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18-ORD-053

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In re: Jon Fleischaker/University of Louisville

Summary: The University of Louisville violated the Open Records Act, both procedurally and substantively, in its responses to requests for records made by three reporters of the Courier-Journal newspaper relating to the University's president and athletic department employees.

Open Records Decision

The question presented in this appeal is whether the University of Louisville ("University") violated the Open Records Act in its disposition of requests from three Courier-Journal newspaper reporters seeking records relating to the University president and employees of the University's athletics department. As set forth below, we find that the University violated the Act, both procedurally and substantively, in response to the requests that are the subjects of this appeal.

Attorney Jon Fleischaker, Kaplan & Partners, LLP, ("Appellant") representing the Courier-Journal newspaper ("Courier-Journal"), by letter dated December 20, 2017, appealed the responses of the University to open records requests made by three Courier-Journal reporters, Jeff Greer, Danielle Lerner, and Tim Sullivan, dating back to the late summer of 2017. The University responded to the appeal by letter dated January 17, 2018. This decision will review the requests made by each reporter, the University's responses to those requests, and its response to the appeal.

Jeff Greer's Open Records Requests for emails and personnel records. On September 30, 2017, Courier-Journal reporter Jeff Greer emailed[1] the University requesting, in pertinent part[2], the following documents:

- Any and all of Dr. Greg Postel's email communications (sent and received) from Monday, September 25, through Friday, September 29[;]
- Tom Jurich's updated personnel file[; and]
- Rick Pitino's updated personnel file[.]

The University responded to Mr. Greer's request for the emails of Dr. Postel (the interim University President) on November 10, 2017, by requesting that Mr. Greer narrow his request. Mr. Greer responded that same day, declining the University's invitation to narrow his request for the four days of emails. In its response to this appeal, January 17, 2018, the University merely stated: "Dr. Postel's emails Sept 25-29 response pending; expected Jan 22nd."

We first note that the University failed to respond in a timely manner to the open records request. KRS 61.880(1)[3] establishes specific legal requirements applicable to all public agencies that receive an open records request. It requires

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[1] Although e-mail is not a recognized means of submitting a request under KRS 61.872(2), which authorizes delivery by hand, mail, or fax transmission, a public agency can waive this requirement, either expressly or by a course of conduct, by responding without objection as the University did in this case. 07-ORD-064; 08-ORD-144.

[2] This decision deals only with those requests, or portions of requests, from Courier-Journal reporters where the responses were deemed unsatisfactory by Appellant. We recognize that there were other requests made by reporters that Appellant has not complained of in this appeal. The University explained, on appeal, that it had received 91 open records requests from Courier-Journal reporters in 2017, and had responded with "more than 10,425 pages of records."

[3] KRS 61.880(1) states: "Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. 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."

a response within three "business days" as to whether the public agency will comply with the request. The untimely response, over a month after the request was made, greatly exceeded the time in which University should have responded to Mr. Greer, and constitutes a procedural violation of more than minor significance. In general, a public agency cannot postpone this deadline. 04-ORD-144, p. 6. "The value of information is partly a function of time." *Fiduccia v. U.S. Dept. of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). This is a fundamental premise of the Open Records Act, underscored by the three-day response time codified at KRS 61.880(1). *See* 05-ORD-134, pp. 3-5.

The University's response was not only untimely, but also failed to comply with the Act's requirement KRS 61.872(5)[4] to provide a detailed explanation for the delay in producing the records, and the earliest date on which the records would be available. In the absence of a legitimate detailed explanation of the cause for the delay, this Office finds that the Courier-Journal did not receive "timely access" to the requested documents. 16-ORD-188 (University of Louisville's response was not timely under KRS 61.880(1) nor did it satisfy the requirements of KRS 61.872(5)); 16-ORD-210 (University of Louisville violated the Open Records Act in failing to either comply with all requirements of KRS 61.880(1), or properly invoke KRS 61.872(5)). We remind the University that the procedural requirements of the Open Records Act "are not mere formalities but are an essential part of the prompt and orderly processing of an open records request." 93-ORD-125, p. 5 (city failed to comply with procedural requirements of the Act); 11-ORD-218 (fire department violated KRS 61.880(1) by issuing a perfunctory response to records request).

