20-ORD-001

January 8, 2020

In re: Matt Stahl/Western Kentucky University

Summary: Western Kentucky University ("WKU") did not violate the Open Records Act ("the Act") when it denied Matt Stahl's ("Appellant") request for student education records, and explained these documents were exempt under federal and state law. WKU also met its burden of proof regarding the denial of records based on their nonexistence.

Open Records Decision

On October 11, 2019, Appellant requested from WKU, "[a]ny records or correspondance [sic] from WKU athletics, Title IX Office, Office of Student Conduct or WKU police, with any reference to Marlon Hunter or Chris McNeal or Frederick Edmond or Ray Harper or any combination of the previously mentioned names, between April 6, 2015 and April 6, 2016."

On October 16, 2019, WKU denied the request. WKU identified the staff of WKU athletics, the Title IX Office, Office of Student Conduct and WKU police that searched for responsive records. WKU stated that the offices did not possess any records referencing Ray Harper. Regarding Marlon Hunter, Chris McNeal, and Frederick Edmond, WKU withheld those records under the Family Educational Rights and Privacy Act of 1974 ("FERPA") and the Kentucky Family Educational Rights and Privacy Act ("KFERPA"). WKU stated, "[a]ll records in the possession of the offices identified in the request were created during the time period when the three individual students were enrolled as students of the

University." WKU also denied the request because the records were "preliminary," under KRS 61.878(1)(i) and (j), and under the "personal privacy and federal law exemptions to the [Act] in KRS 61.878(1)(a) and (k)." WKU failed to identify the records it was withholding under KRS 61.878(1)(i) and (j) or explain how those exceptions applied to each category of record withheld. However, WKU's position that FERPA and KFERPA prevented the disclosure of education records was sufficient to overcome the inadequacy of its response[1] in citing KRS 61.878(1)(i) and (j).

On October 22, 2019, Appellant appealed the disposition of the request to this Office, and WKU responded on October 29, 2019. This Office requested copies of the responsive records for purpose of *in camera* review, under KRS 61.880(2)(c)[2] and 40 KAR 1:030, Section 3.[3] This Office also asked that WKU identify the records and provide a brief explanation of how the asserted exceptions applied to the records withheld. *See* KRS 61.880(1).

On November 13, 2019, WKU provided 500 pages of records for purposes of *in camera* review, and verified that the records comprise all existing records in its possession. WKU identified the records as 82 pages of Athletics Department records and 418 pages of Title IX Office and Office of Student Conduct disciplinary records, and explained how FERPA and KFERPA applied to each category. WKU stated that its police department did not possess responsive records, because no criminal charges had been filed with that agency.

<u>WKU's Records are "Education Records" as Defined in FERPA</u>.

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[1] WKU's initial response to the Appellant merely listed the exceptions it relied upon without explaining to Appellant how they applied. This initial response was insufficient. However, WKU supplemented its initial response on appeal and therefore corrected the issue.

[2] KRS 61.880(2)(c) states, in relevant part: "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."

[3] 40 KAR 1:030, Section 3 states: "Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which a 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."

WKU withheld all responsive records relating to Marlon Hunter, Chris McNeal, and Frederick Edmond, asserting FERPA, incorporated into the Act by operation of KRS 61.878(1)(k),[4] and its state counterpart KFERPA, incorporated by KRS 61.878(1)(l).[5] FERPA regulates access to "education records," which are defined at 20 U.S.C. § 1232g(a)(4)(A) as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 18-ORD-168, p. 4. More specifically, FERPA protects from disclosure "education records (or *personally identifiable information* contained therein other than directory information…) of students without the written consent of their parents to any individual, agency, or organization[.]" 20 U.S.C. § 1232g(b)(1) (emphasis added).

The term "education records" includes all information, in whatever form, which satisfies the two-part test described above. 18-ORD-168. Therefore, student records, "do not have to be related to academic matters to be 'education records' under FERPA[.]" *Id*. at 5-6 (quoting *United States v. The Miami Univ.,* 91 F. Supp.2d 1132, 1149 n. 17 (S.D. Ohio 2000)). Accordingly, the academic records, athletic records, and disciplinary records at issue in this appeal are "education records" as defined by FERPA.

WKU Did Not Violate the Act in Withholding Student Education Records.

This Office's *in camera* review revealed there were two separate categories of student education records. The first category related to the specific students. The second category related to general policies and procedures for handling student disciplinary actions. WKU's initial denial stated the records custodian "examined the records and determined the documents constitute student education records, including records of student discipline, which are excluded from public inspection by operation of the [FERPA], 20 USC § 1232g, which is

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[4] KRS 61.878(1)(k) exempts, "[p]ublic records or information the disclosure of which is prohibited by federal law or regulation[.]"

