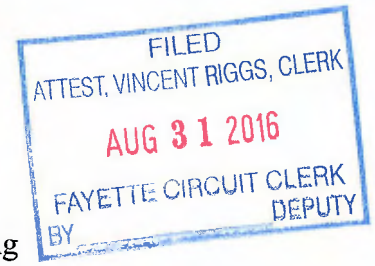
COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 8
CASE NO. 16-CI-3229

UNIVERSITY OF KENTUCKY — PLAINTIFF/APPELLANT

v.



THE KERNEL PRESS, INC.
d/b/a THE KENTUCKY KERNEL — DEFENDANT/APPELLEE

Serve: Chris Poore
026 Journalism Building
University of Kentucky
Lexington, KY 40506-0042

COMPLAINT AND NOTICE OF APPEAL

Comes the plaintiff/appellant, University of Kentucky ("University"), and for its complaint and notice of appeal states as follows:

INTRODUCTION

Although the statute requires the University to name the Kentucky Kernel as a party and to refrain from naming the Attorney General (see KRS 61.880 and KRS 61.882), the legal reality is the University's dispute is with the reasoning of the Attorney General and not with the student newspaper.

The Attorney General has declared that Kentucky's Open Records Act requires the University to disclose all details—except the name of the victim/survivor—of the University's investigation into the alleged sexual assault of a student. The mandate for total disclosure includes materials that are protected by federal privacy law because they would easily lead to the identification of victim/survivors, records that are preliminary in nature, and documents that are

protected by the attorney-client or work-product privilege. Moreover, while there are many responsible media outlets that would never misuse this information, the Decision is not limited to responsible media outlets; it applies equally to ill-intended requests from stalkers and prisoners.

In reaching his conclusion, the Attorney General ignored three key legal principles:

First, the University's obligations under federal privacy laws such as FERPA, VAWA, Clery, and HIPAA trump any obligations under the state Open Records Act, even to the extent they are not necessarily incorporated into the Act via KRS 61.878(1)(k). *See* U.S. Const. Art. VI, § 2. Thus, for example, the United States Department of Education has declared schools may not share information protected by FERPA with a state attorney general as part of an open records dispute. *See* July 25, 2006 *FPCO letter to Texas Office of Attorney General re: Disclosure of Education Records by School District*, available online at http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/txago072506.html.

Second, in interpreting statutes, the Supreme Court of Kentucky has unanimously declared "the text of the statute is supreme" and courts "will not construe a meaning that the text of the statute cannot bear." *Owen v. University of Kentucky,* 486 S.W.3d 266, 270 (2016). Thus, in construing statutes, such as the Open Records Act, both courts and the Attorney General must assume that the Generally Assembly "meant exactly what it said, and said exactly what it meant." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). Since the statute simply declares that preliminary materials are exempt from disclosure, the statute cannot be construed as mandating a loss of exemption simply because the University has rendered a final agency action that does not adopt or incorporate the materials. .

Third, both the United States Supreme Court and the Commonwealth's Supreme Court have limited *in camera* inspection of attorney-client privileged documents to judicial officers in extraordinary circumstances. *See United States v. Zolin*, 491 U.S. 554, 570-572 (1989); *Stidham*

v. Clark, 74 S.W.3d 719, 727-728 (Ky. 2002). Specifically, a judicial officer may conduct an *in camera* inspection of attorney-client privileged materials only when there is "evidence sufficient to support a reasonable belief that *in camera* review may yield evidence" that the privilege is inapplicable. *Stidham*, 74 S.W.3d at 727 ((quoting *Zolin*, 491 U.S. at 572). There is no authority for an executive branch official—such as the Attorney General—to conduct an *in camera* review of attorney-client privileged materials as a matter of routine practice. Indeed, in the context of judicial *in camera* inspection of attorney-client privileged documents, the U.S. Supreme Court explicitly rejected such routine inspections:

> A blanket rule allowing *in camera* review as a tool for determining the applicability of [exceptions to privilege] would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings.

Zolin, 491 U.S. at 571 (citations omitted). While the Attorney General has the authority to review additional records as part of his resolution of an Open Records Act appeal, this authority is limited to documents that are not protected by attorney-client privilege, a similar privilege, or federal law.

Ultimately, the Attorney General's decision—that all details of a sexual assault investigation, except the name of the victim/survivor, are available to everyone—has a chilling effect on whether victim/survivors will report incident and undermines the University's ability to fulfill its obligations under both federal law and the Constitution. The implications go far beyond a student newspaper and these particular victims/survivors.

To be sure, the public has a right to access and understand the workings of the University, but University also has an obligation to protect the privacy of victims/survivors and those who may be wrongly accused. The Legislature—the People's democratically elected agents—

recognized this when enacting the Kentucky Open Records Act. "Despite its manifest intention to enact a disclosure statute, the General Assembly determined that certain public records should be excluded from disclosure. . . . .the General Assembly has determined that the public's right to know is subservient to statutory rights of personal privacy and the need for governmental confidentiality." *Beckham v. Bd. of Educ. of Jefferson Cty.*, 873 S.W.2d 575, 577-78 (Ky. 1994).

PARTIES AND JURISDICTION

1. This action is brought pursuant to KRS 61.880(5) and KRS 61.882 as an appeal from the Open Records Decision of the Office of the Kentucky Attorney General in *In re Lexington Kernel/University of Kentucky*, 16-ORD-161 (2016) (A. Beshear, A.G.) ("the Decision"). This action is reasonably necessary to prevent the potentially disastrous consequences that would result from compliance with a decision that represents clear disregard for victims' and witnesses' privacy rights, the supreme authority of federal law, and the importance of protecting and preserving the confidentiality of privileged communications and materials fundamental to ensuring that Kentucky's flagship and land-grant university effectively operates at all levels.

2. Although the University's disagreement is with the Attorney General's decision and not with the Kernel, pursuant to KRS 61.880(3) and 40 KAR 1:030 the Attorney General has not been made a party to this action, nor will he be served with summons as if he were a party to this action. Pursuant to the aforementioned provisions, however, the University is providing the Attorney General with written notice of this action as reflected in the certificate of service below.

3. The University is a state university and an agency of the Commonwealth of Kentucky that exists and operates pursuant to the applicable provisions of KRS 164.100 *et seq.*

4. The defendant/appellee, The Kernel Press, Inc. d/b/a The Kentucky Kernel ("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.

5. Jurisdiction and venue are proper in this Court pursuant to KRS 23A.010, KRS 61.880(5), and KRS 61.882 because the University has its principal place of business in Fayette County, Kentucky and because the records at issue are maintained, in whole or in part, in Fayette County, Kentucky.

FACTS & PROCEDURAL HISTORY

6. An account of the facts relevant to this appeal is set out in the University's May 3, 2016 response and its June 15, 2016 supplemental response to the Attorney General in Open Records Appeal Log No. 201600183, copies of which are included in the exhibits to this complaint and notice of appeal. Accordingly, this pleading will recite only some of the facts addressed therein.

7. By written request received by the University on April 7, 2016, the Kernel requested copies of "all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of [former University professor] James Harwood and any allegations of sexual harassment, sexual assault, or any other misconduct by James Harwood." A copy of the Kernel's request is attached as "Exhibit A."

8. By letter dated April 11, 2016, the University respectfully denied the Kernel's request, advising it was unable to release the records sought because the records contained information of a personal nature, the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy (i.e., that of the alleged victim and witnesses involved in the allegations against Harwood); because the records were preliminary; and because at least some of the records were protected by attorney-client and/or work-product privilege. A copy of

the University's response is attached as "Exhibit B." Notwithstanding these issues, the University provided the Kernel with a wide variety of materials, including an agreement with Harwood pursuant to which Harwood resigned his employment with the University.

9. By letter sent in April 2016, the Kernel appealed the University's response to the Office of the Attorney General. Copies of that letter and the Attorney General's April 22, 2016 acknowledgment of it are attached as "Exhibit C."

10. The University responded to the Kernel's appeal by memorandum to the Attorney General dated May 3, 2016. A copy of that memorandum is attached as "Exhibit D." In its response, the University explained its investigative obligations under the Constitution of the United States and Title IX of the Education Amendments of 1972, as well as its position on the preliminary, private, and privileged nature of the records in question.

11. By letter dated May 26, 2016, the Attorney General sought additional information from the University in the form of written responses to a number of questions about the University's position in this matter, the investigative process for complaints like the one at issue in the underlying records, and the University's search for records responsive to the Kernel's request. The Attorney General also asked the University to provide a copy of records to which the Kernel was denied access. A copy of the Attorney General's letter is attached as "Exhibit E."

12. The University responded to the Attorney General's requests by supplemental memorandum dated June 15, 2016. A copy of the University's supplemental memorandum is attached as "Exhibit F." In its supplemental memorandum, the University explained at length its obligations to investigate and address allegations of sexual assault; details about the specific investigation at issue in the Kernel's request; the exemptions claimed by the University, the specific reasons for claiming them, and the proper construction of those exemptions pursuant to applicable law; the substantial risks and harm to victims of sexual assault that would result from

disclosure of records such as those at issue; and the legal constraints of attorney-client/work-product privilege and federal law that prevented the University from producing the records for *in camera* review notwithstanding the Attorney General's request. The University supported its memorandum with an affidavit from its Interim Associate Vice President of Institutional Equity and Title IX Coordinator, Patty Bender, describing the contents of the investigative file directly at issue and the investigative process involved with the records sought by the Kernel.

13. On August 1, 2016, the Attorney General issued the Decision (16-ORD-161). A copy of the Decision is attached as "Exhibit G."

14. In the Decision, the Attorney General erroneously held in relevant part as follows:

a. The University failed to meet its burden of proof in denying the Kernel's request by not providing records for *in camera* review.

b. The University must make immediate provision for the Kernel's inspection and copying of disputed records with the exception of the names and personal identifiers of the complainant and witnesses pursuant to KRS 61.878(1)(a) as construed in 99-ORD-39 and 02-ORD-231.[1]

15. The Attorney General's decision in 16-ORD-101 was contrary to both state and federal law; the plain language of relevant statutes and corresponding rules of statutory construction; prior decisions of the Attorney General including *In re Kentucky Kernel/University of Kentucky*, 12-ORD-220 (2012) (Conway, A.G.) and *In re Kentucky Kernel/University of Kentucky*, 08-ORD-052 (2008) (Conway, A.G.); proper application of attorney-client and work-product privilege; the limits of the Attorney General's authority to conduct *in camera* reviews; and the significant privacy interests of victims and witnesses involved with sexual assault cases.

