16-ORD-161

August 1, 2016

In re: *Kentucky Kernel*/University of Kentucky

Summary: Records relating to university's investigation of sexual harassment allegations leveled by a student against a professor were not shown to be protected by exceptions and privileges 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

Kentucky Kernel editor-in-chief and reporter William Wright appeals the University of Kentucky's denial of his request "to obtain copies of all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of a tenured professor and any allegations of sexual harassment, sexual assault, or any other misconduct by [the professor]."[1] The university promptly denied Mr. Wright's request explaining:

[1] The underlying facts in this appeal are not disputed. In the summer of 2015, the University received a complaint from a graduate student alleging sexual harassment by a tenured faculty member. Although the University stated that the student "filed a complaint," suggesting a written complaint, the University later advised us that there was no written complaint. Pursuant to Title IX, 20 U.S.C. §§1681-88, the University's Office of Institutional Equity and Equal Opportunity, launched an investigation the results of which were forwarded to University Counsel. Counsel relied on these results in advising the University how it should proceed. The University resolved the complaint in April 2016 by entering into a settlement agreement with the professor under the terms of which he resigned from the University, effective August 31, 2016, and was prohibited from returning to the campus except for health care purposes, but would

> all records detailing the . . . investigation from the University's Office of Institutional Equity and Equal Opportunity are unable to be released pursuant to KRS 61.878(1)(i) and (j). These records are considered preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of a final action of a public agency; or preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended and are exempt from disclosure. Additionally, some documents in the file are protected pursuant to KRS 61.878(1)(a), as they contain information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. Finally, some documents are protected pursuant to the Kentucky Rules of Evidence 503, as they are considered attorney-client/work product privileged and are exempt from disclosure.[2]

The University did not explain the application of these exceptions to the records withheld in contravention of KRS 61.880(1) (requiring the agency "to include a statement of the specific exception authorizing the withholding of the record *and a brief explanation of how the exception applies to the record withheld*" and not to simply recite the language of the exception.) (Emphasis added.)

Upon receipt of this office's notification of the *Kernel's* appeal, the University expanded on its position. Noting that it had provided Mr. Wright with "a wide variety of materials – including the agreement with the accused professor" but failing to identify any other records released to Mr. Wright or to provide this office with copies of the records released, notwithstanding our KRS

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continue to receive his salary until August 31, 2016, and his and his family's health care benefits until December 31, 2016, or until he locates a new position.

[2] KRE 503 is incorporated into the Open Records Law by KRS 61.878(1)(l), authorizing public agencies to withhold, "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]" See, for example, *Commonwealth, Cabinet for Health and Family Services v. Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008) (recognizing that "the burden of proof of demonstrating that a requested public record falls within the attorney-client privilege falls upon the Administration [agency]"); *Hahn v. University of Louisville*, 80 S.W.3d 771 (Ky. 2001).

61.880(2)(c) request for copies of the released records, the University maintained that:

- because the University's investigating unit, the Office for Institutional Equity and Equal Opportunity lacks authority to take final agency action and can only recommend action, all investigative reports are preliminary recommendations per KRS 61.878(1)(i) and (j);[3]
- given the nature of the underlying complaint in this case, KRS 61.878(1)(a) erects a barrier to disclosure insofar as "it surely encompasses all investigative records that specifically identify a student or which concern sexual activity of an individual or individuals."[4]

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[3] In support, the University cited OAG 78-738. This opinion predates *City of Louisville v. Courier-Journal*, 637 S.W.2d 658 (Ky. App. 1982), *Kentucky State Board of Medical Licensure v. Courier-Journal*, 663 S.W.2d 953 (Ky. App. 1983), and *Univ. of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373 (Ky. 1992), interpreting KRS 61.878(1)(i) and (j) in a manner inconsistent with OAG 78-738. That opinion therefore no longer represents controlling legal precedent. By the same token, 00-ORD-29, 94-ORD-108, and OAG 91-161 predate 01-ORD-83 in which the Attorney General reconsidered his interpretation of KRS 61.878(1)(i) and (j), in the manner approved by the Kentucky Supreme Court in *Commonwealth v. Chestnut*, 250 S.W.3d 655, 663-664 (Ky. 2008), and concluded that "the courts purposefully employed the broader concept of 'adoption' rather than 'incorporation', relative to preliminary investigative reports and records, to avoid narrow legalistic interpretation."

