General noted that through KRS 61.880(2)(c) the Kentucky General Assembly assigned the burden of proof in an open records appeal to the agency resisting disclosure, and also provided the Attorney General the authority to request additional documentation, including the records at issue, from the agency for substantiation. 17-ORD-011. The Attorney General also stated that the decision of whether or not to request additional documentation or a copy of the records from the agency is discretionary and based on the facts specific to each appeal. *Id.* The Attorney General found that the University failed to meet its burden of proof in denying *The Kernel's* open records request. *Id.*

25. On February 23, 2017, the University filed its Complaint and Notice of Appeal in the above-styled action.

CLAIMS

Count I Violations of KRS Chapter 61

26. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

27. KRS 61.8802(2)(c) provides as follows: "On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency

[Kentucky State University], and the Attorney General may request additional documentation from the agency for substantiation.”

28. 40 KAR 1:030(3) provides as follows: “KRS 61.846(2) and KRS 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which complaint is made. If documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.”

29. By refusing to provide the Attorney General with documents he lawfully requested for confidential review pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3), in order to substantiate the University’s denial of *The Kernel’s* open records request, the University violated KRS 61.880(2)(c).

Count II Injunctive Relief

30. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

31. CR 65.01 authorizes an injunction to “restrict or mandatorily direct the doing of an act.” The Attorney General asks this court to permanently enjoin the University from withholding the documents requested by the Attorney General with respect to *In re: Kentucky Kernel/Kentucky State University*, 17-ORD-011, consistent with its prayer for relief below.

32. CR 65.05 provides: A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant’s rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such judgment ineffectual.

33. As this Complaint for Declaration of Rights and Permanent Injunction shows, the University unlawfully withheld potentially substantiating documentation from the Attorney General upon his lawful request, which severely impaired the Attorney General's ability to render a reasoned open records decision. *See e.g.*, 96-ORD-106, p. 5; 10-ORD-079, p. 5. The University's actions violate Kentucky law, specifically, 61.880(2)(c).

34. The University's actions constitute a violation of the Commonwealth's rights. The Attorney General is the chief law officer of the Commonwealth, and is charged with reviewing the denial of open records request. KRS 61.880(2); 40 KAR 1:030(1). During an open records appeal, the Attorney General may request additional documentation from an agency. KRS 61.880(2)(c); 40 KAR 1:030(3). Despite the Attorney General's request to the University, the University unlawfully withheld the documents, severely impairing the Attorney General's ability to issue a reasoned Open Records Decision. The University's unreasonable and unlawful failure to provide the requested additional documentation and records at issue established that the Commonwealth's rights have been violated, and that the University will continue its pattern of unlawful behavior in this manner unless the Court permanently enjoins the University from doing so.

35. The University's violation of Kentucky law is so flagrant that there is a high likelihood that the Attorney General will prevail in a full trial on the merits of this action.

36. Additionally, no Circuit Court Judge has refused the requested relief and no injunction bond is required by the Attorney General pursuant to CR 81A.

PRAYER FOR RELIEF

WHEREFORE, the Intervening Plaintiff, Commonwealth of Kentucky, through its Attorney General, demands as follows:

1. For an expedited review of this action pursuant to KRS 418.050, KRS 61.882(4) and CR 57;
2. For a judgment declaring Kentucky State University's failure to provide the Attorney General with the additional documentation, including the records involved, he requested on November 29, 2016, pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3), to be a violation of Kentucky law;
3. For a permanent injunction enjoining Kentucky State University from any further refusal to comply with future requests by the Attorney General for additional documentation pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3).
4. For reasonable costs and attorneys' fees; and
5. For any and all further relief to which the Plaintiff may appear entitled.

Respectfully Submitted

ANDY BESHEAR
ATTORNEY GENERAL

/s/La Tasha Buckner

La Tasha Buckner
Executive Director
Office of Civil and Environmental Law
Sam Flynn
S. Travis Mayo
Assistant Attorneys General
Capitol Building, Suite 118
700 Capital Avenue
Frankfort, KY 40601
(502) 696-5300

Exhibit A

E44CB17E-D692-4283-8CC5-C8BD29AFBAFB : 000027 of 000047

EXH : 000001 of 000002

Kentucky Kernel
026 Grehan Journalism Building.
Lexington, Ky. 40506

Date: October 18, 2016

Kentucky State University
400 E Main St.
Frankfort, KY 40601

To Whom It May Concern:

Under the Kentucky Open Records Act § 61.872 et seq., I am requesting an opportunity to obtain all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years. Sexual misconduct includes but is not limited to sexual assault, sexual harassment, sexual exploitation and/or stalking.