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1 The Attorney General also erroneously suggested that the University had not addressed the Attorney General's inquiries and that FERPA does not apply to records addressing allegations of sexual misconduct by a professor against a student.

16. At all times relevant hereto, the University has acted in good faith regarding compliance with its obligations under the Kentucky Open Records Act.

COUNT I: APPEAL FROM THE ATTORNEY GENERAL'S DECISION IN 16-ORD-161

17. The University adopts and incorporates the allegations in Paragraphs 1-16 of this complaint and appeal as if fully set out herein.

18. In addition to the assignments of error addressed above, other issues that form the basis of this appeal and for which the University seeks this Court's *de novo* review are as follows:

a. When an agency refuses to provide privileged materials or documents protected by federal privacy laws to the Attorney General for *in camera* review, whether the Attorney General can use the agency's refusal as the sole basis for declaring the materials are not exempt or whether the Attorney General must make a substantive determination as to whether the exemption applies based upon the information provided to the Attorney General?

b. Whether the records at issue are protected from disclosure by federal privacy law?

c. To the extent the records at issue are protected from disclosure by federal privacy law, whether the University's obligations under federal privacy law trump the University's obligations under the State Open Records law?

d. Whether federal law prohibits disclosure of the records at issue such that they are exempt from disclosure under KRS 61.878(1)(k)?

e. Whether the records at issue fall within the personal privacy exemption in KRS 61.878(1)(a)?

f. Whether the records at issue are preliminary under KRS 61.878(1)(i) and/or (j)?

g. To the extent the records at issue are preliminary, whether preliminary records lose their exempt status simply because the agency has rendered a final action?

h. To the extent the records at issue are preliminary and lose their preliminary status when incorporated into the final agency action, whether any of the records at issue have indeed been incorporated into the final agency action?

i. Whether the records at issue are exempt from disclosure under KRS 61.878(1)(l) to the extent they are subject to attorney-client and/or work-product privilege?

PRAYER FOR RELIEF

WHEREFORE, pursuant to KRS 61.880(5) and KRS 61.882, the University prays for the following:

A. This Court's review of this matter *de novo*, as provided in KRS 61.882, and entry of a briefing schedule to facilitate that review.

B. Reversal of the Attorney General's erroneous decision in 16-ORD-161.

C. Judgment that the University's positions in this case are proper and consistent with applicable law.

D. A determination that the University has at all relevant times acted in good faith regarding compliance with its obligations under the Kentucky Open Records Act.

E. All other relief in law or equity to which the University may be entitled.

Respectfully submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

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william.thro@uky.edu
COUNSEL FOR UNIVERSITY OF KENTUCKY

CERTIFICATE OF SERVICE

This is to certify that, pursuant to KRS 61.880(3) and 40 KAR 1:030, a copy of the foregoing was served upon the following by certified mail, this 31st day of August 2016:

Hon. Andy Beshear, Attorney General
Hon. Amye L. Bensenhaver, Assistant Attorney General
Commonwealth of Kentucky
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

COUNSEL FOR UNIVERSITY OF KENTUCKY

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EXHIBIT A

Kentucky Kernel

026 Grehan Journalism Building• Lexington, Ky. 40506
Phone: (724) 344-6945 • E-Mail: wright.w84@gmail.com
Web: kykernel.com

Date: Jan. 18, 2016

Custodian of Records
University of Kentucky
301 Main Building
Lexington, KY 40506-0032

To Whom It May Concern:

Under the Kentucky Open Records Act § 61.872 et seq., I am requesting an opportunity to obtain copies of all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of James Harwood and any allegations of sexual harassment, sexual assault or any other misconduct by James Harwood.

If there are any fees for searching or copying 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 time within three business days. If access to the records I am requesting 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 any or all of this request, 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,

Will Wright
Reporter, Kentucky Kernel

EXHIBIT B

UNIVERSITY OF KENTUCKY

Official Records Custodian
301 Main Building
Lexington, KY 40506-0032
859 257-6366
fax 859 323-1062
www.uky.edu

April 11, 2016

VIA E-MAIL: wright.w84@gmail.com

Mr. Will Wright
Kentucky Kernel
026 Grehan Journalism Building
Lexington, KY 40506

Re: Open Records Request

Dear Mr. Wright:

We are in receipt of your Open Records Request received by this office on April 7, 2016. Your email states the following:

> "Under the Kentucky Open Records Act § 61.872 et seq., I am requesting an opportunity to obtain copies of all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of James Harwood and any allegations of sexual harassment, sexual assault or any other misconduct by James Harwood."

RESPONSE: Please be advised that all records detailing the above-referenced investigation from the University's Office of Institutional Equity and Equal Opportunity are unable to be released pursuant to KRS 61878(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.

Please let us know if we can assist you further.

Sincerely,

Bill Swinford

Bill Swinford
Official Records Custodian

EXHIBIT C

Notification to Agency of Receipt
of Open Records Appeal

Re: Open Records appeal filed by William Wright

An appeal has been filed with the Attorney General pursuant to KRS 61.880(2) regarding your agency's denial of an open records request. A copy of the appeal is attached. A copy of this notice is being sent to the complaining party.

Pursuant to 40 KAR 1:030 Section 2, the agency may respond to this appeal. The agency must send a copy of its response, and any accompanying materials, to the complaining party.

The Attorney General shall not agree to withhold action on the appeal beyond the time limit imposed by KRS 61.880(2). The agency response should be faxed to:

Amye Bensenhaver
Attorney General's Office
700 Capitol Avenue
Frankfort, Kentucky 40601
Fax: (502) 564-6801

If you wish to respond, please refer to log number 201600183.

Your response must be received no later than Thursday, April 28, 2016.

This notice was distributed on 04/22/16 to:

William Wright
Editor-in-Chief
Kentucky Kernel
026 Grehan Journalism Building
Lexington, KY 40506

Bill Swinford
Official Records Custodian
University of Kentucky
301 Main Building
Lexington, KY 40506-0032

William Thro
General Counsel
University of Kentucky
301 Main Building
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William Wright
Editor-in-Chief
Kentucky Kernel
Cell: 724-344-6945
Email: wright.w84@gmail.com

Office of the Attorney General of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, KY 40501

To the Office of the Attorney General,

Thank you for hearing my appeal. Cheyene Miller and I — both reporters and editors at the Kentucky Kernel, UK's independent student newspaper — believe the University of Kentucky is denying our right to view public records. We wrote and published a story titled "Continued pay, benefits for UK professor who resigns amid allegations of sexual harassment," that ran on April 6, 2016. The article details how a UK professor signed a resignation agreement with UK amid allegations of sexual harassment that were brought to the university by students. The university handled these complaints internally. In the process of reporting a follow-up article, I requested from the University of Kentucky Open Records Office "copies of all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of James Harwood and any allegations of sexual harassment, sexual assault or any other misconduct by James Harwood." I was denied these records and because the university claims they are 1) preliminary drafts, notes, correspondence with private individuals or preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended and are exempt from disclosure, and 2) the records contain information of a personal nature where the pubic disclosure would constitute an unwarranted invasion of personal privacy. Some documents, the university said, are considered attorney-client/work product privileged and are exempt from disclosure.

I do not believe the "preliminary" distinction should disqualify these records from release. The university and Mr. Harwood already reached a resignation agreement, and any records that led the university to make that agreement should be public. As for the personal nature of the documents, I believe the university could remedy this by redacted the names of any victims. I am not sure about the attorney-client work, but I do not believe this would contaminate all records.

I look forward to hearing back from the Office of the Attorney General. Thank you for your time, and I hope you will hear my appeal.

Sincerely,
William Wright

By Cheyene Miller

news@kykernel.com

Amid a university investigation of alleged sexual harassment by UK associate professor of entomology James Harwood, UK and Harwood came to a resignation agreement that would allow the professor to continue receiving pay and benefits until August 31.

According to records obtained by the Kentucky Kernel through an open records request, the Office of Institutional Equity and Equal Opportunity has been conducting an investigation of Harwood's conduct based on sexual harassment allegations, which Harwood has denied.

"I was not found guilty, the case is closed and I will be resigning, effective 31 August 2016, for family medical reasons," Harwood wrote in an email to the Kernel.

UK Discrimination and Harassment defines "sexual harassment" as: "unwelcome sexual advances, requests for sexual favors, or other verbal or physical behavior of a sexual nature."

The university and Harwood reached an agreement "to resolve (the) matter without the need for further cost or expense," according to the university records.

The terms of the agreement include:

- Harwood will tender his resignation, effective as of August 31, 2016. The resignation is irrevocable.
- The university will not initiate proceedings to revoke Harwood's tenure.
- Harwood shall continue his employment and receive $109,900 annually and shall receive benefits afforded to regular, full-time faculty until — the set date of August 31, Harwood gains employment elsewhere, or Harwood submits a letter of resignation with an effective date prior to August 31.
- Harwood and his family will receive health benefits from the university through Dec. 31, 2016, or the date Harwood starts his new job — whichever comes first.
- Harwood shall not have direct contact with university faculty, staff or students except for necessary, work-related communications made via electronic mail. Other forms of communication, should they be necessary, will be directed to fellow entomology professors Subba R. Palli and John Obrycki.
- Harwood shall not be on campus except for health care related services for him or his immediate family. If he needs to be on campus for some other reason, he must submit a request in writing to Associate General Counsel Timothy West.

Harwood signed the agreement Feb. 26 and tendered his resignation from the university, which goes into effect August 31.

The university declined to comment on the situation.

The Kernel will update this story as more information becomes available.

