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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000394-MR

THE KERNEL PRESS, INC.,
D/B/A THE KENTUCKY KERNEL — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 16-CI-03229

UNIVERSITY OF KENTUCKY AND
THE KENTUCKY PRESS ASSOCIATION — APPELLEES

AND — NO. 2017-CA-001347-MR

COMMONWEALTH OF KENTUCKY, EX REL.
ANDY BESHEAR, ATTORNEY GENERAL — APPELLANT

v. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 16-CI-03229

UNIVERSITY OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: The Kernel Press, Inc. d/b/a The Kentucky Kernel (the Kernel), appeals an opinion and order of the Fayette Circuit Court ruling documents requested by the Kernel from the University of Kentucky (the University) under Kentucky's Open Records Act, KRS[1] 61.870 *et seq.*, are exempt from disclosure under the Family Educational Rights and Privacy Act (FERPA) because they cannot be reasonably redacted to protect the privacy of the students identified in those records. Also before this Court is an appeal filed by the Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General (AG), after the Fayette Circuit Court denied the AG's motion for summary declaratory judgment regarding the authority of the AG under the Open Records Act to conduct an *in camera* review of documents that are protected or privileged, including those within the purview of FERPA.

We conclude that the University failed to follow the Open Records Act by not fulfilling its statutory mandates under the Act. We also conclude that the University failed to meet its burden in circuit court to prove that all the

[1] Kentucky Revised Statutes.

requested records are exempt from the Act when its only proof was an insufficient index and copies of the requested records for the circuit court's *in camera* review. We further conclude that the University violated the Open Records Act when it refused to permit the AG to conduct an *in camera* review of the requested records in redacted form. We reverse and remand this case to the circuit court for the University to separate nonexempt records from records claimed exempt, redact any personally identifying information from exempt records and, to the extent possible without disclosing exempt information, state with exactness why each record is exempt. If requested, the circuit court may also consider the award of costs, attorney's fees and penalties as provided for in KRS 61.882(5). We deny the AG's request for declaratory judgment in so far as it requests injunctive relief against the University.

This case involves material compiled by the University as a result of an investigation conducted pursuant to Title IX of the United States Education Amendments of 1972, which prohibits sex discrimination, including sexual harassment or sexual assault, under any program or activity receiving federal funds. 20 United State Code (U.S.C.) §1681 *et seq*. When an educational institution receiving federal funds is aware of an alleged sexual assault by a member of its educational community, it must respond with something other than

deliberate indifference. *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999).

In the summer of 2015, two female students in the University of Kentucky's College of Agriculture's Department of Entomology complained of sexual assaults by tenured professor, James D. Harwood. To comply with Title IX, the University's Office of Institutional Equity and Equal Opportunity (Institutional Equity) investigated the allegations.

The University presented its findings to Harwood, who chose to resign from the University prior to a final adjudication of the matter. According to the terms of the agreement between the University and Harwood, Harwood would continue to receive pay and benefits until August 31, 2016. After learning Harwood could resign and seek academic employment elsewhere, the complaining students sought to expose what they believed was a flaw in the Title IX reporting and investigation process and, through a spokesperson, contacted the Kernel, the University's student newspaper.

On March 21, 2016, the Kernel sent the University a letter pursuant to the Kentucky Open Records Act seeking:

> . . . to obtain copies of all records detailing Dr. James D. Harwood's resignation amid accusations of sexual assault [including but not limited to] the Title IX complaints filed by the two female students, any reprimands and any condemnations, Harwood's personnel file, and any documents detailing the University of Kentucky's

> investigation into allegations of sexual assault, sexual harassment, or allegations of alcohol abuse committed by Harwood.

On March 29, 2016, the University sent the Kernel records from its Human Resources Department and personnel records from the College of Agriculture, subject to redactions of personal information, such as Harwood's home phone numbers and addresses. The University also provided Harwood's separation agreement and resignation letter. However, the University refused to release for inspection its Title IX investigation file.

