COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

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

20-ORD-043

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In re: Melissa Stone/University of Louisville

Summary: University of Louisville ("University") violated the Open Records Act ("the Act") by its untimely disposition of a request for records. The University failed in part to establish the applicability of KRS 61.878(1)(a), and failed to establish applicability of the work product doctrine. Information identifying students was protected by FERPA. Confidential communications from the University's attorneys were protected by attorney-client privilege. Preliminary records related to grant renewal proposals could be withheld under KRS 61.878(1)(i) and (j) except to the extent they were adopted as the basis of final agency action.

Open Records Decision

The University violated the Act in its disposition of a February 6, 2019, request by Melissa Stone ("Appellant") for "[a]ny official University of Louisville memorandums, email, or other communications from Dr. Tayna Franklin, Dr. Ashlee Bergin, Dr. Franklin Marshal, [or] Dr. Gregory Postel" regarding three subjects: "the Kenneth J. Ryan Abortion Training Program also referred to as the Ryan Training Program," "Planned Parenthood," or "EMW Women's Surgical Center."

The University first replied on February 13, 2019, five business days after the electronic request was submitted, requesting a "narrow date range" from Appellant. The following day, Appellant agreed to limit her request to records

between January 1, 2016, and January 31, 2019. Despite follow-up communications from Appellant in March, May,[1] June, and September 2019, the University did not provide a date by which records would be available.

Finally, on October 23, 2019, the University notified Appellant that it was giving "persons who might claim a privacy interest" an opportunity to take legal action under *Beckham v. Board of Education of Jefferson County,* 873 S.W.2d 575 (Ky. 1994), to block the release of records. The University stated that it would release records to Appellant "no later than November 8, 2019," unless it was "notified of a motion to quash."

On December 20, 2019, the University e-mailed records to Appellant, with several redactions and omissions on various grounds. The University did not, however, indicate that anyone had filed an action pursuant to *Beckham* that would have been the cause of the further delay. Due to the size of the attached files, Appellant did not receive the e-mail, and therefore she initiated this appeal on February 13, 2020.[2]

KRS 61.880(1) requires a public agency to make a final disposition of an open records request within three business days. KRS 61.872(5) permits a longer period of time when records are "in active use, in storage or not otherwise available," if the agency gives "a detailed explanation of the cause … for further delay and the place, time, and earliest date on which the public record will be available for inspection." The University, however, did not respond within three business days, nor did it allege any of the circumstances described in KRS 61.872(5) or give a detailed explanation[3] or the earliest date on which the records would be available. Subsequently, it failed to honor its stated date of November 8, 2019, for providing responsive records. By failing to provide records on the date the University identified, the University failed to discharge its duties under the Act.

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[1] There is evidence in the record that on May 13, 2019, the University e-mailed Appellant "additional contracts" it discovered. However, Appellant did not specifically request "contracts" and it is unclear to which request these records related.

[2] On February 20, 2020, the University made the same set of records available to Appellant via online storage, and she finally obtained the records.

[3] The University's only explanation for the delay prior to October 23, 2019, was a statement on September 4, 2019, that "[o]ur outside counsel is reviewing documents at this time." This is not a valid basis for delay under the Act.

See, e.g., 01-ORD-38 (finding violation where university provided only a projected or speculative date when records would be available and thus did not provide the "earliest date," as required by KRS 61.872(5)). By providing no records for more than 10 months after the request, and failing to give any reason for delay until eight months after the request, the University violated KRS 61.880(1).[4]

While the University wholly failed to dispose of the request according to KRS 61.880(1), the University met its burden regarding some redactions it made and failed to meet is burden regarding others. KRS 61.880(2)(c). The University alleged four separate bases for its redactions and omissions from the records provided to Appellant.

First, the University invoked KRS 61.878(1)(a), which excludes from open records "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Specifically, the University stated that it had "redacted personal cell and email addresses, brokerage account information, information regarding access to EMW Women's Surgical Center, physician schedules and locations, and information regarding students."