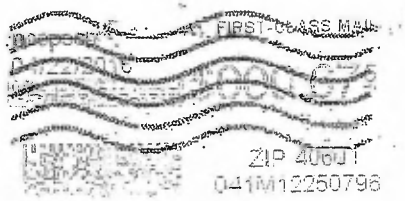
Will Wright contributed to this report.

Published April 6, 2016, on kykernel.com

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
700 CAPITOL AVENUE
CAPITOL BUILDING, SUITE 118
FRANKFORT, KENTUCKY 40601-3449

2:15pm

LEXINGTON KY 405
22 APR 2016 PM 3.T



WILLIAM THRO
GENERAL COUNSEL
UNIVERSITY OF KENTUCKY
301 MAIN BUILDING
LEXINGTON, KY 40506-0032

40506$0032

EXHIBIT D

LOG NO: 201600183
OPEN RECORDS APPEAL

In re: William Wright/University of Kentucky

THE UNIVERSITY OF KENTUCKY'S RESPONSE TO THE APPEAL

Pursuant to 40 KAR 1:030 § 2, the University of Kentucky responds to the Open Records Act Appeal filed by Mr. William Wright, a reporter for the Kentucky Kernel. For the reasons set below, the Attorney General should find the records in question are exempt from disclosure.

Factual Background

In the summer of 2015, a graduate student filed a complaint against a tenured professor alleging the tenured professor had sexually harassed her. Pursuant to both the Equal Protection Clause, U.S. Const. amend XIV § 1, and Title IX, 20 U.S.C. §§ 1681-88, the University had an obligation to investigate these allegations and, if the investigation indicates a reasonable belief the allegations are true, must take appropriate action against the alleged harasser. Failure to do so results in liability for the University. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-91(1998). Pursuant to the University's standard practice, the Office of Institutional Equity and Equal Opportunity conducted the investigation.

Although the Constitution and statutes mandated the investigation, the investigation was also in anticipation of litigation. Indeed, litigation of some sort was almost inevitable. If the complaining witness felt the University's response was

deliberately indifferent, the complaining witness could sue the University for monetary damages. See *Id.* at 290-91. At the same time, if the University undertook disciplinary action against the alleged harasser, the University would have to provide due process hearing. *See University of Kentucky Administrative Regulations* § 6.2 (describing the process for handling claims of sexual assault). Because the alleged harasser was a tenured faculty member, any finding of guilt would result in the commencement of tenure revocation proceedings against the alleged harasser. *See University of Kentucky Governing Regulations* § X.B.1.f(2) (describing the tenure revocation process).

As part of his efforts to insure the University complied with its constitutional and statutory obligations and to advise senior administrators on the appropriate course of action, the General Counsel relied heavily on the investigative materials. Ultimately, the University and the accused professor reached an agreement whereby the accused professor resigned. The University believes this resolution fulfills its constitutional and legal obligations and is the appropriate course of action.

Acting upon rumors, Mr. Wright and his colleagues filed an extensive open records act request for a wide variety of materials related the accused professor, the allegations, and the investigation. The University provided a wide variety of materials—including the agreement with the accused professor, but withheld the investigation materials as exempt because: (1) under 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; (2) the records fall within the personal privacy exemption of KRS § 61.878(1)(a) in that the records contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy; and (3) under KRE 503, the records are protected by the attorney-client/work product privilege.

Mr. Wright, espousing a narrow reading of the preliminary exemption and essentially ignoring the personal privacy exemption and the attorney-client/work product privilege, appealed to the Attorney General.

ARGUMENT

I. The Investigative Reports of the University's Office for Institutional Equity and Equal Opportunity Are Preliminary

Under the longstanding interpretations of multiple Attorneys General, the investigative reports of the University's Office for Institutional Equity and Equal Opportunity are preliminary. Quite simply, the Office has no authority to take a final agency action; it may only recommend action. Therefore, all of its investigative reports are preliminary recommendations. Indeed, almost forty years ago, the Attorney General observed:

> The first document, the report of the Equal Opportunity Office, is exempt under KRS 61.878(1)(h): "preliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended." We have found the title "Equal Opportunity Office" to be somewhat misleading. The office consists

> mainly of the director, Victor P. Gaines. *It has no power to make a binding ruling and only investigates complaints and makes a recommendation to the University administration. Accordingly, the reports of the office are only preliminary recommendations.*

Ky. Op. Att'y Gen. No. 78-738 (1978) (Stephens, A.G.) (emphasis added). Over the years, subsequent Attorneys General have frequently and repeatedly reaffirmed the continuing validity of this reasoning. *See, e.g. In re Strauss/Kentucky High School Athletic Ass'n*, 00-ORD-29 (2000)(Chandler, A.G.); *In re Jones/University of Kentucky*, 94-ORD-108 (1994) (Gorman, A.G.); Ky. Atty. Op. 91-161 (1991)(Cowan, A.G.).

Given the longstanding interpretation of multiple Attorneys General and given the lack of a subsequent change in the statute, the Attorney General should reaffirm the longstanding principle that the investigative materials of the University of Kentucky's Office of Institutional Equity and Equal Opportunity are preliminary. Nothing more should be required of the University.[1]

II. The Personal Privacy Exemption Applies to the Investigative Records

The Kentucky General Assembly has mandated transparency for all public institutions and agencies, but also has forbidden the disclosure of "information of a

[1] Mr. Wright seems to take the position that, once an agency makes a final decision, all materials that led to the final decision must be revealed even where the final decision does not incorporate the preliminary recommendation. Put another way, if the decision maker considered a variety of different and often competing or contradictory recommendations, the agency must disclose all such recommendations. Such an interpretation would chill the candid discussions among senior government officials that are essential to any highly complex decision.

personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS § 61.878(1)(a). This personal privacy exemption "reflects our society's recognition that 'privacy remains a basic right of the sovereign people.'" *Cape Publications, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 821, (Ky. 2008)(Quoting *Board of Educ. v. Lexington–Fayette Urban County Human Rights Comm'n*, 625 S.W.2d 109, 110 (Ky.App.1981)). Indeed, "Kentucky's private citizens retain a more than *de minimus* interest in the confidentiality of the personally identifiable information collected from them by the state. This interest increases as the nature of the information becomes more intimate and sensitive and as the possible consequences of disclosure become more adverse." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 85 (Ky. 2013).

While there is some debate as to the scope of the personal privacy exemption, it surely encompasses all investigative records that specifically identify a student or which concern sexual activity of an individual or other individuals.[2] See *Kentucky Bd. of Examiners of Psychologists & Div. of Occupations & Professions, Dep't for Admin. v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992) (Personal Privacy Exemption extends to "fine details" of alleged sexual misconduct which "are largely personal and are commonly treated circumspectly.").

III. The Attorney-Client/Work Product Privilege Applies to the Investigative Materials

[2] To the extent the investigative records are educational records within the meaning of 20 U.S.C. § 1232g, federal law prohibits the University from disclosing the records.

Although the investigative reports clearly are preliminary material and clearly contain material subject to the personal privacy exemption, the Attorney-Client/Work Product Privilege applies.

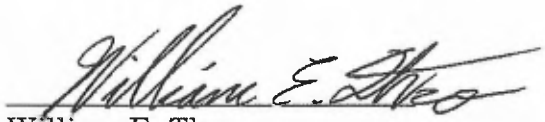
Given the constitutional and statutory obligations of the University as well as the virtual certainty of litigation, the General Counsel relied heavily on the investigative reports in formulating legal advice to senior administrators. Therefore, the investigative reports are attorney-client/work product privileged. *See Invesco Institutional (N.A.), Inc. v. Paas*, 244 F.R.D. 374, 387 (W.D. Ky. 2007) (Setting out the standard for invocation of the work product doctrine).

CONCLUSION

For the reasons stated above, the Attorney General should affirm the University's response of withholding the records.

Respectfully submitted this 3rd day of May, 2016.

UNIVERSITY OF KENTUCKY



William E. Thro
General Counsel
University of Kentucky
Office of Legal Counsel
301 Main Building
Lexington, KY 40506-0032

EXHIBIT E

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

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May 26, 2016

Mr. William E. Thro
General Counsel
Office of Legal Counsel
301 Main Building
University of Kentucky
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Re: Open Records Appeal – Log Number 201600183

Dear Mr. Thro:

As you know, the *Kentucky Kernel* has appealed the University's denial of reporter William Wright's January 18, 2016, request for copies of "all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of James Harwood and any allegations of sexual harassment, sexual assault, or any other misconduct by James Harwood." The University originally justified the denial as follows:

> [A]ll records detailing the above-referenced investigation from the University's Office of Institutional Equity and Equal Opportunity are unable to be released pursuant to KRS 61878(1)(i) and (j). [Sic] 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.

Responding to the *Kernel's* letter of appeal, you stated:

> The University "provided a wide variety of materials – including the agreement with the accused professor, but withheld the investigation materials as exempt because: (1) under KRS 61.878(1)(i) and (j), these records were 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; (2) the records fall within the personal privacy exemption of KRS 61.878(1)(a) in that the records contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy; and (3) under KRS 503, the records are protected by the attorney-client/work product privilege.

Pursuant to KRS 61.880(2)(c), and to facilitate our analysis of the issues on appeal, we ask that the University review the authorities cited below and substantiate its denial by providing additional documentation in the form of written responses to the following inquiries.

Although the language of KRS 61.878(1)(i) and (j) has not been amended since the law was enacted in 1976, case law construing these exceptions has guided our analysis since 1982, superceding the 1978 opinion on which the University relies. In *University of Kentucky v. Courier-Journal and Louisville Times*, 830 S.W.2d 373, 378 (Ky. 1992), for example, the Kentucky Supreme Court determined, in the context of a University conducted investigation of an NCAA violation, that "investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." In a later opinion, the Kentucky Court of Appeals determined that "a resignation from a position by an employee before [the public agency] has reached a decision

concerning possible termination is a 'final action.' The effect of [the public employee's resignation was to end the [agency's] disciplinary proceedings against him. The subsequent decision of the commission to end the hearings against [the employee] constituted its 'final action.'" *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001) quoting 00-ORD-107 for the proposition that "[t]he fact that the agency decided to take no further action on the complaint or that the investigation was preempted by the resignation, in our view, indicates that the 'final action' of the agency was to take 'no action' on the complaint."