If there are any fees associated with getting these records, please inform me if the cost will exceed \$100. However, I would also like to request a waiver of all fees.

The Kentucky Open Records Act requires a response within three business days. If access to the records will take longer than that time period, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny this request, or any portion of it, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Matthew Smith

Reporter, Kentucky Kernel

(502) 525-9919; smith_matt44@yahoo.com

Exhibit B

E44CB17E-D692-4283-8CC5-C8BD29AFBAFB : 000029 of 000047

EXH : 000001 of 000002

From: Rowe, Gordon Gordon.Rowe@kysu.edu
Subject: RE: Open Records Request-Kentucky Kernel
Date: October 24, 2016 at 6:11 PM
To: Matt Smith smith_matt44@yahoo.com



Matt,

Your Open Records request is denied on the grounds that it necessarily requires Kentucky State University ("KSU") to disclose private information regarding victims of sexual assault, which would violate the Clery Act, the Violence Against Women Act, potentially FERPA, and victims' fundamental rights to privacy. Please feel free to contact me if you have any questions.

Gordon Rowe
KSU General Counsel

From: Matt Smith [mailto:smith_matt44@yahoo.com]
Sent: Tuesday, October 18, 2016 10:33 PM
To: Rowe, Gordon
Subject: Open Records Request-Kentucky Kernel

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Exhibit C

E44CB17E-D692-4283-8CC5-C8BD29AFBAFB : 000031 of 000047

EXH : 000001 of 000003



KENTUCKY STATE UNIVERSITY

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OFFICE OF GENERAL COUNSEL

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www.kysu.edu

November 15, 2015

VIA ELECTRONIC TRANSMISSION

Gordon Slone
Attorney General's Office
700 Capitol Avenue
Frankfort, Kentucky 40601
Fax: 502-564-6801

**Re: Open Records Request
Log No. 201600455**

Dear Gordon:

I am in receipt of the appeal filed by Matthew Smith of the Kentucky Kernel (the "Kernel") regarding an Open Records Request by Mr. Smith. Mr. Smith's request was denied because he sought information that would have required Kentucky State University ("KSU" or the "University") to disclose information prohibited from disclosure by the Family Educational Rights and Privacy Act ("FERPA"), the CLERY Act, the Violence Against Women Act ("VAWA") and would have otherwise unnecessarily invaded the privacy of the victims of sexual assault on our campus.

The investigative records include personally identifiable information of victims and accused persons, which the University may not disclose under FERPA. Although the Clery Act and VAWA require reporting of general statistics and information regarding sexual assault and domestic violence neither allow for disclosure of the personally identifiable information protected by FERPA. Kentucky's Open Records laws also recognize the important protections of FERPA.

Kentucky's Open Records laws do not require a public agency to disclose records that contain information of such a personal nature that the "public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." See KRS 61.878(1)(a). The disclosure of the investigative records in the sexual assault cases contains myriad intimate details of the traumatic events involved in sexual assaults. Particularly on a small campus such as KSU's campus, these intimate details of the lives and trauma of the accusers would be unnecessarily and widely disseminated. It would not be difficult to review these disclosures to determine the personal identity of these victims, which, in many cases, would cause further harm and trauma to the victims of sexual assault.

IN ALL THINGS EXCELLENCE

Kentucky State University is an equal educational and employment opportunity/affirmative action institution.

Page Two of Two
November 15, 2016

In addition, the investigative records requested by the Kernel are comprised of preliminary drafts, notes and memoranda, which are exempted from disclosure under KRS 61.878. Specifically, KRS 61.878(1)(i) and KRS 61.878(1)(j) prohibit such disclosures.

Also, in some cases, investigations may not be fully completed. In those cases, disclosure of the investigative records would potentially harm ongoing investigation or reveal confidential witnesses prior to final adjudication. Public agencies are not required to make such disclosures. See KRS 61.878(1)(h).

Based upon the foregoing, the Attorney General should affirm the University's denial of disclosure of the documents requested by the Kernel.

Please feel free to contact me if you require additional information or if you have any questions about this response.

Sincerely,

/s/ Gordon A. Rowe, Jr.