[4] We wholeheartedly agree that the identity of the complainant and witnesses, as well as their personally identifying information, must be shielded from disclosure. See, e.g., 99-ORD-39 and 02-ORD-231. However, *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.,* 826 S.W.2d 324 (Ky. 1992), upon which the University relies focused on the regulatory board's response to written complaints of sexual misconduct involving one of its licensees. The Board released the written complaints that spawned the investigation and its final order, but withheld the underlying complaint file containing, *inter alia*, "information elicited within the unique relationship between a psychologist and client" which the Court characterized as "information . . . touch[ing] upon the most intimate and personal features of private lives." *Bd. of Examiners*, 826 S.W.2d at 328. In *Board of Examiners,* the public was afforded access to written complaints identifying the nature of the licensee's conduct and the Board's final order premised on the licensee's agreement to surrender his license and to not seek re-license. This is not the case here. Because the complaint in this appeal was oral, there is no means by which to assess the seriousness of the allegations or the appropriateness of the terms of settlement. We do not believe that the public can ascertain "from the already disclosed portions of the record that the [University] has faithfully performed the purpose," to "promptly, responsibly, and thoroughly" investigate the tenured professor against whom these allegations were made. *Board of Examiners,* 826 S.W.2d at 328.

- because "General Counsel" relied on the investigative reports in formulating legal advice to senior administrators, the reports are attorney-client/work product privileged.[5]

Unable to resolve the issues on appeal based on the University's original and supplemental responses, on May 26, 2016, this office requested additional documentation from the University, as well as a copy of the records released to the *Kernel* and a copy of the records the University withheld from the *Kernel*, "for substantiation." KRS 61.880(2)(c). The University, in response, introduced new arguments in support of its denial, and argued that this office has a very limited role under KRS 61.880(2). The University did not directly, or, in some cases, even indirectly, address our inquiries and refused our request for copies of the disputed *and* undisputed records, themselves.[6]

The University misconstrues the meaning and import of KRS 61.880(2)(c). That statute 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

[5] Having reviewed the authorities cited by the University in support of its position that the investigation, and the report submitted to the University's "senior administrators" for appropriate action, we remain unconvinced, without further proof in the form of a review of the report under KRS 61.880(2)(c) "for substantiation," that the report is attorney-client and work product privileged. Repeatedly, the University asserts that the investigation was launched and the report generated, under specific federal law mandating same and not for the purpose of rendition of legal services. Title IX, 20 U.S.C. §§1681-88 and the Due Process Clause, U.S. Const. amend. XIV, §1.

[6] One newly introduced argument supporting its refusal to disclose the disputed records is based on the University's characterization of the records as Family Educational Rights and Privacy Act, 20 U.S.C. 1232g and 34 C.F.R. Part 99 protected records. The University noted that we have deferred to its interpretation of FERPA in past decisions, citing 12-ORD-220 (an appeal involving a former University of Kentucky basketball player's recruitment by the University and his eligibility) and 08-ORD-052 (an appeal involving access to emails sent through Student government's executive branch listserv that included communications between professors and students). This appeal involves records containing allegations of misconduct against a professor, not a student, and we are not prepared, absent a review of the records, "for substantiation," to accept the University's characterization of them as FERPA protected student "education records."

> 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.) The University's refusal to honor the Attorney General's requests suggests that it views these requests as either adversarial or a form of "advoca[cy] for the requester," or both.[7] The juxtaposition of the assignment of the burden of proof to the agency and the Attorney General's authority to request additional documentation "for substantiation" establishes the contrary. 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. Accordingly, we find that the University of Kentucky failed to meet its burden of proof in denying the *Kentucky Kernel's* request and must make immediate provision for Mr. Wright'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).

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[7] The University cites *Owen v. University of Kentucky*, 2016 WL 2604779 at 3 (Ky. 2016) in support of a number of arguments, including its argument that the thirty-four year old judicial interpretation of KRS 61.878(1)(i) and (j) is of no legal effect because the strict language of these exceptions does not support the courts' interpretation. We are disinclined to reject a well-entrenched interpretation of the Open Records Law based on a non-open records opinion rejecting past interpretation of an unrelated statute that turned on a subsequent amendment to the statute. Similarly, we are disinclined to accept the University's application of *Owen* to KRS 61.880(2)(c) thereby restricting, *inter alia*¸ our ability to request additional documentation for substantiation, especially where the courts have clearly recognized that authority and criticized an agency that refused to honor such requests. *Cabinet for Health and Family Services v. Todd County Standard, Inc.,* 2015 WL 8488991 (Ky. App. December 11, 2015) (admonishing an uncooperative agency for its unwillingness to respond to inquiries and share documentation so as to "frustrate[ ] the Attorney General's statutory review under KRS 61.880." *Todd County Standard* at 6.

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 should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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