1. In light of these authorities, does it remain the University's position that the preliminary documents exceptions authorize nondisclosure of investigative materials, and, if so, how does the University distinguish the cited authorities?

2. Please describe, in general terms, the process of investigation/disciplinary proceedings by which a tenured University professor/employee, against whom allegations of sexual harassment are made by a University student or another University employee, is conducted. Please provide the Attorney General with a copy of the University of Kentucky Administrative Regulations and the University of Kentucky Governing Regulations referenced in the University's response. If any other written materials exist addressing this process, please provide us with a copy of those materials and identify the pertinent portions.

3. Please describe any challenges that impede the University's ability to redact the names and personal identifiers of Dr. Harwood's accusers per KRS 61.878(4). Does the University assert privacy rights on behalf of Dr. Harwood? If so, please explain.

4. The University asserts that because "counsel relied heavily on the investigative reports in formulating legal advice to senior administrators," the reports are shielded from disclosure by the attorney-client privilege. Is it the University's

position that if counsel "relies heavily" on the terms of a new policy "in formulating legal advice to senior administrators," about the legality of the policy, that policy is attorney-client/work product privileged? How far does the privilege extend to public records that pass through counsel's hands? Please substantiate the University's reliance on the attorney-client privilege and work product doctrine to support nondisclosure of the investigative reports.

5. Please indicate whether a search was conducted for records documenting past allegations of misconduct by Dr. Harwood and the University's response to these allegations.

6. Please provide the Office of the Attorney General with a copy of all records released to Mr. Wright and a copy of all responsive records to which he was denied access, clearly identifying each set of records. 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.

Please respond to these requests, in writing, on or before June 15, 2016, and provide Mr. Wright with a copy of your response excluding, of course, the records in dispute. Pursuant to KRS 61.880(2)(c), we will maintain the confidentiality of those records. We appreciate your cooperation in this matter.

Sincerely,

Andy Beshear
Attorney General

Amye L. Bensenhaver
Assistant Attorney General

#183
cc: William Wright

EXHIBIT F

LOG NO: 201600183
OPEN RECORDS APPEAL

In re: William Wright/University of Kentucky

THE UNIVERSITY OF KENTUCKY'S SUPPLEMENTAL RESPONSE

Pursuant to KRS § 61.880, the Attorney General has requested additional documents and substantiation of the University's legal position. The University submits this supplemental response, which will address each of the Attorney General's questions. In doing so, the University also will provide additional information about the underlying records and law that will give context to the University's answers. Moreover, the University will explain why, consistent with prior holdings of the Attorney General and the Kentucky Supreme Court, it is critical that the Attorney General uphold the exempt status of the investigative file at issue in this case.

INTRODUCTION

This appeal asks a fundamental question:

> When a public university investigates allegations of sexual assault between two members of the University Community, is the public entitled to view the entire investigative file?

Given the federal law privacy protections in this situation, the obvious state law privacy interests of the participants, the preliminary nature of the records, and

other considerations of both attorney-client privilege and work product, the answer is an unequivocal no.

Yet, a reporter for a student newspaper contends nothing is off limits. As a practical matter, this contention is disturbing. As a matter of law, it is simply wrong.

BACKGROUND

I. The University's Obligations to Investigate and Adjudicate Allegations of Sexual Assault

This Open Records Act appeal involves a student newspaper's request for records related to the University's investigation of a graduate student's allegations of sexual assault against a tenured professor. Although the University has provided many documents—including the final agency action of the settlement agreement—the student newspaper wishes to obtain *all* records, including preliminary documents, documents protected by federal statutes, communications that invade the personal privacy of both the victim/survivor and the alleged perpetrator, and materials protected by work product privilege.[1]

Based on the Attorney General's questions, it appears the University may not have adequately communicated the scope of its obligations under Title IX, 20 U.S.C. §§ 1681-88, and the Due Process Clause, U.S. Const. amend XIV, § 1, when one

[1] Although Mr. Wright focused his request on the actual current investigation, his request also encompassed the existence of allegations outside of the current investigation. The University's search was for all allegations, not just those that were the subject of the current investigations. There were no other allegations.

member of the University Community alleges sexual assault by another member of the University Community. Similarly, it appears the University may not have adequately explained why any allegation of sexual assault involves a subjective belief that litigation is a real possibility and this belief is objectively reasonable. A thorough understanding of these legal realities is critical to any evaluation of the University's claims that the requested records (1) are preliminary; (2) involve personal privacy; (3) are protected from disclosure by federal law; and (4) are protected by privilege. Therefore, the University begins its response with an overview of its obligations under both federal law and the Constitution.

A. The University's Obligations under Title IX and the Due Process Clause

Under Title IX, when the University learns of an alleged sexual assault by one member of the University Community against another member of the University Community, it must respond with something other than deliberate indifference. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646-47 (1999). On April 4, 2011, the United States Department of Education's (DOE) Office for Civil Rights (OCR) issued a Dear Colleague Letter (DCL) to set out its view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations.[2] That DCL letter "explains the requirements of Title

[2] The University also is subject to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), which requires institutions of higher education to comply with certain safety and security related requirements as a condition of participation in Title IX and Higher Education Assistance (HEA)

IX pertaining to sexual-harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence." *See* OCR's April 4, 2011 "Dear Colleague" letter, available online at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. On April 29, 2014, additional guidance was issued by the DOE/OCR entitled "Questions and Answers on Title IX and Sexual Violence." *See* April 29, 2014 OCR Guidance ("Questions and Answers on Title IX and Sexual Violence"), available online at: http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf Proposed regulations pursuant to VAWA were issued June 20, 2014 and final regulations were issued on October 20, 2014.

As set out in guidance published by OCR, Title IX's implementing regulations outline three key procedural requirements, including procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints. *See, supra*, April 29, 2014 OCR Guidance at page 9 (citing 34 C.F.R. §106.8(b)). According to OCR, "These requirements apply to all forms of sex discrimination and are particularly important for preventing and effectively responding to sexual violence."

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programs. *See* 20 U.S.C. §1092(f). In 2013, the Violence Against Women Act (VAWA) amended the Clery Act to require institutions to provide, among other things, programs and policies to address incidents of dating and domestic violence, sexual assault and stalking. 42 U.S.C. §13925 *et seq.*

OCR expects that a university's procedures for responding to sexual misconduct complaints will include several elements, including "provisions for adequate, reliable, and impartial investigation of complaints." *See* April 29, 2014 OCR Guidance at page 12. The need for confidentiality in responding to sexual misconduct complaints is critical. As OCR explains:

> OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence.
>
> ***
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> Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response.

Id. at pages 18-19. In addition, of course, consistent with federal law, OCR maintains the importance of guarding an investigation's participants against retaliation. *See id.* at pages 42-43.

At a minimum, the University must investigate allegations of sexual misconduct and, if the University concludes there is a reasonable belief the allegations are true, then the University must initiate disciplinary action against

the student or employee.[3] *See University Administrative Regulation (AR) § 6.2—Policy on Sexual Assault, Stalking, and Relationship Violence and accompanying Appendix.*[4]

Of course, the University likewise has certain obligations to alleged perpetrators. Since the landmark decision in *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), it has been clear the Constitution requires due process before a public university expels a student or imposes a lengthy disciplinary suspension. *See Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 633-37 (6th Cir. 2005). Due process obligations also apply with respect to public employees who have a constitutionally protected property interest in their employment. *See Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538-539 (1985). Given the difficulty of enrolling elsewhere or obtaining employment after being found

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[3] There is some ambiguity as to whether the guidance contained in the Dear Colleague Letter and subsequent follow-up guidance from the OCR is actually binding on the University. Unlike a statute's implementing regulations, the Dear Colleague Letter was not subject to the notice and comment procedures of the Administrative Procedure Act. To the extent the DCL and follow-up guidance is binding on the University, the University must adhere. Moreover, to the extent it is binding on the University, the University's obligations under the DCL would trump any obligations under state law.

Alternatively, to the extent it represents OCR's view of "best practices," it is prudent for the University to follow it. Of course, if there is a conflict between the University's obligations under the DCL and the University's obligations under the Constitution, the Constitution prevails.

[4] All of the University Governing Regulations and Administrative Regulations cited in this Supplemental Response and in the University's Response are available in the University's on-line regulations library at http://www.uky.edu/regs/. Because the regulations are available on-line, the University trusts it is unnecessary to provide the Attorney General with hard copies.

guilty of sexual assault as well as the stigma associated with being labeled a sex offender, due process requires nothing less. As the U.S. Supreme Court explained:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

The University takes this constitutional obligation seriously. When a University of Kentucky student or employee faces potential expulsion or loss of employment because of an allegation of sexual assault, the University ensures the alleged perpetrator receives: (1) notice of the charges; (2) a hearing before an independent fact-finding panel of three persons; (3) the assistance of an attorney or other advisor; (4) an opportunity to challenge the evidence and utilize some form of cross-examination of the witnesses against him; (5) an opportunity to call witnesses, present relevant evidence, and advocate an affirmative defense; and (5) an appeal to an independent tribunal. *See Appendix to University AR § 6.2.*

B. Overview of Specific University Obligations and Processes

In keeping with the mandates of federal law and expectations of OCR, the University has adopted Administrative Regulation §6.2, *supra*, for purposes of addressing allegations of sexual misconduct. AR §6.2 sets out a number of key

rights for both the victim/survivor ("complainant") and the accused ("respondent"), and provides that an investigation will ensue upon receipt of a complaint of sexual violence. The University has published information to the entire university community emphasizing the importance of confidentiality during this process and recognizing that, while the *parties* may be entitled to certain information necessary to their participation in the case, the public at large is not:

> It is not possible to guarantee absolute confidentiality or anonymity. The privacy of persons who make complaints is respected and discretion is exercised. The confidentiality of each party involved in an investigation, complaint or charge is observed, to the extent possible provided it does not interfere with UK's ability to investigate the allegations or take corrective action. Due process requires that the alleged harasser know the allegations, know who made them, be allowed to respond to the charges and offer a defense before any disciplinary action occurs.