Gordon A. Rowe, Jr.

cc: Matthew Smith

Exhibit D

E44CB17E-D692-4283-8CC5-C8BD29AFBAFB : 000034 of 000047

EXH : 000001 of 000004



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
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FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

November 29, 2016

Mr. Gordon Rowe, Jr.
General Counsel
Office of Legal Counsel
400 East Main Street
Frankfort, Kentucky 40601

Re: Open Records Appeal - Log Number 201600455

Dear Mr. Rowe:

As you are aware, Matthew Smith, *Kentucky Kernel*, has appealed Kentucky State University's denial of his October 18, 2016, request "to obtain all investigative records for all Title IX allegations of sexual misconduct allegations levied against university employees in the past five years." On behalf of Kentucky State University ("KSU"), you denied Mr. Smith's request "on the grounds that it necessarily requires KSU to disclose private information regarding victims of sexual assault, which would violate the Clery Act, the Violence Against Women Act, potentially FERPA, and victims' fundamental rights to privacy."

Responding to Mr. Smith's letter of appeal, you elaborated to some degree, also stating that the investigative records include personally identifiable information of victims and accused persons, which KSU may not disclose under FERPA. You also mentioned that KRS 61.878(1)(a) does not require public disclosure of personal information that would constitute a clearly unwarranted invasion of personal privacy and that the investigative records are comprised of preliminary drafts, notes and memoranda, which are exempted from disclosure under KRS 61.878(1)(i) and (j). Further, you stated that investigations may not be fully completed and that, under KRS 61.878(1)(h), public agencies are not required to make disclosures of investigative

Letter to Gordon Rowe, Jr.

November 29, 2016

Page 2

records that would harm the ongoing investigation or reveal confidential witnesses prior to final adjudication.

KRS 61.880(2)(c) states that the burden of proof is on the agency to sustain its action in withholding public records. That statute also gives the Office of the Attorney General the authority to request "additional documentation from the agency for substantiation" and "[t]he Attorney General may also request a copy of the records involved but they shall not be disclosed." In order to carry out its statutory duty, pursuant to KRS 61.880(2)(a), to issue a written decision stating whether the agency violated provisions of the Open Records Act, this office requires that KSU provide a copy of the records involved in Mr. Smith's request, including any records that you do not contend are exempt. Pursuant to KRS 61.880(2)(c) and 40 KAR 1:030 Section 3, the records will be held confidentially, will not be disclosed to the public, and will be destroyed at the time the decision is rendered. If the University asserts FERPA protection for the identity of students, we will accept redacted copies of the records withheld but only to protect names and personal identifiers of students.

In addition to providing copies of the requested records, please describe, in general terms, the process of investigation/disciplinary proceedings by which a KSU professor or employee, against whom allegations of sexual misconduct are made by a KSU student or another KSU employee, is conducted. Please provide me with a copy of any KSU regulations or policies implicated in the records involved in Mr. Smith's request. Please include in your description the types of records generated during such an investigation, who creates those records, to whom the records are sent, and who receives the records. If any other written materials exist addressing this process, please provide me with a copy of those materials and identify the pertinent portions.

In light of statutory time constraints imposed on this office by KRS 61.880(2), please ensure that your written response is received in this office on or before December 21, 2016, and provide Mr. Smith with a copy of your response excluding, of course, the records in dispute.

Letter to Gordon Rowe, Jr.


November 29, 2016

Page 3

We appreciate your cooperation in this matter.

Sincerely,

Andy Beshear
Attorney General


Gordon Slone
Assistant Attorney General

#455

cc: Matthew Smith

Exhibit E

E44CB17E-D692-4283-8CC5-C8BD29AFBAFB : 000038 of 000047

EXH : 000001 of 000002



KENTUCKY STATE UNIVERSITY

OFFICE OF GENERAL COUNSEL

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PHONE: (502) 597-6414
FAX: (502) 597-7021

www.kysu.edu

January 6, 2017

VIA ELECTRONIC TRANSMISSION

Gordon Slone
Attorney General's Office
700 Capitol Avenue
Frankfort, Kentucky 40601
Fax: 502-564-6801

**Re: Open Records Request
Log No. 201600455**

Dear Gordon:

Kentucky State University does not have any records specifically categorized as "Title IX investigations into sexual misconduct allegations levied against University employees in the past five years," which were specifically requested by Matthew Smith of the Kentucky Kernel (the "Kernel") in the Open Records Request which is the subject of the above-referenced appeal. However, attached hereto are records relating to a final agency action against a former University employee who was accused of sexual misconduct (at that time, the allegations were not investigated under Title IX but under the general University policy against sexual harassment). The name of the student involved has been redacted.