On April 7, 2016, the Kernel again made an open records request asking for "an opportunity to obtain copies of all records detailing the investigation" by the University or Institutional Equity of Harwood and "any allegations of sexual harassment, sexual assault or any other misconduct" by Harwood. The University responded to the request as follows:

> 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 61.878(l)(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 Kentucky Rules of Evidence 503, as they are considered attorney-client/work product privileged and are exempt from disclosure.

The Kernel requested review by the AG pursuant to KRS 61.880(2).

To resolve the matter, the AG authored a letter to the University instructing it to substantiate its denial of the request by providing written responses to specific inquiries as to the exceptions and privileges cited by the University. In that same letter, the AG asked the University to explain "any challenges that impeded the University's ability to redact the names and personal identifiers of Dr. Harwood's accusers per KRS 61.878(4)" and explain whether the University was also asserting privacy rights on Harwood's behalf. The letter concluded with a request that the University provide the AG with copies of the documents for *in camera* review in redacted form to protect the names and the personal identifiers of the students.

The University filed a supplemental response. In addition to the exceptions to the Open Records Act previously relied upon in denying the requested records and the attorney-client privilege, the University asserted that it could not release the records based on FERPA to the Kernel or to the AG for *in camera* inspection. It referenced a July 25, 2006 *Letter from the U.S. Department of Education's Family Policy Compliance Office to Texas Office of the Attorney*

General Family Policy Compliance Office advising that FERPA does not permit a state attorney general to conduct an *in camera* review of education records.

On August 1, 2016, the AG rendered a decision in the Kernel's favor on the grounds that the University failed to meet its burden of proof in denying the Kernel's request by not providing records for an *in camera* review. The AG ordered that the University make duplicate records immediately available for the Kernel's inspection and copying with the names and personal identifiers of the complaining students and student witnesses redacted.

Pursuant to KRS 61.882, the University appealed the AG's decision to the Fayette Circuit Court. The AG intervened in the action to seek a declaration of rights on the issue of the AG's authority to require government agencies to submit documents withheld from open records requests to the AG for *in camera* review. Later, the complaining students filed an *amicus* brief aligning themselves with the University's position that compliance with the AG's request would disclose personal identifying information.

On January 23, 2017, the Fayette Circuit Court entered an order reversing the AG's opinion. The court concluded the requested documents constituted "education records" under FERPA and, after an *in camera* review, that the records could not be redacted to remove all personally identifiable information.

That order was not made final and appealable and did not address the AG's declaratory judgment action.

The day after the court entered its order, the University responded to discovery requests propounded upon it by the AG. That response, filed over nine months after the Kernel made its first open records request, included an index of the investigation file regarding the accusations made against Harwood. It categorized that material in the file as follows: (1) Final Investigative Report and related exhibits, notes and emails; (2) Miscellaneous notes; (3) Student C; (4) Complainant 2; (5) Harwood, James;[2] (6) Student D; (7) Complainant 1; (8) Students E and F; and (10) Student G. Within each category, the University claimed all material was exempt, redundantly making the same statement:

> Exemptions Claimed: The records indexed under this tab are exempt in whole or in part pursuant to FERPA, the [Violence Against Women Act], Clery, and /or the U.S. Constitution consistent with KRS 61.878(l)(k). The records are further exempt in whole or in part pursuant to KRS 61.878(1)(a), (i) and/or (j) as preliminary records and/or records for which disclosure would create an unwarranted invasion of personal privacy.