See University's FAQs regarding Sexual Harassment and other forms of Discrimination (available online at https://www.uky.edu/EVPFA/EEO/discrimination_faq.html).

C. Background of this Particular Investigation

The student's allegation against a tenured professor was investigated by the Title IX Coordinator's staff within the University's Office of Institutional Equity and Equal Opportunity ("Institutional Equity"). In conducting such an investigation, Institutional Equity informs the complaining witness that the University will do its best to ensure anonymity if they want it. The complaining witness is assured that only the respondent and others in the University with a legitimate need to know will be made aware of the complaint and the details of the

complaint. Institutional Equity also informs witnesses that the University will take steps to protect their privacy. Consistent with AR §6.2, participants are told that for due process reasons their identities may have to be shared with the accused individual respondent, but the University also makes it clear that it will take steps to protect disclosure of personally identifiable information to the public at large. Likewise, the respondent is made aware that complaints of this nature are considered private. *See* Exhibit A: Affidavit of Patty Bender.

In general terms, the investigative file at issue contains emails between the investigator and parties and witnesses, the investigator's interview notes, documents supplied by the student, documents supplied by the professor, and documents supplied by witnesses. The file is replete with sexually explicit details addressed during the case. Again, all of these things were provided to the University under legitimate assurances and expectations of confidentiality as outlined above. To disclose those details to the public now would undoubtedly have a chilling effect on the participation of students and employees in future investigations of this kind. *See* Exhibit A.

SUMMARY OF ARGUMENT

The University's legal position is clear.

First, multiple federal laws prohibit disclosure of the records.

Second, the state law personal privacy exemption applies to investigative files concerning allegations of sexual misconduct.

Third, the investigative file is preliminary. The statutory text simply says that preliminary records are exempt; it does not say that preliminary records become non-exempt materials once the agency makes a final decision. While the Supreme Court of Kentucky has created an exception when the agency adopts the preliminary materials as part of the final agency action, that judicially created exception does not apply here. *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001) is distinguishable and at the very least much more limited than the Attorney General has suggested.

Fourth, to the extent records in the investigative file request legal advice or convey information to help counsel provide legal advice, the attorney-client privilege protects those records.

Fifth, to the extent the records were prepared in anticipation of litigation, the work product doctrine applies. While investigations into allegations of discrimination often are a matter of ordinary business, the Dear Colleague letter has the effect of mandating an investigation and, in circumstances, requiring the initiation of litigation. Thus, there is a subjective of expectation of litigation that is objectively reasonable.

Finally, with all due respect, the University cannot allow the Attorney General to pursue an *in camera* inspection of records that are privileged or protected from disclosure by federal law. To do so would waive the privilege or violate the law. Moreover, the Attorney General's request represents a misunderstanding of the significance of disclosure, the separation of powers, and

the judicially established limits on *in camera* review.

ARGUMENT

I. Federal Law Prohibits Disclosure

The confidentiality expectations relative to this investigative file have roots far deeper than University policy or OCR guidance. The investigative file at issue directly relates not only to a tenured professor, but also to the complaining student, and further contains personally identifiable information about other student witnesses. As such, the file contains education records arising out of an investigation conducted pursuant to Title IX and subject to several federal privacy mandates. The fact that the file also relates to the employment of a tenured professor changes nothing. *See Rhea v. Distr. Bd. of Trs. of Santa Fe Coll.*, 109 So.3d 851, 858 (Fla. App. 2013) (en banc) ("If a record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person").

The use of student education records by the University and its employees is governed by the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, 20 U.S.C. § 1232g and 34 CFR Part 99. FERPA controls the use and disclosure of "education records," which are broadly defined as records that are maintained by a covered educational institution, or someone acting for the

institution, which directly relate to a student who was or is in attendance at the institution. 20 U.S.C. § 1232g(a)(4), 34 CFR 99.3.

Here, the reporter seeks an investigative file that constitutes and contains personally identifiable information about a student complaint of sexual misconduct. Such records are confidential under FERPA, the Clery Act, VAWA, and implementing regulations. *See* 20 U.S.C. §1232g, 20 U.S.C. §1092(f)(8)(B)(v), 34 C.F.R. Part 99, and 34 C.F.R. §668.46(b)(11)(iii). In addition, while the University is aware that the Open Records Act generally expects a public agency will take steps to separate exempt information from the non-exempt via redaction, redaction in this case would be legally insufficient. The file at issue contains facts about specific students in specific circumstances. Moreover, the student newspaper reporter's attention to this case gives the University great concern that the reporter already knows the identity of at least one of students involved. Under FERPA, then, the University cannot sufficiently "de-identify" the investigative file by redaction because (1) it is evident that the reporter knows the identity of the complainant or other student witnesses to whom the file relates; and/or (2) alone or in combination, records in the investigative file are linked or linkable to specific students that likely would allow a reasonable person in the university community without personal knowledge of the relevant circumstances to identify the students with reasonable certainty. *See* 34 C.F.R. §99.3. The problem of de-identifying the records is compounded by the fact that there were only a few graduate students taught by the

professor at issue during the period in question, such that the relevant students' identities would be easily traceable regardless of redaction.

II. The Personal Privacy Exemption Prohibits Disclosure of the Records

A. Personal Privacy Is a Basic Right of a Sovereign People

The Kentucky General Assembly has mandated transparency for all public institutions and agencies, but also has forbidden the disclosure of "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KRS § 61.878(1)(a). This personal privacy exemption is considered "the foremost exception to the disclosure rule" and "reflects our society's recognition that 'privacy remains a basic right of the sovereign people.'" *Cape Publications, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 821, (Ky. 2008)(Quoting *Board of Educ. v. Lexington–Fayette Urban County Human Rights Comm'n*, 625 S.W.2d 109, 110 (Ky.App.1981)); *Kentucky Bd. of Examiners of Psychologists & Div. of Occupations & Professions, Dep't for Admin. v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). Indeed, "Kentucky's private citizens retain a more than *de minimus* interest in the confidentiality of the personally identifiable information collected from them by the state. This interest increases as the nature of the information becomes more intimate and sensitive and as the possible consequences of disclosure become more adverse." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 85 (Ky. 2013).

B. The Personal Privacy Exemption Applies to Allegations of Sexual Assault

While there is some debate as to the scope of the personal privacy exemption, it surely encompasses all investigative records that specifically identify a student or which concern sexual activity of an individual or other individuals. *See, supra, Bd. of Examiners of Psychologists*, 826 S.W.2d at 328 (Personal Privacy Exemption extends to "fine details" of alleged sexual misconduct which "are largely personal and are commonly treated circumspectly."). An individual who is a victim/survivor of sexual assault may not want the details of the sexual assault printed in the newspaper or broadcast over the airwaves. Forcing disclosure of the details may well deter other victim/survivors from coming forward. Similarly, an individual who is accused of sexual assault may not want the details of the allegations distributed through the media. Even though the alleged perpetrator is presumed innocent until proven otherwise, the mere accusation of such a horrific act will carry a significant stigma.

The Personal Privacy Exemption applies here. *Board of Examiners of Psychologist's v. Courier-Journal* is dispositive. *Board of Examiners* addressed the question of whether investigative files regarding complaints of sexual misconduct may be withheld from disclosure pursuant to KRS 61.878(1)(a).

In *Board of Examiners*, the Courier-Journal sought access to all documents relating to patient complaints of sexual misconduct levied against a Board licensee who had resigned amidst the allegations. The Board provided copies of the

complaints and its final order,[5] but declined to produce its investigative file. The Attorney General affirmed the Board's position, and eventually so did the Kentucky Supreme Court. In so doing, the Court explained at length:

> The narrow issues, then, are whether the subject information is of a "personal nature," and whether public disclosure "would constitute a clearly unwarranted invasion of personal privacy." *** But the issue involves much more information than that to be found in the application, and many more privacy interests than just Tadajewski's.
>
> ***
>
> We need not examine those decisions for correctness of result or rationale. We need not attempt to reconcile the "case-by-case" caveat with the categorical "final action" rule, nor to decide whether a complaint file is "adopted by the Board as part of its action" when the formal complaint is dismissed. It suffices to say that we cannot accept the conclusion of the Court of Appeals that, because there was a final action, the decision in City of Louisville compels disclosure in the present case.
>
> ***
>
> In the present case it appears from the already-disclosed portions of the record that the Board has faithfully performed its purpose. It is evident that the Board investigated the allegations against Tadajewski promptly, responsibly, and thoroughly. The conditions of Tadajewski's resignation were equivalent to permanent revocation of his license—the ultimate disciplinary measure which might have been imposed had the action matured. And Tadajewski's capitulation prior to the scheduled hearing dispels any suspicion of persecution.
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> ***
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> It is also relevant that the allegations against Tadajewski charged sexual misbehavior. The clients' complaints and their and Tadajewski's depositions surely focus upon the fine details of those charges. Such

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[5] In this matter, there was no actual written complaint filed by the complainant. Nevertheless, FERPA, VAWA, and the Clery Act's confidentiality mandates would preclude the University from producing such a complaint in this case.

> affronts are largely personal, and are commonly treated circumspectly.
>
> ***
>
> We must conclude that the information contained in the complaint file is of a personal nature—indeed, of a very personal nature—and that disclosure of the remainder of the public record in this case would constitute a serious invasion of the personal privacy of those who complained against Tadajewski, as well as other former clients involved in the investigation. The information sought touches upon the most intimate and personal features of private lives. Mindful that the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity, and that the Board has in this case effectually promoted the public interest in regulation, and that there is a countervailing public interest in personal privacy, here strongly substantiated, we hold that further disclosure of information contained in the public record in this case would, as a matter of law, constitute a clearly unwarranted invasion of personal privacy.

Board of Examiners, 826 S.W.2d at 325-329.