It is my understanding that in similar appeals other state educational institutions have only provided the final agency decisions, pursuant to KRS 61.878(1)(i) and KRS 61.878(1)(j), which except from disclosure requirements preliminary drafts, notes and memoranda. I would be glad to discuss with you at your earliest convenience whether you require additional documents in regard to the appeal.

Sincerely,

/s/ Gordon A. Rowe, Jr.

Gordon A. Rowe, Jr.

IN ALL THINGS EXCELLENCE

Kentucky State University is an equal educational and employment opportunity/affirmative action institution.

EXHIBIT F

E44CB17E-D692-4283-8CC5-C8BD29AFBAFB : 000040 of 000047

EXH : 000001 of 000006



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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FAX: (502) 564-2894

17-ORD-011

January 24, 2017

In re: Matthew Smith/Kentucky State University

Summary: Records relating to university's investigation(s) into allegations of sexual misconduct were not shown to be protected by exceptions relied upon by the university where Attorney General was not given records to review under authority of KRS 61.880(2)(c).

Open Records Decision

Matthew Smith, *Kentucky Kernel*, by letter dated October 18, 2016, made an open records request to Kentucky State University (KSU) "to obtain all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years." Gordon Rowe, General Counsel, KSU, denied Mr. Smith's request explaining:

Your Open Records request is denied on the grounds that it necessarily requires Kentucky State University ("KSU") to disclose private information regarding victims of sexual assault, which would violate the CLERY Act, the Violence Against Women Act, potentially FERPA, and victim's fundamental rights to privacy."

Mr. Rowe did not cite any of the statutory exceptions provided for by the Kentucky Open Records Act in denying the Open Records request. Mr. Smith filed an appeal of KSU's denial of his request and KSU answered that appeal on November 15, 2016. KSU's response again referred to the Family Educational

17-ORD-011

Page 2

Rights and Privacy Act (FERPA), the Clery Act, the Violence Against Women Act (VAWA)¹ and KRS 61.878(1)(a). In regards to withholding records pursuant to KRS 61.878(1)(a), the response further stated:

The disclosure of the investigative records in the sexual assault cases contains myriad intimate details of the traumatic events involved in sexual assaults. Particularly on a small campus such as KSU's campus, these intimate details of the lives and trauma of the accusers would be unnecessarily and widely disseminated. It would not be difficult to review these disclosures to determine the personal identity of these victims, which, in many cases, would cause further harm and trauma to the victims of sexual assault

Unable to resolve the issues on appeal based on KSU's original denial and response to the appeal, on November 29, 2016, this office requested additional documentation from KSU pursuant to the authority granted this office by KRS 61.880(2)(c). In order for this office to meet the statutory deadline imposed by KRS 61.880(2)(b) for issuance of its decision on the appeal, the documentation was to be provided no later than December 21, 2016. After that deadline passed without a response from KSU, this office contacted the office of KSU's General Counsel and a response to the request for additional documentation was received January 6, 2017. In its response, KSU altered course from its previous letters, now stating that:

Kentucky State University does not have any records specifically categorized as "Title IX investigations into sexual misconduct allegations levied against University employees in the past five years," which were specifically requested by Matthew Smith of the Kentucky Kernel (the "Kernel") in the Open Records Request which is the subject of the above-referenced appeal. However, attached hereto are records relating to a final agency action against a former University employee who was accused of sexual misconduct (at that time, the allegations were not investigated under Title IX but

¹ Family Educational Rights and Privacy Act (FERPA), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), and the Violence Against Women Act of 1994 (VAWA) are federal laws. Federal privacy laws may be incorporated into the Open Records Act through KRS 61.878(1)(k).

17-ORD-011

Page 3

under the general University policy against sexual harassment).
The name of the student involved has been redacted.

From this response, this office is unable to determine whether KSU is merely denying that it has conducted any Title IX investigations into sexual misconduct allegations levied against University employees in the past five years and therefore has no responsive investigative records, or is denying that it has records specifically categorized as "Title IX investigations into sexual misconduct allegations levied against University employees in the past five years." The latter interpretation would apply an overly strict reading of the requirement of KRS 61.872(2)² to describe the records the requester wishes to inspect.³ In either case, the University's response mentions only one instance⁴ relating to an accusation of sexual misconduct by a former University employee, whereas the November 15, 2016, response refers to "accusers," "sexual assault cases," "victims," and "many cases." That November 15th response also stated that "in some cases, investigations may not be fully completed. In those cases, disclosure of the investigative records would potentially harm ongoing investigation or reveal confidential witnesses prior to final adjudication." This office is left to speculate as to whether there was only one instance of sexual misconduct by a University employee in the past five years, or whether there have been multiple such instances. This lack of clarity would have been unnecessary had the University merely provided the records requested for the OAG's *in camera* review.