Within each category, the index included various records. The records included photographs; documents such as notes taken regarding interviews with student witnesses, the complaining students and others; notes regarding the dissertations of

[2] The index states this is category 6, when it is actually 5. Consequently, the remaining categories are also numbered incorrectly.

the complaining students; emails from various sources and other identifying information. Also among the voluminous file were materials such as a camera user manual, University policies, notes regarding interviews with co-workers regarding Harwood's professionalism, Harwood's curriculum vitae and emails regarding scheduling various meetings.[3]

Based on the index, the Kernel filed a motion to alter, amend or vacate the circuit court's February 17, 2017 order insofar as it concluded that every part of the file was protected from disclosure and no part of the file could be redacted so as to protect the student's identities. Additionally, the Kernel requested that the Court make its January 23, 2017 opinion and order final and appealable. On February 23, 2017, the circuit court denied the motion to alter, amend or vacate but made the January 23, 2017 order final and appealable. The Kernel appealed to this Court on February 27, 2017.

Meanwhile, the circuit court had not ruled upon the AG's request for declaratory judgment regarding its authority to conduct an *in camera* inspection of all documents pertaining to the investigation of Harwood and a permanent injunction to enjoin the University from refusing to provide the AG with records it seeks to review in conjunction with requests under the Open Records Act.

[3] We point out these limited documents as examples only and our list is by no means all inclusive.

The circuit court ruled that FERPA precludes disclosure of the disputed records without consent of the student to the AG in the course of an open records request. The circuit court further ruled that the AG's request that the University be permanently enjoined from refusing to provide any records pursuant to the Open Records Act to the AG was too broad to be granted. The AG appealed. We resolve the Kernel's appeal and the AG's appeal in this Opinion.

The Open Records Act provides two avenues of relief when an agency denies a request. KRS 61.882 permits the requester to file an original action in circuit court. However, KRS 61.880 provides for what is intended to be a less costly and more time efficient means of obtaining public records by permitting the review of the matter by the AG. After the AG renders a decision, the parties may accept that decision which, after thirty days, becomes binding and enforceable in court. KRS 61.880(5)(b); *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013).

If a party is dissatisfied with the AG's decision, an action may be filed in circuit court within thirty days. KRS 61.880(5)(a). Although referred to as an appeal, it is treated as an original action. *Id*. The circuit court determines the matter *de novo* without being bound by the AG's decision. KRS 61.882(3).

This case reached this Court by the second avenue. We review the circuit court's factual findings for clear error. *City of Ft. Thomas*, 406 S.W.3d at

848. "[C]learly erroneous means not supported by substantial evidence. Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons." *Hughes v. Kentucky Horse Racing Authority,* 179 S.W.3d 865, 871 (Ky.App. 2004) (footnotes and quotation marks omitted). "Whether an agency has complied with the disclosure requirements of the Open Records Act is a question of law subject to *de novo* review." *Eplion v. Burchett,* 354 S.W.3d 598, 601 (Ky.App. 2011).

Our decision depends on interpretation of state and federal laws and the interplay of those laws. At the forefront of our discussion of state law is the Kentucky Open Records Act and its exceptions.

Under the Open Records Act, "[a]ll public records shall be open for inspection by any person[.]" KRS 61.872(1).[4] Compliance with the Act by public agencies is required to ensure the transparency of government. As stated in *Kentucky Bd. of Examiners of Psychologists & Div. of Occupations & Professions,*

[4] "'Public record' means all books, papers, maps, photographs, cards, tapes, disks, diskettes, recordings or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. 'Public record' shall not include any records owned by a private person or corporation that are not related to functions, activities, programs, or operations funded by state or local authority[.]" KRS 61.870(2). There is no dispute that the University is a public agency or that the material sought by the Kernel are public records.

Dep't for Admin. v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324, 328 (Ky. 1992):

> The public's "right to know" under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.

Although the Open Record Act favors disclosure, "the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity[.]" *Id.* Here, there is more at stake than simple curiosity.

The public has an interest in the investigatory methods used by its public agencies and to know that a publicly funded university has complied with all federal and state laws, including Title IX. A Title IX investigation into a professor's sexual abuse of a student is of public interest, not because of the identity of the victim or the details of the assault, but because of the interest in seeing that our public universities are in compliance with Title IX and that such allegations are dealt with appropriately.