It is no different in this case, where a student newspaper seeks to satisfy public curiosity by exposing the fine details of sexual misconduct charges against a university employee. As evidenced by the professor's departure and the settlement agreement produced the student newspaper reporter, it is evident the University has already addressed those charges promptly, responsibly, and thoroughly. Having left the University, the professor has already practically experienced the fullest possible consequence that might have been imposed had the action matured and a finding been rendered against him based on the evidence. The public already knows all it needs to know. Anything further amounts to little more than voyeurism by an eager student newspaper. Such salacious curiosity is not the kind of "public interest" the Open Records Act was designed to facilitate. In contrast, the

privacy interests at stake are exactly the kind of paramount concerns that KRS 61.878(1)(a) was created to protect.

III. The Preliminary Exemption Applies

A. Preliminary Materials Do Not Lose Their Exempt Status

In his questions to the University, the Attorney General suggests that all preliminary materials lose their exempt status once the agency makes a final decision. Specifically, the Attorney General implies that materials related to an investigation of alleged wrongdoing by an employee lose their preliminary status when the employee and the University enter into a settlement agreement requiring: (1) a resignation by the employee; (2) a release of all of the employee's claims against the University; and (3) a release of all of the University claims against the employee.[6] With all due respect to the Attorney General, this view ignores both the statutory text and the narrow nature of the judicially created exception to the preliminary exemption.

In construing a statute, the law assumes—as the Attorney General must—that the Generally Assembly "meant exactly what it said, and said exactly what it meant." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). Accordingly, the scope of the preliminary exemption begins—and ends—with the statutory text. As the Supreme Court of Kentucky recently explained:

[6] Contrary to the Attorney General's assertions, the final agency action is not the resignation; it is the comprehensive settlement agreement.

> It must be clear at the outset that the first rule of statutory interpretation is that the text of the statute is supreme. Upon review, "the words of the text are of paramount concern, and what they convey, in their context, is what the text means." In determining what the text means, words will be presumed to be understood in their ordinary meanings, unless context mandates otherwise. But most significantly, we will not construe a meaning that the text of the statute cannot bear.

Owen v. University of Kentucky, 2016 WL 2604779 at 3 (Ky. 2016). "Where a statute is plain and unambiguous on its face, we are not at liberty to construe the language otherwise, even though such a construction may be more consistent with the statute's legislative purpose." *Pennyrile Allied Cmty. Servs., Inc. v. Rogers*, 459 S.W.3d 339, 343 (Ky. 2015). "It is not for [the courts] to rewrite the statute so that it covers only what we think is necessary to achieve what we think [the legislature] really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215, (2010). Thus, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Ultimately, neither the courts nor the Attorney General can "displace the legislature's judgment for our own." *Owen*, 2016 WL 2604779 at 5.

Applying these statutory interpretation principles, records that fall within the preliminary exemption remain within the exemption even after the agency renders a final decision. The text is clear—preliminary materials are exempt from disclosure. K.R.S. § 61.878(1) (i) & (j). The text is absolute—preliminary materials are always exempt. There is nothing in the text suggesting that preliminary materials cease to be exempt once an agency makes a final agency action. While such an exception may make sense as a matter of public policy, the General

Assembly never adopted such an exception. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) ("The question, however, is not what Congress 'would have wanted' but what Congress enacted..."). Nor will the current text bear a judicial construction creating such an exception. *See Ross v. Blake*, 136 S. Ct. ____, 2016 WL 3128839 at 5 (2016) (Refusing to recognize a special circumstances exception to the Prison Litigation Reform Act). That ends the inquiry. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167-68 (2004) ("Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of [the statute] at all."). Accordingly, applying *Owen*, preliminary materials remain exempt even after final agency action.[7]

B. If the Judicially Created Exception Survives, It Is Inapplicable to the Records

To be sure, the Supreme Court of Kentucky has created a judicial exception to the preliminary exemption, declaring "investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency

[7] *Owen* also commands a narrow interpretation of the Attorney General's authority when handling an Open Records Act appeal. By the terms of the statute, the Attorney General's authority is limited to a review of the requester's written request for records and the public agency's related denial. KRS § 61.880(2)(a). While the Attorney General may *request* additional documentation to substantiate the agency's position, KRS § 61.880(2)(c), the Attorney General may not conduct an investigation, revise the original request, reject the agency's interpretation of the scope of the request, second guess the agency's interpretation of the requirements of federal law, demand the agency prove the non-existence of a record or the adequacy of its search for a record, opine on the meaning of statutes not at issue in the appeal, entertain appeals where the requested records have been provided, or act as an advocate for the requester.

as part of its action." *Univ. of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). In doing so, the Court expanded a narrower judicially created exception recognized by the Court of Appeals in *City of Louisville v. Courier-Journal*, 637 S.W.2d 658 (Ky. App. 1982) and *Kentucky State Board of Medical Licensure v. Courier-Journal*, 663 S.W.2d 953 (Ky. App. 1983). Yet, as explained above, this judicially created exception has no basis in the statutory text. Thus, the judicially created exception is in tension with *Owen*.[8]

However, the Attorney General need not resolve the tension between *Owen* and the Court's creation of a judicial exception. Even if the judicially created exception survives *Owen*, the judicially created exception is limited to situations where the preliminary materials are actually adopted as part of the final agency action. See *City of Louisville*, 637 S.W.2d at 659 ("Of course, *if* the Chief *adopts* its notes or recommendations as part of his final action...the preliminary characterization is lost *to that extent*") (emphasis added). Here, the final agency action was entering into a comprehensive settlement agreement with the employee. The Settlement Agreement does not adopt any of the investigative materials. Thus,

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[8] *Owen* also is in tension with the Attorney General's Opinions and Decisions that interpret statutes by speculating about the subjective intent of the legislature rather than relying on the words of the statutory text. *See, e.g.*, Ky. OAG 15-009 (2015) (Conway, A.G.) (Ignoring the plain language of the text and concluding nepotism statute does not apply when a relative is employed before a board member is appointed or elected). *In re Garrard Central Record/Lancaster City Council*, 13-OMD-067 (2013) (Conway, A.G.) (Ignoring the plain language of the text and refusing to inquire as to whether a public body intentionally violated the Open Meetings Act); *In re Cron/Butler County Fiscal Court*, 10-OMD-043 (2010) (Conway, A.G.) (Ignoring the plain language of the text and refusing to recognize an educational discussion exception to the Open Meetings Act).

and for reasons explained further below, the judicially created exception would not apply.

C. *Palmer* is Distinguishable

Regardless of whether the judicially created exception still survives, the law upholding non-disclosure in this matter is clear. *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001) provides *only* that when a public employee resigns over allegations of misconduct, that resignation constitutes "final action" that requires production of (a) the resignation, and (b) the initiating complaint to the extent that complaint is not subject to another exemption. Here, the University has already produced the "final action" in the professor's case (the settlement agreement). Further, as explained above, there is no written complaint to produce and, even if there was, it would be protected from disclosure pursuant to federal law and personal privacy interests.

The question, then, is whether the investigative file compiled by the University has lost its exempt status. The Attorney General answered that question with a resounding "no" in *In re: Zirbes/Lexington-Fayette Urban County Government*, 10-ORD-053 (2010)(Conway, A.G.). In that Open Records Decision, the Lexington-Fayette Urban County Government denied a request for records related to the internal investigation of a corrections officer accused of sexual misconduct. LFUCG produced the referral form that initiated the investigation and produced record documenting its "final action," namely the decision to take no action following the officer's resignation. The Attorney General unequivocally held,

"LFUCG is *not* obligated to provide her with the underlying investigative records because those records were not adopted as part of its final action" and therefore "the investigative records retain their preliminary characterization." (emphasis added.)

IV. To the Extent the Records at Issue Request Legal Advice or Convey Information to Help Counsel Provide Legal Advice, the Attorney-Client Privilege Applies to the Records

"The protection from disclosure of privileged communications between an attorney and client is one of the foundation principles of Anglo–American jurisprudence. Where the privilege applies its breach undermines confidence in the judicial system and harms the administration of justice." *The St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 775 (Ky. 2005).[9] The attorney-client "privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). It "is not

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[9] The scope of the attorney-client privilege is clear. As the Supreme Court of Kentucky explained:

> For the privilege to attach, the statement must be a confidential communication made to facilitate the client in his/her legal dilemma and made between two of the four parties listed in the rule: the client, the client's representatives, the lawyer, or the lawyer's representatives. KRE 503(a)(5) states that "[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."

Haney v. Yates, 40 S.W.3d 352, 354 (Ky. 2000)

contingent on actual or threatened litigation." *Collins v. Braden*, 384 S.W.3d 154, 160 (Ky. 2012). "Client communications intended to keep the attorney apprised of business matters may be privileged if they embody an implied request for legal advice based thereon." *Lexington Pub. Library v. Clark*, 90 S.W.3d 53, 60 (Ky. 2002) (quoting *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 404 (8th Cir. 1987)). Indeed, the privilege even applies to reports prepared as a matter of organizational policy to assist counsel in the provision of legal advice. *Collins*, 384 S.W.3d at 160.

In this matter, the Title IX Coordinator investigated to fulfill the University's obligations under the Title IX but also to give information to the General Counsel so that he could advise University administrators on the appropriate actions. To the extent the Title IX Coordinator communicated with the University's lawyers, there was an implicit, if not explicit, request for further legal advice. The University's policy of investigating every allegation of sexual assault results in reports that assist the General Counsel in the provision of legal advice. Thus, attorney-client privilege applies to the records.

V. To the Extent the Records Were Prepared In Anticipation of Litigation, the Work Product Doctrine Applies to the Records

A. The Work Product Doctrine Applies to Documents Prepared in Anticipation of Litigation

"The attorney-client privilege and the work-product doctrine are different, differing in what each covers, when and how applied, and whether protected

communications are absolutely protected as in the former but not in the latter."[10] *The St. Luke Hosps., Inc.*, 160 S.W.3d at 777. "The attorney-client privilege operates to protect only confidential communications between an attorney and a client, while the work product doctrine exists to protect any document prepared by or for an attorney in anticipation of litigation." *Invesco Institutional (N.A.), Inc. v. Paas*, 244 F.R.D. 374, 386 (W.D. Ky. 2007). Thus, the work product doctrine "is distinct from and broader than the attorney-client privilege." *United States v. Nobles*, 422 U.S. 225, 238 (1975). The work product doctrine "protects from discovery documents and tangible things prepared in anticipation of litigation by or for a party or by or for that party's representative." *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006).