KRS 61.878(1)(a) permits the categorical redaction of "discrete types of information routinely included in an agency's records and routinely implicating similar grounds for exemption," including date of birth, Social Security number, driver's license number, and home address. *Ky. New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 89 (Ky. 2013). Personal telephone numbers and private e-mail addresses are subject to categorical redaction. *See, e.g.*, 16-ORD-205. Accordingly, the University properly redacted this information.

When categorical redaction does not apply, KRS 61.878(1)(a) requires a "comparative weighing of the antagonistic interests" between an identified privacy interest and the public interest in disclosure. *Ky. Bd. of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). The public purpose of the Act is to ensure "meaningful public oversight, to

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[4] On appeal, Appellant complained that several e-mails provided to her were not legible. On March 2, 2020, the University provided corrected copies and explained that those e-mails "became corrupted when the files were converted to PDF." That issue, having been resolved, is now moot.

enable Kentuckians to know 'what their government is up to.'" *Ky. New Era,* 415 S.W.3d at 89.

To rely on the exception provided by KRS 61.878(1)(a), the University must provide "a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). If the University identified a personal privacy interest in the records redacted, that interest would be weighed against the public interest in disclosure. *See Ky. Bd. of Examiners,* 826 S.W.2d at 327-28. However, the University articulated no privacy interest as to "brokerage account information, information regarding access to EMW Women's Surgical Center, physician schedules and locations, [or] information regarding students."

If an agency merely cites KRS 61.878(1)(a) without articulating a privacy interest, this Office cannot engage in a "comparative weighing of the antagonistic interests." *Id.* Therefore, the University failed to meet its burden of proof in applying that exception to these non-categorical redactions.[5]

As to "brokerage account information," the University failed to identify whose personal privacy interest was at stake. For an account belonging to a private individual with no involvement of public funds, the balance of interests would likely favor personal privacy. *See Hines v. Com., Dept. of Treasury,* 41 S.W.3d 872, 875 (Ky. App. 2001) (holding private individual's privacy interest in the value of abandoned property held in trust by the Kentucky State Treasury outweighed the public interest because the information did not involve public expenditures).

The University, however, has not clearly stated whether the "brokerage account information" was related to a private individual, to the University itself, or to a business entity. Records of an account belonging to a public agency necessarily involve the use of public funds and do not implicate personal privacy interests. *See Lexington-Fayette Urban Cty. Gov't v. Lexington Herald-Leader Co.,* 941 S.W.2d 469 (Ky. 1997) (holding that settlements to lawsuits involving public funds were not exempt under KRS 61.878(1)(a)). Similarly, a brokerage account owned by a business would not presumptively contain information subject to *personal*

[5] There may be a legitimate personal privacy interest in these documents. However, because the University did not articulate one, this Office will not speculate about that potential privacy interest in this decision.

privacy, although the records might be exempt under KRS 61.878(1)(c).[6] Because the University did not articulate whose "brokerage information" was at issue, it failed to meet its burden of proof for the redaction of "brokerage account information" under KRS 61.878(1)(a). In this way, the University violated the Act.

The second basis for the University's redactions is the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The University stated that it had redacted "records identifying students." FERPA provides, at 20 U.S.C. § 1232g(b)(1):

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than [certain limited exceptions.]

"Education records" are defined in 20 U.S.C. § 1232g(a)(4)(A) as "those records, files, documents, and other materials which … contain information directly related to a student; and … are maintained by an educational agency or institution or by a person acting for such agency or institution."

The University stated that it redacted "records identifying students," and that its redactions consisted of "information regarding students." The term "education records" includes all information, in whatever form, that relates to a student and is maintained by an educational institution. *See, e.g., United States v. Miami University,* 194 F.3d 797, 812 (6th Cir. 2002) ("Notably, Congress made no content-based judgments with regard to its 'education records' definition."); *Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F.Supp. 40, 49 (D.N.H. 1994) ("Congressional intent was to fashion a broad definition"). Therefore, the student information was properly redacted under FERPA.

The third basis cited by the University for withholding records was KRS 61.878(1)(i) and (j). Specifically, the records custodian stated, "I identified records

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[6] The University, however, did not make an argument under KRS 61.878(1)(c).

regarding grant renewal proposals that I withholding [*sic*] from release as they contain preliminary discussions of matters not finalized, drafts, and/or contain opinions and recommendations. The content of these records did not constitute final action in this matter."