This is not to say a Title IX file may not contain records that are exempt from disclosure. Even when there is a public interest in disclosure, the public's right to inspect public records is not absolute. While KRS 61.878 provides that certain records are exempt, those exemptions are "strictly construed,

even though such examination may cause inconvenience or embarrassment to public officials or others."' KRS 61.871. The University, in an "if it's not this exemption and then it's that exemption" approach, has at some point claimed that "all" or "some" of the requested materials fall under five different exemptions. Two exemptions were found to be applicable by the circuit court.

KRS 61.878(1)(a) exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]" That exemption comports with the individual's constitutional privacy interest "in avoiding disclosure of personal matters." *Whalen v. Roe,* 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). As the United States Supreme Court has noted with regard to parallel provisions of the Federal Freedom of Information Act, the privacy exemption is implicated when disclosure of information pertaining to a particular individual is sought from Government records. *United States Department of State v. The Washington Post Co.*, 456 U.S. 595, 602, 102 S.Ct. 1957, 1962, 72 L.Ed.2d 358 (1982).

However, the right to privacy in not unlimited. There are instances when "privacy interests must yield to the public's right to know what its government is up to." *Lawson v. Office of Atty. Gen.*, 415 S.W.3d 59, 70 (Ky. 2013). To determine whether a record should be withheld on this ground, the

reviewing court must "balance the interest in personal privacy the General Assembly meant to protect, on the one hand, against, on the other, the public interest in disclosure." *Id.* at 69.

The complaining students who alleged to have been sexually assaulted have a privacy interest in the nondisclosure of their identities. The right of privacy in preventing the public dissemination of their identities and details of the assault is fundamental. *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998). Recognizing that right, in *Kentucky Bd. of Examiners*, the Court held that information revealing the identities of patients of a psychologist accused of sexual misconduct did not have to be disclosed under the Open Records Act. *Kentucky Bd. of Examiners*, 826 S.W.3d at 326. As the Court observed, information revealing the identities of the victims "touches upon the most intimate and personal features of private lives." *Id.* at 328.

Here, the Kernel nor the AG seeks unredacted records from the University. However, without further detail, the University asserts and the circuit court found that redaction would not sufficiently protect the students' privacy interest.

The second exemption the circuit court found applicable is KRS 61.878(1)(k), which exempts "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation[.]" The circuit court found the

records requested by the Kernel are prohibited from disclosure by FERPA and, therefore, under the Open Records Act, are not required to be disclosed.

By enacting FERPA, the United State Congress has already balanced the privacy interests and the public interest in disclosure when it comes to education records, records in which the public would have very little, if any, interest. Enacted pursuant to Congress's spending power, *Gonzaga Univ. v. Doe,* 536 U.S. 273, 278, 122 S.Ct. 2268, 2272–73, 153 L.Ed.2d 309 (2002), FERPA provides: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization[.]" 20 U.S.C. §1232g(b)(1). If a student has attained eighteen years of age, permission or consent shall only be required by the student. 20 U.S.C. §1232g(d).

Not all courts agree that FERPA prohibits the release of education records by a University. *See Bauer v. Kincaid,* 759 F.Supp. 575, 589 (W.D.Mo. 1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records.") *But See United States v. Miami University,* 294 F.3d 797, 809 (6th Cir.

2002) (after federal funds are accepted, the school is prohibited from releasing education records without consent).

Although Kentucky law is scant on FERPA, there is sufficient published law to conclude Kentucky takes the view that FERPA prohibits disclosure of education records under the Open Records Act. Notably, Kentucky has adopted its own version of FERPA, KRS 160.700 *et.seq*., applicable to elementary and secondary schools indicating the General Assembly has determined that education records are not subject to the Open Records Act. Moreover, in *Hardin Cty. Sch*., our Supreme Court implicitly held that educational records are exempt from disclosure under the Open Records Act. *Hardin Cty. Sch. v. Foster*, 40 S.W.3d 865 at 868-69 (Ky. 2001).