Likewise, the University's claims of privacy regarding the requested records pursuant to FERPA, the Clery Act, and the Violence Against Women Act,

² KRS 61.872(2) states: "Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, *describing the records to be inspected*. The application shall be hand delivered, mailed, or sent via facsimile to the public agency." (Emphasis added).

³ "A request must be specific enough so that a public agency can identify and locate the records in question." OAG 89-8. "A description is sufficiently precise for purposes of records access by mail if it describes the records in definite, specific, and unequivocal terms." 98-ORD-17. Mr. Smith's Open Records request was specific enough for KSU to identify and locate the records in question.

⁴ KSU provided two letters having to do with final agency action for a single case alleging sexual harassment by a University employee but did not provide any investigative records.

17-ORD-011

Page 4

could not be resolved without having the requested records to review against those claims.

When an agency's denial of an Open Records request is appealed to the Office of the Attorney General, this office is statutorily tasked by KRS 61.880(2)(a) to "issue . . . a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884." KRS 61.880(2)(c) provides:

On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. *The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation.* The Attorney General may also request a copy of the records involved but they shall not be disclosed. (Emphasis added.)

Within a single sentence, the legislature assigns the burden of proof to the agency resisting disclosure, and invests the Attorney General with the authority to "request additional documentation *for substantiation.*" (Emphasis added.) As we observed at page 2 of 12-ORD-220, "when denied the opportunity to review the [disputed] records [or documentation necessary 'for substantiation'] 'the Attorney General's ability to render a reasoned open records decision [is] severely impaired.'" Citing 96-ORD-106, p. 5, and 10-ORD-079, p. 5. Such is the case in the appeal before us. It is the Attorney General's duty to conduct a meaningful review and issue an informed and reasoned decision, guided by the statutorily assigned agency burden of proof.

"The Kentucky Open Records Act provides for an '*adjudicatory process*' where an individual who receives an unsatisfactory response to an open records request may appeal to the Attorney General. At the conclusion of the process, the Attorney General issues an opinion, which if not appealed to the circuit court, has the 'force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.'" *Taylor v. Maxson*, 483 S.W.3d 852, 857 (Ky. Ct. App. 2016), *citing* KRS 61.880(5)(b). As the Office of the Attorney General is charged with issuing decisions that have the

17-ORD-011

Page 5

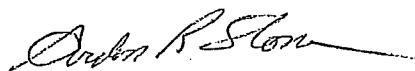
full force and effect of law (unless appealed), it must have access, as needed, to the records at issue in order to make a fully informed decision.

The Attorney General's decision of whether or not to request additional documentation from the agency for substantiation, or a copy of the records involved, is discretionary and based on the facts specific to each appeal.

Accordingly, we find that Kentucky State University failed to meet its burden of proof in denying Mr. Smith's request and must make immediate provision for Mr. Smith's inspection and copying of the disputed records with the exception of the names and personal identifiers of the complainant and witnesses per KRS 61.878(1)(a) as construed in 99-ORD-39 and 02-ORD-231 (copies enclosed).

Either party may appeal this decision by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General must be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Andy Beshear
Attorney General


Gordon Slone
Assistant Attorney General

#455

Distributed to:

Gordon Rowe
Matthew Smith

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NO. 17-CI-00199**

KENTUCKY STATE UNIVERSITY

PLAINTIFF/APPELLANT

v.

THE KERNEL PRESS, INC.,
d/b/a THE KENTUCKY KERNEL

DEFENDANT/APPELLEE

ORDER

This matter having come before the Court on the motion of the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, to intervene as a matter of right as a Plaintiff herein, the Court having considered the record and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the motion is GRANTED, and the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, is joined as an Intervening Plaintiff herein. The tendered Intervening Complaint is deemed FILED as of the date of the entry of this Order. The Intervening Plaintiff shall have the right to submit a brief herein on the issues raised in the Intervening Complaint.

This is a final and appealable order and there is no just cause for delay.

So ORDERED this _____ day of _____, 2016.

HON. THOMAS D. WINGATE
JUDGE, FRANKLIN CIRCUIT COURT

DATE: _____

Tendered by:

La Tasha Buckner
Executive Director
Office of Civil and Environmental Law
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601

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