In determining whether documents and tangible things were prepared in "anticipation of litigation," courts inquire whether the document or thing "was prepared or obtained *because of* the prospect of litigation." *Id. See also United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir.1998); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir.1992); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir.1983); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3rd Cir.1979) (all adopting the "because of" standard). This "because of standard" has both a subjective and objective element. *Roxworthy*, 457 F.3d at 594. *See also In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir.

[10] To the extent the records reflect communications between the University's inside and outside counsel and university administrators regarding legal advice, the records clearly are protected by attorney-client privilege.

1998); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir.1993) (requiring anticipation to be objectively reasonable); *Nat'l Union*, 967 F.2d at 984 (same). Thus, the court must ask: (1) whether a document was created because of a party's subjective anticipation of litigation, as contrasted with an ordinary business purpose; and (2) whether that subjective anticipation of litigation was objectively reasonable." *Roxworthy*, 457 F.3d at 594.

B. After the 2011 Dear Colleague Letter, All Investigations of Sexual Assault Are In Anticipation of Litigation

As the Sixth Circuit's wording of the inquiry suggests, some materials "prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes, are not covered by the work product privilege." *Id.* at 593. However, "[t]here is a distinction between precautionary documents 'developed in the ordinary course of business' for the "remote prospect of litigation" and documents prepared because 'some articulable claim, *likely* to lead to litigation, [has] arisen.' Only documents prepared in the latter circumstances receive work-product protection." *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2010).

In answering this inquiry, courts have sometimes concluded that organizations conduct investigations into alleged discrimination as part of the ordinary course of business and, thus, not protected by the work product privilege. *See, e.g. Long v. Anderson Univ.*, 204 F.R.D. 129, 137 (S.D. Ind. 2001) (Although counsel advised Defendants throughout the process of their investigation, it took

place as a result of the university's harassment policy, thus as an ordinary and customary step in conducting its business.); *Miller v. Fed. Express Corp.*, 186 F.R.D. 376, 387 (W.D. Tenn. 1999) (Absent additional circumstances, the fact that in every instance defendant's corporate counsel instructs employees involved with the GFTP/EEO investigation that the investigation is being launched in the anticipation of litigation does not ensconce it as work product."). These cases involved situations where there was no legal obligation to investigate, but the organization had a policy mandating investigations as a precautionary measure. The cases do not involve a situation where the organization was *legally required* to conduct an investigation and, in some circumstances, actually initiate disciplinary proceedings against the alleged perpetrator. It is one thing for an organization to conduct an investigation as a precaution because there is a remote possibility of litigation. That is simply good policy. It is quite another for an organization to be legally required to conduct an investigation and, in some circumstances, to initiate disciplinary proceedings. These requirements make every investigation in anticipation of litigation.

For a public university subject to the Due Process Clause, the effect of the 2011 Dear Colleague Letter is to make every sexual assault investigation in anticipation of litigation. [11] If someone alleges a member of the University

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[11] Prior to the 2011 Dear Colleague Letter, if the University received an allegation of sexual assault, the University could not be liable "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser v. Lago Vista*

Community has sexually assaulted another member of the University Community, the University is legally required to investigate and, if it determines there is a reasonable belief to support the charges, pursue a disciplinary proceeding against the alleged perpetrator. [12] Alternatively, if the University's investigation concludes there is not a reasonable belief the allegations are true, it is likely the victim/survivor will sue the University for being deliberately indifferent in violation of Title IX. Moreover, if the matter proceeds to hearing and the alleged perpetrators are found guilty of sexual assault, the alleged perpetrator may challenge the adequacy of the process. *See, e.g., Doe v. Hazard,* ____ F. Supp. 3d ___, 2016 WL 208304 (E.D. Ky. 2016)(denying request to enjoin the university from conducting a third disciplinary hearing after the student was convicted twice but both convictions were overturned on appeal), *appeal docketed sub. nom Doe v. University of Kentucky,* No. 16-5170 (6th Cir. 2016).[13] Conversely, if the matter proceeds to hearing and the alleged perpetrator is found innocent or a guilty verdict is reversed on appeal, the victim-survivors may sue under Title IX. *See, e.g., Doe v. University of Kentucky,* No. 5:15-CV-296 (E.D. Ky. 2015)(alleging violation of Title IX because the alleged perpetrator was found guilty three times and guilty verdict was reversed

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Indep. Sch. Dist., 524 U.S. 274, 290 (1998). While conducting an investigation and, in many circumstances, initiating disciplinary proceedings was one way of avoiding liability, there was no legal requirement to pursue this course of action. The Dear Colleague Letter made that a mandate.

[12] Of course, if the alleged perpetrator accepts responsibility for his/her actions, there is no disciplinary proceeding but there is an imposition of sanction.

[13] In addition to the *Doe* case, the University has received two credible threats of litigation form alleged perpetrators.

on appeal three times). Of course, if any victim/survivor or any alleged perpetrator believes the University has violated Title IX, the individual may file an administrative complaint with the U.S. Department of Education.[14] Such a complaint may result in a finding that the University has violated Title IX and, conceivably, litigation over whether the federal government would lose all federal funding.

In sum, after the 2011 Dear Colleague Letter, the University has a subjective expectation that any allegation of sexual assault will result in some form of litigation; this expectation is objectively reasonable. Accordingly, the work product doctrine applies to the investigative materials.

V. With All Due Respect, the University Cannot Allow the Attorney General to Conduct an *In Camera* Review of Records That Are Privileged and/or Protected from Disclosure by Federal Law

The Attorney General also requests the University allow him to make *in camera* inspection of records that are privileged and/or protected from disclosure by federal law. Because of concerns about waiving privilege and violating federal law, the University historically has declined to allow the Attorney General to conduct an *in camera* inspection of records that are privileged and/or protected from disclosure by federal law. Traditionally, the Attorney General has respected this position and has not forced the University to submit privileged/protected materials for *in camera*

[14] A victim/survivor has filed an administrative complaint alleging the University has violated Title IX by failing to expel the alleged perpetrator. That complaint currently is under investigation. The alleged perpetrator is the plaintiff in the *Doe* litigation.

review. *See In re Kentucky Kernel/University of Kentucky*, 12-ORD-220 (2012) (Conway, A.G.) ("[W]e rely on the University's interpretation and application of the federal law, and its professed appreciation for the value of transparency, to ensure that public records are not improperly withheld in the name of student privacy."); *In re Kentucky Kernel/University of Kentucky*, 08-ORD-052 (2008) (Conway, A.G.) (Stating the federal government confirmed the University's position regarding the disclosure of student records).

However, recently the Attorney General declared that he is *always* entitled to make an *in camera* inspection of privileged/protected documents and, if the agency refuses his demand, then the Attorney General simply will declare that the privileged/protected documents must be disclosed.[15] *See In re Hatemi/Kentucky Medical Services Foundation*, 16-ORD-113 (2016)(A. Beshear, A.G.) (Ordering the disclosure of communications between counsels because the University of Kentucky refused to provide copies of the communications for in camera review).

With all due respect to the Attorney General, this new assertion of an unconditional right to conduct an *in camera* inspection of another executive branch agency's privileged/protected documents is simply wrong. It represents a

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[15] Given the limitations on *judicial in camera* review of privileged documents, *United States v. Zolin*, 491 U.S. 554, 571 (1989), the Attorney General's assertion of an absolute right to conduct an in camera review of privileged documents is overreach. In effect, the Attorney General is claiming that his authority to decide an Open Records Act appeal is greater than the authority of the state and federal courts. Yet, the Attorney General's authority to decide Open Records Act appeals is derived from a statute and nothing in that statute gives the Attorney General greater authority than the state and federal courts. *See Owen*, 2016 WL 2604779 at 3.

misunderstanding of the significance of disclosure, the separation of powers, and the judicially established limits on *in camera* review. [16]

First, providing the records to the Attorney General for *in camera* inspection would waive the privilege and/or violate federal law. *See, e.g., U.S. Dept. of Educ. O Family Policy Compliance Office Letter to Texas Office of Attorney General re: Disclosure of Education Records by School District* (June 25, 2006) (available online at http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/txago072506.html) (FERPA does not permit a State Attorney General to conduct an in camera review of FERPA protected records as part of the resolution of an Open Records dispute). In resolving an Open Records Act appeal, the Attorney General is not a court. Disclosure of privileged/protected materials to the Attorney General does not enjoy the same protections as disclosure to a judicial tribunal. Although the General Assembly has admonished the Attorney General not to disclose documents that an agency provides for *in camera* review, KRS § 61.880, nothing in the statute

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[16] As the Supreme Court of the United States explained:

> A blanket rule allowing *in camera* review as a tool for determining the applicability of [exceptions to privilege] would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings.

Zolin, 491 U.S. at 571 (citations omitted).

guarantees the preservation of privilege or allows an agency to disclose materials where federal law prohibits disclosure. [17]

Second, the Attorney General's demand that another executive branch agency, such as the University, submit privileged/protected documents for *in camera* review raises significant intra-branch separation of powers issues.[18] *See* Ky. Const. §§ 27-28. The Commonwealth Constitution divides power among the three branches of government, Ky. Const. § 27, and then further divides executive branch power among various offices. Ky. Const. §§ 69, 72, 91-92, 97, 99. Combining this division of power between components within the executive branch with the Commonwealth Constitution's division of power between the three branches and the National Constitution's division of sovereignty between the States and the National Government, there is a "triple security" for the People's liberty. *Cf. The Federalist No. 51* (Madison) (Describing the division of power between the branches of the federal government and the division of sovereignty between the States and National Government as a "double security."). These constitutional divisions occasionally lead to litigation over the authority of individual constitutional actors. *See, e.g.*

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[17] Although the Attorney General has asserted the University's obligations to comply with the Open Records Act trump its obligations to comply with federal law, *In re Angel/University of Kentucky*, 13 ORD 046 (2013) (Conway, A.G.), *vacated sub nom. University of Kentucky v. Angel* (Fayette Cir. Aug. 2013), the constitutional reality is federal law trumps state law. *See* U.S. Const. art. VI, § 2. Thus, the General Assembly cannot authorize the University to violate federal law by disclosing protected materials.