This Court addressed FERPA in *Medley v. Bd. of Educ., Shelby Cty.*, 168 S.W.3d 398 (Ky.App. 2004). Pursuant to the Open Records Act, a tenured high school teacher requested video tapes made in her classroom. The request was denied based on FERPA and KRS 160.700 *et. seq*. After the AG and the circuit court affirmed the denial, the teacher appealed. This Court concluded FERPA precluded disclosure of education records. *Id*. at 403. It noted that KRS 61.878(1)(k) states records are excluded from an open records request when federal law or regulation prohibits disclosure of the record. *Id*.

We conclude FERPA precludes the University from releasing to the Kernel unredacted education records contained in the Title IX investigation file. However, that conclusion far from resolves this case.

First, not all records maintained by a University that relate to a student are education records. The records must directly relate to the student. 20 U.S.C. § 1232g(a)(4)(A). Moreover, FERPA contains exemptions from its purview including "records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose[.]" 20 U.S.C. §1232g(4)(B)(iii). Finally, the purpose of FERPA is to prohibit the disclosure of personally identifiable information which includes:

> (a) The student's name;
>
> (b) The name of the student's parent or other family members;
>
> (c) The address of the student or student's family;
>
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
>
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
>
> (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant

> circumstances, to identify the student with reasonable certainty; or
>
> (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 Code of Federal Regulations (C.F.R.) §99.3.

Based on the above definitions, it is clear that "education record" means more than an individual student's academic performance, financial aid record or scholastic probation record. That was the conclusion reached in *Miami Univ.*, 294 F.3d at 815, where the Court held that disciplinary records are education records because they directly relate to a student and are kept by that student's university. However, it is also clear that although a record may relate to a student, it may not "directly" relate to that student. The Court made that distinction in *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F.Supp.2d 1019 (N.D.Ohio 2004).

Ellis involved allegations of alleged corporal punishment of students by a substitute teacher. The Court held that "[w]hile these records clearly involve students as alleged victims and witnesses, the records themselves are directly related to the activities and behaviors of the teachers themselves and are therefore not governed by FERPA." *Id*. at 1023. It observed that "FERPA applies to the disclosure of student records, not teacher records." *Id*. at 1022. Here, the

University denied the Kernel's open records request even though the investigation file contains records related to Dr. Harwood.

Even those records in the investigation file that directly relate to a student are not prohibited from disclosure if properly redacted. "Although FERPA contains no redaction provision, neither does it prohibit such." *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 908 (Ind.Ct.App. 2003). In *Miami Univ.*, 294 F.3d at 811, the Court noted that education records with the "student's name; Social Security Number; student identification number; and the exact date and time of the alleged incident" redacted comported with FERPA's requirements.

Our Supreme Court gave tacit approval to redaction of education records otherwise subject to nondisclosure under FERPA in *Hardin Cty. Sch.,* where it held that statistical compilations of student disciplinary records were not education records as defined in FERPA after all student personally identifying information was removed. *Hardin Cty. Sch.,* 40 S.W.3d at 869. Other Courts have also held that redaction of education records is not only permissible, but disclosure of redacted education records complies with FERPA. *See Osborn v. Bd. of Regents of University of Wisconsin System,* 254 Wis.2d 266, 286, 647 N.W.2d 158, 168 n.11 (2002) ("once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no

longer directly related to a student); *Unincorporated Operating Div. of Indiana Newspapers, Inc.*, 787 N.E.2d at 907-08 (materials are not "education records" if student identifying information has been redacted); *Compare with Rhea v. Distr. Bd. of Trs. of Santa Fe Coll.*, 109 So.3d 851 (Fla.App. 2013) (*unredacted* email sent by a student concerning the professor's classroom behavior and teaching style was an education record under FERPA).