[5] KRS 61.878(1)(l) exempts, "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]"

incorporated into the Open Records Act by KRS 61.878(1)(k). . . ." FERPA also prohibits the release of "education records" where the "personally identifiable information" therein, "alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." *See* 34 C.F.R. § 99.3(f). Based on this Office's *in camera* review, the documents could not have been redacted in a manner that protected the identity of the students. Therefore, WKU properly withheld the student education records requested.

Regarding the policies and procedures, WKU's response must also be viewed in light of Appellant's specific request, which read "… with any reference to. . ." specific students. In our review, the policies and procedures did not make any reference to the specific students. FERPA and KFERPA do not apply to such general, non-specific documents. Because these records do not make "any reference to" the identified students, they are nonresponsive to the request.

<u>WKU Did Not Violate the Act by Withholding Athletic Department Records</u>.

WKU did not violate the Act when it withheld the 82 pages of WKU Athletics responsive records in their entirety. In a generic sense, the documents this Office reviewed *in camera* could have the "personally identifiable information" easily redacted. *See* 34 CFR §99.31(16)(b)(1). "Although FERPA contains no redaction provision, neither does it prohibit such." *Unincorporated Operating Div. of Indiana Newspapers, Inc., v. Trustees of Indiana Univ*., 787 N.E.2d 893, 908 (Ind. Ct. App. 2003). Courts have found that records with the personally identifiable information of a student removed are no longer "education records" subject to exemption under FERPA. *Id*. at 907-8; *United States v. Miami University*, 294 F.3d 797, 811 (6th Cir. 2002); *Hardin Cty. Sch.*, 40 S.W.3d at 869. As such, in some circumstances, student records can be redacted and released upon request without violating FERPA.

However, "personally identifiable information" may be redacted and the record may be released only if "the educational agency . . . has made a reasonable determination that a student's identity is not personally identifiable." *Id*. In *Miami University*, the college newspaper generally requested all disciplinary records held by the University Disciplinary Board covering a two-

year period. *Id*. at 803. The Court found that the requested records could be released provided personally identifiable information was redacted. *Id*. at 811. However, in this case, Appellant has requested the records of specifically identified students, unlike the general request made in *Miami University*. Even if the names and information of the students were redacted, they would still be linkable to specific students because of the specific nature of Appellant's request. *See* 34 C.F.R. § 99.3(f). Therefore, WKU properly withheld the Athletic Department Records.

WKU Met Its Burden of Proof Regarding Nonexistent Records.

Regarding responsive records relating to Ray Harper, this Office finds that WKU's initial response met the agency's burden of proof regarding the nonexistence of responsive records. In addition, WKU met its burden of proof regarding the nonexistence of WKU police records.

The Attorney General has consistently recognized that a public agency cannot provide a requester with access to a nonexistent record or that which it does not possess. 07-ORD-190, p. 6; 06-ORD-040. Nor is a public agency required to "prove a negative" in order to refute an unsubstantiated claim that a certain record exists in the possession of the agency. *See Bowling v. Lexington-Fayette Urban Cty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005); 11-ORD-091. The Act only regulates access to records that are "prepared, owned, used, in the possession of or retained by a public agency." 10-ORD-230; KRS 61.870(2). In order to satisfy the burden of justifying its denial per KRS 61.880(2)(c), however, a public agency must offer some explanation for the nonexistence of the records in dispute at a minimum. *See* 01-ORD-38; 04-ORD-075; 12-ORD-231. As such, WKU was required to conduct a "good faith" search, and "expend reasonable effort to identify and locate the requested records." *See* 95-ORD-96, p. 7.

WKU met its burden regarding the nonexistence of records relating to Ray Harper by describing a "good faith" search in the initial response, but WKU was unclear whether the WKU police possessed any responsive records. On appeal, WKU stated that the WKU police reported receiving no criminal charges relating to the student disciplinary cases, demonstrating that the agency conducted a "good faith" search. *See* 95-ORD-96. Accordingly, this Office finds that WKU ultimately met its burden of proof regarding the nonexistence of records.

Conclusion

While WKU was correct in withholding certain records subject to FERPA, this Office will not accept an agency's blanket denial under FERPA as an adequate response. To comply with the Act as it incorporates FERPA, educational agencies must describe, in detail, the categories of student records they possess. Further, they must explain why and how FERPA applies to those categories of documents, and why redaction of personally identifiable information would inadequately protect the identity of the student. As well, they must acknowledge whether a student has signed a FERPA waiver and whether the conditions of that waiver apply in the context of a specific request. For those requesting records from educational institutions, the language used in a request is crucial for determining whether an agency adequately complied.

A party aggrieved by this decision may appeal it 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 shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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