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24-ORD-219

October 7, 2024

In re: Raymond Lauk/Eastern Kentucky University

Summary: Eastern Kentucky University (“the University”) did not violate the Open Records Act (“the Act”) when it denied a request for a copy of a copyrighted work.

Open Records Decision

On August 27, 2024, Raymond Lauk (“the Appellant”) requested “a copy of the August 2024 Moody’s Investor[s] Service report on Eastern Kentucky University.” In a timely response, the University denied the request on the grounds that it “is not the ‘custodian’ of the [report] for purposes of KRS 61.870(6), which defines ‘custodian’ as ‘the official custodian or any authorized person having personal custody and control of public records.’” The University explained that Moody’s Investors Service, Inc. (“Moody’s”) “makes documents of this nature available on its website,” but any copies the University might possess “have been acquired by University employees through the establishment of an individual account through Moody’s website, which makes clear users are only granted a ‘personal, revocable, non-exclusive, non-transferable license to use the Site conditioned on’ compliance with Moody’s Terms of Use.” The University further explains that the Terms of Use “explicitly prohibit . . . account holders from exporting, disseminating, and/or reproducing ‘any information or Materials obtained from or through the Site.’” Finally, the University invoked KRS 61.878(1)(c) on the grounds that the Moody’s report was a record “generally recognized as confidential or proprietary.” This appeal followed.

The Appellant claims that the Moody’s report, as “[a]n analysis of the university finances[,] certainly is a public document, just like any other analysis such as the annual audit.” However, the University explains that the report is not “one the University contracted with Moody’s to write and publish on the University’s behalf and for the University’s use.” Rather, it is a document published by Moody’s “of its own accord, on its own website, and without requiring the approval of or any financial consideration from the University.” The University further argues that, while some of its employees may have “access” to publications on Moody’s website through their

individual accounts, the report in question is not within the University's custody and control.

Under KRS 61.870(2), "public record" includes "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." However, "an agency's 'access' to digital records, without more, does not mean that the public agency is the custodian of such records" or that they are public records for purposes of the Act. 20-ORD-109. A public agency is not the custodian "of anything and everything available on the Internet," 22-ORD-131, but "is responsible only for those records within its own custody or control." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 856 (Ky. 2013) (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)).

Here, the University refers to the "Terms of Use" on Moody's website to demonstrate that it lacks the necessary custody and control over the Moody's report to make it available to the public under the Act. Specifically, Moody's does not allow users to "disseminate, broadcast, reproduce, [or] transfer . . . any information or Materials obtained from or through the Site, without Moody's prior written consent."¹ Moreover, on appeal, the University points out that the Moody's report is a copyrighted work under 17 U.S.C. § 102(a), which applies to all "original works of authorship fixed in any tangible medium of expression." Federal copyright law is incorporated into the Act under KRS 61.878(1)(k). *See, e.g.*, 22-ORD-095; 09-ORD-079. A copyright holder possesses several exclusive rights, including the right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership" and the right to authorize others to do so. 17 U.S.C. § 106(3). It is clear from the Terms of Use that Moody's, the copyright holder, has not authorized users of its website to distribute copies of its materials to the public. Thus, to the extent the University or its employees may possess copies of the Moody's report, they may not, consistent with federal law, disseminate them to the public.

The Appellant argues that the Moody's report should be available to the public because the University "had to provide a great deal of data and sit for an interview with Moody's" and was able to review a draft version "for errors [or] to add additional information." However, while the University acknowledges that it assisted Moody's in preparing the report "by supplying public records [and] financial data," those records are not what the Appellant requested. He requested the report published independently by Moody's for its own purposes on its own website, which is a copyrighted work of Moody's and is not a public record of the University,

¹ See "Terms of Use," § 1(c)(ii), available at <https://www.moody.com/web/en/us/legal/terms-of-use.html> (last accessed Oct. 7, 2024).

notwithstanding that some University employees may possess copies of it.² Because the Moody's report is exempt from public disclosure under federal law, the University did not violate the Act when it denied the Appellant's request.³

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ James M. Herrick
James M. Herrick
Assistant Attorney General

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Distributed to:

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² The Attorney General has long construed the definition of "public records" in KRS 61.870(2) to exclude "library reference materials" possessed by a public agency, such as statutes and regulations, because the disclosure of such materials "would not enable the public to monitor public agency operations or serve any purpose which underlies the [Act]." 16-ORD-196; 14-ORD-073; 10-ORD-112; 04-ORD-200; 99-ORD-35. But here, because federal law is dispositive of the issues on appeal, it is not necessary to decide whether the Moody's report constitutes "library reference materials" excluded from the definition of "public records."

³ Because 17 U.S.C. §§ 101, *et seq.*, is dispositive of the issues on appeal, it is not necessary to address the University's alternative argument under KRS 61.878(1)(c).