The exception when FERPA prohibits release of education records redacted of all personally identifiable information is specific. The educational agency is prohibited from releasing education records where, despite redaction, it has reason to believe that the requester "knows the identity of the student to whom the record relates." 34 C.F.R. 99.3. Without reference to any particular record, the University maintains that no record in the investigation file can be redacted because the Kernel knows the identity of the complaining witnesses. The Kernel denies such knowledge. Even if the University had presented proof of the Kernel's knowledge, that would not prohibit release of all records but only those that fall within FERPA's purview.

The University, at various times throughout this dispute, has given many reasons why the entire file should be exempt but given no explanation as to

how a specific exemption applies to a particular record.[5] This is particularly troublesome where some of the records may be exempt but others clearly are not. We cannot say that the circuit court's finding that all the records are exempt from disclosure under FERPA was supported by substantial evidence. Some records certainly are not directly related to any student such as a camera manual, University policies, and scheduling notes. While we could reverse on the clearly erroneous standard, we also hold that this case must be reversed and remanded as a matter of law. We do so because the University has yet to fulfill its statutory responsibilities under the Open Records Act.

Upon receipt of an open records request, the custodian of the records has specified responsibilities. This is so because in contrast to "most disputes [where] both sides have more-or-less equal access to the relevant facts, so that factual assertions and legal claims can be adversarially tested, in [Open Record Act] cases only the agency knows what is in its records." *City of Fort Thomas*, 406 S.W.3d at 851. Therefore, the General Assembly has placed duties upon the public agency to promptly review each request on a case-by-case basis and respond to that request to the fullest extent possible without revealing any exempt information.

[5] Some of those exemptions claimed such as the federal Violence Against Women Act have been relegated to nothing more than a footnote in the University's appellate brief.

When an agency denies an open records request, the agency must support its rejection with specificity. KRS 61.880(1) provides:

> An agency response denying, in whole or in part, inspection of any record shall 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. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

The meaning of KRS 61.880(1) and its directive to the agency is "exact. It requires the custodian of records to provide particular and detailed information in response to a request for documents." *Edmonson v. Alig*, 926 S.W.2d 856, 858 (Ky.App. 1996). To expedite the open records request process, the Act imposes upon the agency the responsibility to respond to the requester within three days. KRS 61.880(1).

The Act also places the responsibility on the public agency to redact any exempt material from a file and release the remaining materials. KRS 61.878(4) provides: "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." With the responsibility of redaction squarely placed on the agency, blanket exemptions from disclosure are prohibited. As stated in *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 88 (Ky. 2013), the Act does not permit "the nondisclosure of an entire

record or file on the ground that some part of the record or file is exempt[.]" The University did just that by claiming because the records are maintained by the University and concerned students' complaints under Title IX, the records are all exempt when clearly they are not.

At the circuit court level, the burden to prove an exemption applies remains with the agency and the court requires more than simply a brief explanation of how an exemption applies. "[T]he court must hold the agency to its burden of proof by insisting that the agency make a sufficient factual showing . . . to justify the exemption." *City of Fort Thomas*, 406 S.W.3d at 852. In *City of Fort Thomas*, the Court suggested the agency may submit "an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld." *Id*. at 849.

The University ultimately attempted to meet its burden of proof to establish that all records requested by the Kernel were exempt by filing an index in the circuit court. Not only was this index belatedly filed after the circuit concluded that all records contained in the investigation file were exempt under FERPA, but it was also deficient.