[18] Although the University is part of the executive branch, the Governor does not directly the University in the same manner as he controls the various Cabinets and various Boards and Commissions. Thus, the University has a large degree of quasi-constitutional autonomy.

Fletcher v. Commonwealth ex rel. Stumbo, 163 S.W.3d 852 (Ky. 2005) (Governor may not spend money without legislative appropriation); *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, No. 16-CI-00389 (Franklin Cir. Ct. 2016)(Governor has the authority to reduce budgetary allotment to institutions of higher education). If the Attorney General may demand an *in camera* inspection of the privileged/protected records of the University, then the Attorney General logically can demand an *in camera* inspection of the privileged/protected records of the Governor, other state constitutional officers, other executive branch agencies, and the Commonwealth Attorneys.[19] Recognizing such a power would disrupt the delicate balance of power between executive branch components and undermine the "triple security."[20]

Third, regardless of concerns about waiver/federal law violations or state constitutional issues, it is inappropriate for the Attorney General to conduct an *in camera* of privileged/protected materials except in extraordinary circumstances. *Zolin*, 491 U.S. at 572. *See also City of Fort Thomas v. Cincinnati Enquirer*, 406

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[19] For example, suppose a newspaper made an Open Records Act request of the Governor seeking all communications between the Governor's General Counsel and the Governor concerning the legal and constitutional authority of the Governor to reduce the budgetary allotment to the various universities. The Governor certainly would deny such a request and claim the records were exempt as attorney-client privileged. If the newspaper appealed, the Attorney General would demand to make an in camera inspection of the communications between the Governor's General Counsel and the Governor. If the Governor refused, then the Attorney General would order the Governor to release the communications.

[20] To the extent the statute empowering the Attorney General to decide Open Records Act and Open Meetings Act appeals violates the constitutionally mandated balance of power within the executive branch and between the branches, the statute is unconstitutional.

S.W.3d 842, 852 (Ky. 2013) (*in camera* inspection in Open Records cases "should be the exception"). Addressing the issue of when to allow *judicial in camera* review of privileged materials, the Supreme Court of Kentucky observed:

> [The U.S. Supreme Court] established the following standard for determining when *in camera* review may be used to determine whether communications or materials claimed to be privileged fall either outside the scope of the privilege or within a specified exception to the privilege:
>
> > [B]efore a ... court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability.... [T]he threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.
>
> Once that showing is made, the decision whether to engage in *in camera* review rests within the sound discretion of the trial court, considering such factors as the volume of materials the court is asked to review, the relative importance of the alleged privileged materials to the case, and the likelihood that the evidence produced by an *in camera* review, together with other available evidence then before the court, will establish that the privilege has been waived or that the communication or material is either outside the scope of the privilege or within a specified exception to the privilege. We agree and now adopt that standard as applicable to requests for *in camera* review with respect to claims of privilege under Kentucky law.

Stidham v. Clark, 74 S.W.3d 719, 727-28 (Ky. 2002) (block quotation original) (quoting *Zolin*, 491 U.S. at 572). In short, there is no right to judicial *in camera* review of privileged/protected materials. *See Norsworthy v. Castlen*, 323 S.W.3d 764, 769 (Ky. App. 2010) (Refusing to allow judicial in camera review of attorney-client privileged material where the Commonwealth had not proven by a preponderance of the evidence that an exception to the attorney-client privilege

would apply). The fact the Attorney General believes *in camera* review might be helpful in resolving an open records appeal does not justify *in camera* review of privileged/protected material.[21]

Hopefully, the above analysis will cause the Attorney General to reconsider his position. Ideally, the Attorney General will recognize the limits of his statutory authority and the need for public agencies to respect privilege and statutory prohibitions on disclosure. If not, the University already has demonstrated a willingness to vigorously litigate its claims of privilege. *See Tibbs v. Bunnell,* No. 2012-CA-000916-OA (Ky. App. Aug. 17, 2012) (unpublished) (issuing writ of prohibition prohibiting circuit court from ordering the disclosure of Patient Safety Work Product), *aff'd with modifications*, 448 S.W.3d 796 (Ky. 2014)(3-1-2 decision) , *pet. for cert filed sub nom. Tibbs v. Goff,* No. 14-1140 (Mar. 18, 2015), *call for the views of the Solicitor General,* 136 S. Ct. 290 (2015)(petition for certiorari pending) (litigation over the scope of the Patient Safety Work Product privilege).

CONCLUSION

The University is fully committed to the principles of transparency and full accountability to the People of the Commonwealth, but the University has constitutional and statutory obligations to the victim/survivors of sexual assault

[21] Even if the requester makes the required showing under *Stidham, in camera* review by the Attorney General is still inappropriate because of the waiver/violation issues and state constitutional issues. If the matter were in court and the requester made the required showing under *Stidham*, then in camera review would be appropriate.

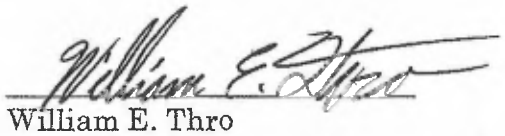
and to those individuals who are accused of sexual assault.[22] Quite simply, federal law precludes the disclosure of certain private information. In their efforts to meet the University's legal and constitutional obligations, the University's leaders depend upon the candid discussions contained in preliminary documents, the legal advice contained in attorney-client privileged documents, and the details of work product prepared in anticipation of ligation. As the General Assembly explicitly recognized, records that are preliminary, involve personal privacy, protected by federal law, or involve attorney-client/work product privilege are exempt from disclosure.

Given the detailed explanation in this Supplemental Response, the University expects the Attorney General will recognize the statute does not require the disclosure of the records from the investigation of allegations of a sexual assault involving a student and a tenured professor. For the reasons stated above, the Attorney General should affirm the University's response of withholding the records.

[22] Upon information and belief, the University processes more Open Records Act requests than any other public agency—more than 900 requests in 2015. Indeed, if the University did not maintain a website containing documents, such as coach's contracts that are frequently requested, the number would be even higher. Despite the large number of requests, only a small number are ever appealed to the Attorney General.

Respectfully submitted this 15th day of June 2016.

UNIVERSITY OF KENTUCKY



William E. Thro
General Counsel
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301 Main Building
Lexington, KY 40506-0032

LOG NO: 201600183
OPEN RECORDS APPEAL

In re: William Wright/University of Kentucky

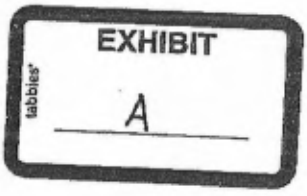
AFFIDAVIT OF PATTY BENDER

Comes the affiant, Patty Bender, and after being duly sworn states as follows:

1. I am employed by the University of Kentucky as the Interim Associate Vice President of Institutional Equity and have served in that position since July 2015. From June 2003 through June 2015 I served as the University of Kentucky's Assistant Vice President of Equal Opportunity. From 1996 until June 2003 I served as the Technical Compliance Officer in the University's Office of Institutional Equity and Equal Opportunity.

2. I also serve as the University's Title IX Coordinator.

3. As the University's Title IX Coordinator, I have conducted and routinely oversee investigations carried out pursuant to University Administrative Regulation (AR) § 6.2 –Policy on Sexual Assault, Stalking, and Relationship Violence. I also supervise Deputy Title IX Compliance Officers who conduct investigations carried out pursuant to AR § 6.2. I am therefore familiar with the steps followed, the kinds of information gathered, and the assurances typically given to parties and witnesses in the course of an investigation conducted pursuant to AR § 6.2.



4. I have received extensive training on conducting investigations in compliance with Title IX, its implementing regulations, and related guidance and expectations published by the United States Department of Education's Office of Civil Rights. My training includes but is not limited to multi-level training from the Association of Title IX Administrators (ATIXA), training with Margolis Healy on navigating legal issues under OCR's 2011 Dear Colleague Letter, and training from the National Association of College and University Attorneys on campus sexual misconduct issues.

5. In conducting an investigation pursuant to AR § 6.2, my office informs the complaining witness the University will do its best to ensure anonymity if they want it. The complaining witness is assured that only the respondent and others in the University with a legitimate need to know will be made aware of the complaint and the details of the complaint. My office also informs witnesses the University will take steps to protect their privacy. Consistent with AR §6.2, participants are told that for due process reasons their identities may have to be shared with the respondent, but my office also makes it clear that it will take steps to protect disclosure of personally identifiable information to the public at large. Likewise, the respondent is made aware that complaints of this nature are considered private. Based on my experience, disclosing the details of an investigation carried out pursuant to AR § 6.2 to the public would undoubtedly have a chilling effect on the participation of students and employees in future investigations.

6. I am familiar with the specific investigation and investigative file at issue in this case, which concern allegations of sexual misconduct brought by a graduate student against a tenured University professor. While I cannot discuss specifics due to confidentiality and privilege issues, I can, without waiving confidentiality or privilege, speak in general terms about the investigation.

7. In general terms, the investigative file at issue contains emails between the investigator and parties and witnesses, the investigator's interview notes, documents supplied by the student, documents supplied by the professor, and documents supplied by witnesses. The file is replete with sexually explicit details addressed during the investigation. All of these things were provided to the University under legitimate assurances and expectations of confidentiality as outlined above.

Further the affiant sayeth naught.

Patty Bender

Patty Bender

STATE OF KENTUCKY)
) SS:
COUNTY OF FAYETTE)

Acknowledged, subscribed and sworn to before me by Patty Bender on this 15 day of June 2016.

My Commission Expires: 3-8-17

Amy P. Spaziano

NOTARY PUBLIC, STATE AT LARGE

EXHIBIT G

COMMONWEALTH OF KENTUCKY
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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.

Andy Beshear
Attorney General

Amye L. Bensenhaver
Assistant Attorney General

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Distributed to:

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