KRS 61.878(1)(i) and (j), respectively, create exceptions to the Open Records Act in the cases of:

> (i) Preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency; [and]
>
> (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]

According to the Kentucky Supreme Court, if preliminary records are adopted as the basis of final agency action, they lose their former preliminary status under KRS 61.878(1)(i) or (j). *University of Ky. v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992) (*citing City of Louisville v. Courier-Journal & Louisville Times Co.,* 637 S.W.2d 658 (Ky. App. 1982); *Ky. State Bd. of Medical Licensure v. Courier-Journal & Louisville Times Co.,* 663 S.W.2d 953 (Ky. App. 1983)).

With regard to the grant renewal proposals, the University did not clearly state whether the University had taken final agency action as to any of those proposals by the time of Appellant's request. If the University had not taken final action on any of these matters, preliminary drafts were exempt under KRS 61.878(1)(i) and any preliminary recommendations or expressions of opinion were exempt under KRS 61.878(1)(j). To the extent the University had taken final action by the time of the request, those records should have been disclosed to the extent they were "adopted by the agency as part of its action." *Univ. of Ky. v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d at 378.

Finally, the University invoked KRS 61.878(1)(l) and KRE 503 to withhold "documents conveying legal advice/attorney-client work product." KRS 61.878(1)(l) operates in tandem with KRE 503 to exclude from public inspection otherwise public records protected by the attorney-client privilege. *Hahn v. University of Louisville,* 80 S.W.3d 771 (Ky. App. 2001). Records protected by the

work product doctrine may likewise be withheld from public inspection under KRS 61.878(1)(l) and CR 26.02(3). *See Univ. of Ky. v. Lexington H-L Services*, 579 S.W.3d 858, 864-65 (Ky. App. 2018).

The attorney-client privilege attaches to "confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to [a] client." KRE 503(b). "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5).

The work product doctrine "affords a qualified privilege from discovery for documents 'prepared in anticipation of litigation or for trial' by that party's representative, which includes an attorney." *Univ. of Ky. v. Lexington H-L Services*, 579 S.W.3d at 864. "However, the mere potential for litigation is not sufficient to place documents within the scope of the work-product doctrine." *Id.* at 865. "Furthermore, documents which are primarily factual, non-opinion work product are subject to lesser protection than 'core' work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney." *Id.*

KRS 61.880(1) requires that any agency response denying access to public records "provide particular and detailed information" to explain how an exception to the Act applies, not merely a "limited and perfunctory response." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). The University gave no description of any documents it deemed to be "work product," nor any factual context from which to conclude that any document was "prepared in anticipation of litigation or for trial." Likewise, the University did not state sufficient facts to establish that the "documents conveying legal advice" were in fact confidential communications to the University from its counsel in the furtherance of legal services. From this record, it is unclear whether any anticipated litigation existed or to whom the attorney was "conveying legal advice." This Office therefore finds that the University failed to meet its burden of proof as to any records allegedly protected by attorney-client privilege or the work product doctrine. *See* KRS 61.880(2)(c).

In conclusion, the University violated the Act by its egregiously untimely disposition of Appellant's request. It also violated the Act insofar as it failed to meet its burden of proof whether "information regarding access to EMW Women's

Surgical Center, physician schedules and locations" or "brokerage account information" contained private information under KRS 61.878(1)(a), and whether any records were protected by attorney-client privilege or the work product doctrine. However, the University properly withheld preliminary records relating to grant renewal proposals under KRS 61.878(1)(i) and (j) except to the extent that such records were adopted as the basis of final agency action. The University properly invoked KRS 61.878(1)(a) regarding personal telephone numbers and personal e-mail addresses, and properly invoked FERPA regarding information identifying students.

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.

Daniel Cameron
Attorney General

/s/ James M. Herrick

James M. Herrick
Assistant Attorney General

#58

Distribution:

Ms. Melissa Stone
Ms. Sherri Pawson
Thomas A. Hoy, Esq.