While in *City of Ft. Thomas*, the Court held that the agency may meet its burden of proof by submitting an index, the Court was specific as to what that index must contain. That index must provide the requesting party and the court

with "sufficient information about the nature of the withheld record (or the categories of withheld records)" and relationship to the exemption claimed, "to permit the requester to dispute the claim and the court to assess it." *Id*. at 852. As the Court noted, the index should resolve the question of whether a record is exempt and *in camera* inspection is only resorted to if disclosure of the nature of the information withheld and its relationship to the exemption cannot be done without defeating the exemption. *Id*. The burden is on the agency to "identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories" that permit the court to make a "rational link" between "the nature of the document" and the exemption claimed. *Id.* at 851. Conclusory statements that a record is exempt or, as here, that all records are exempt without explanation as to why any exemption is relevant to a specific record is insufficient.

In this instance, the University has not yet made any attempt to comply with the Open Records Act in any meaningful way. It has not separated the exempt from the nonexempt records, redacted any personally identifying information or provided sufficient proof in circuit court that the records are exempt through a proper index. It has taken the indefensible position that the records are exempt because it says they are and it must be believed. That position is directly contrary to the goal of transparency under the Open Records Act.

It is also problematic that the University refused to comply with the AG's request for an *in camera* review. After the University refused to turn over any records to the AG, even those it had provided to the Kernel, the AG concluded that without any substantiating evidence to support the exemptions claimed, the University violated the Open Records Act and that the requested records with all personal identifiers redacted must be released to the Kernel. In intervening in the circuit court action, the AG squarely presents the issue of whether the University's refusal constitutes a violation of the Open Records Act.

The Open Records Act does not confer subpoena power on the AG. Perhaps the General Assembly assumed state agencies would comply with such requests to further the interest in transparency. If that was the assumption, the University has proven it to be wrong.

The General Assembly certainly intended for the AG to save the Court and the requesters time and costs by designating the AG as the "watchdog" in open records cases. It conferred upon the AG the duty to adjudicate open records dispute and, to do so, gave the AG the ability to substantiate an agency's claims that records are exempt through an *in camera* review of the records requested. KRS 61.880(2)(c) provides: "The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also

request a copy of the records involved but they shall not be disclosed." Even when exempt from public disclosure, the Open Records Act provides that no exemption shall "prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function." KRS 61.878(5). Despite the AG's authority to request the records involved, the circuit court concluded that because every record in the investigation file was an education record, FERPA prohibited *in camera* review even by the AG.

The AG argues that FERPA only prohibits the public disclosure of personally identifiable information contained in education records; it does not prohibit *in camera* review by the AG. The AG's argument would be more persuasive absent the explicit language of FERPA.

FERPA prohibits the disclosure of personal identifying information contained in education records to third-parties, unless one of the specifically enumerated exception set out in FERPA and implementing regulations applies. Those exceptions allow disclosure to courts of law, as well as a finite group of expressly listed agencies, such as the U.S. Comptroller General, state educational authorities and the U.S. Attorney General. 20 U.S.C. §1232g(b)(1)(c) and 34 C.F.R. 99.31(a)(3) and (9). Absent from those exceptions are state attorney generals.

The AG argues that as the first adjudicator under the Open Records Act it operates as a judicial officer with delegated judicial authority when conducting a confidential review of alleged education records. While it is true that if not timely appealed an AG decision becomes binding and enforceable in a court of law, the AG's executive branch adjudication does not fall within the "court of law" exception to FERPA. This conclusion is buttressed by the specific exception from nondisclosure to the U.S. Attorney General, which would be mere surplusage if an attorney general was the equivalent of a court of law when considering requests for public records.

We agree with the circuit court that to the extent the investigation file contains education records with *unredacted* personally identifying information the University is *prohibited* from releasing those records for the AG's *in camera* review. The July 25, 2006 *Letter from the U.S. Department of Education's Family Policy Compliance Office to Texas Office of the Attorney General* reached this same conclusion. However, the Department of Education's letter dealt with a request for unredacted education records, a situation much different than here and, therefore, the University's reliance on that letter is misplaced.

First, as we have stated not all the records requested are education records and FERPA does not prohibit their release. Moreover, the AG did not request unredacted records. Whatever weight the letter relied upon by the

University may have in case with identical facts, in this case it has no weight in our decision.

In deciding not to cooperate with the AG's request, the University also purportedly relied on prior AG opinions, 08-ORD-052 and 12-ORD-220, where the AG decided in the University's favor where it refused to turn over records based on FERPA. However, both those instances were in response to requests for records that were indisputably education records as they were directly related to students. Moreover, even if the University is correct that the current AG's stance is inconsistent with prior AGs, the AG is not bound by a previous administration's interpretation. *Commonwealth v. Chestnut*, 250 S.W.3d 655 (Ky. 2008).

We agree with the AG that the University violated the Open Records Act when it refused to allow the AG to review redacted records requested by the Kernel. Such refusal made the AG's review of the matter impossible leaving the AG with no alternative but to decide that the University must release the records to the Kernel. *See Cabinet for Health and Family Services v. Todd County Standard, Inc.*, 488 S.W.3d 1 (Ky.App. 2015) (upholding the AG's decision requiring release of the records after agency refused to release the records to the AG). However, as noted earlier, under the Act, that decision is subject to appeal by the agency in the circuit court where it is reviewed as an original action. KRS 61.880(5)(a). Even if

it is found that an agency violated the Open Records Act, the AG's remedy of disclosure may or may not be upheld by a court.

In *Edmonson*, this Court disagreed with the AG that disclosure was an appropriate remedy where there were undeniable deficiencies in the agency's response. *Edmonson*, 926 S.W.2d at 859. It was pointed out that the exemptions under the Open Records Act exist to prevent public disclosure of records and merely ordering all records to be disclosed based on an agency's procedural default may be inappropriate. *Id*. Therefore, there must be substantive determination as to whether a record is exempt so that material intended to by protected from public disclosure are not released. *Id*.

For the reasons stated, the University has failed to procedurally comply with the Open Records Act, prevented the AG from reviewing the substance of the requested records, and did not meet its burden of proof in the circuit court. While the circuit court conducted an *in camera* review, it made an erroneous factual conclusion that all the records in the investigation file are covered by FERPA. Consequently, to date, there has not been a substantive review of the requested records.

While we could affirm the AG's result and order that the records requested be disclosed in redacted form to the Kernel, we refrain from doing so because that could result in the public disclosure of exempt records. The proper

solution in this case is to order the University to fulfill its statutory responsibilities under the Open Records Act. We remand this case to the circuit court for the University to submit a proper index compliant with this opinion or otherwise satisfy its burden of proof that each record in the Title IX investigation file is exempt. Although at this point, the Kernel has not requested costs and attorney fees or any penalties to be imposed on the University as provided for in KRS 61.882(5), if requested on remand and upon a finding that the University willfully violated the Open Records, those amounts may be awarded.

The final issue is presented in the AG's appeal. The AG requests relief far broader than this case in the form of a judgment declaring that the University be permanently enjoined from violating the Open Records Act by refusing to provide the AG with records requested in an open records appeal. We decline to do so.

In *Fiscal Court of Jefferson Cty. v. Courier-Journal & Louisville Times Co.*, 554 S.W.2d 72, 73 (Ky. 1977), the Court considered a circuit court order that "[e]njoined the members of the Fiscal Court 'from conducting or participating in any further meetings held in violation of the law relating to open meetings[.]"' The Court reversed holding that:

> Blanket injunctions against general violation of a statute are repugnant to the American spirit and should not lightly be either administratively sought or judicially granted. The mere fact that a court has found that a

> defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

Id. at 73-74. We agree with the circuit court that the AG's request is too broad to be granted and would essentially amount to this Court granting the AG subpoena power in Open Records Act disputes involving the University. If that power is to be given, it must be given by the General Assembly.

For the reasons stated, we affirm the circuit court's denial of the AG's request for a permanent injunction. We reverse and remand to the circuit court with directions that the University comply with the Open Records Act consistent with this opinion.

THOMPSON, L., JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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