Personnel Records of Tom Jurich and Rick Pitino. In response to his request for Tom Jurich's and Rick Pitino's updated personnel file, Mr. Greer initially received only each individual's termination letter. The University requested, on October 3, that Mr. Greer provide clarification as to what records he was seeking regarding the personnel files. Mr. Greer responded the he "just meant their personnel files. Updated to include whatever the latest

[4] KRS 61.872(5) states: "If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection."

documentation is." On November 29, the University replied that it had "interpreted your request that you wanted the latest documentation, which I sent you. Please let me know if you seek additional records." On appeal, the University stated that it had asked for clarification of the request for personnel records, but had not received a response. Appellant states that the University has not yet released either individual's personnel file or further explained its refusal to do so.

The University's interpretation of the request for the personnel files is subject to KRS 61.872(3)(b).[5] Whereas KRS 61.872(2)[6] requires, generally, that the requester "describe" the records which he wishes to access by on-site inspection, KRS 61.872(3)(b) requires the requester to "precisely describe[ ]" the records which he wishes to access by mail. *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). A description is precise if it is "clearly stated or depicted," Webster's II, New Riverside University Dictionary 926 (1988); "strictly defined; accurately stated; definite," Webster's New World Dictionary 1120 (2d ed. 1974); and "devoid of anything vague, equivocal, or uncertain." Webster's Third New International Dictionary 1784 (1963). A requester satisfies the second requirement of KRS 61.872(3)(b) if he describes in definite, specific, and unequivocal terms the records he wishes to access by mail. 97-ORD-46, p. 3; 03-ORD-067. We find that the request for the "updated personnel file[s]" of Mr. Jurich and Mr. Pitino meets the standard set forth in *Chestnut*. The request does not ask for merely the "latest documentation" in those personnel files, as interpreted by the University. It is clear that the request encompasses the entire personnel file, to include the latest documentation. The University's failure to provide those records constitutes a substantive violation of the Act.

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[5] KRS 61.872(3)(b) states, in pertinent part, that a person may inspect public records: "By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records ... after [the requester] precisely describes the public records which are readily available within the public agency."

[6] KRS 61.872(2) states that, "Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency."

Danielle Lerner's requests. Courier-Journal Reporter Danielle Lerner also made several open records requests to the University. First, in an October 6, 2017, email, she requested, in pertinent part:

- Payroll records for Jordan Fair and Kenny Johnson from Sept. 1, 2017 through Oct. 6, 2017[;]
- Expense reports from Jordan Fair, Kenny Johnson, Rick Pitino, and David Padgett from Jan. 1, 2017 through Oct. 6, 2017

Payroll Records. The University initially responded to these requests on October 11, 2017, via e-mail. In response to the request regarding payroll records, the University stated that Mr. "Fair has only received his regular monthly check of $17,166.67 on 9/30/17" and Mr. "Johnson has only received his regular monthly check of $46,333.33 on 9/30/17." That e-mail did not provide any of the requested documents, but did state that Ms. Pawson[7] was "working to gather and review documents for your other requests. I expect to have something later this week." Appellant states that the University did not provide additional payroll records in response to this request.

On appeal, the University addressed the requests for payroll records by stating that it had, on October 11, 2017, provided *the information* regarding all pay received in the time frame requested. (Emphasis added). Just as this Office has long held that a request for information need not be honored under the Act, it is also true that a request for records is not satisfied by providing information in lieu of the requested records. The Open Records Act addresses requests for records, not requests for information. 03-ORD-028. The University must provide the requested payroll records, if it has not done so already. The University's failure to provide records responsive to the plainly worded request for payroll records constitutes a violation of the Act.

The University's response that it "expect[s] to have something later this week" is insufficient as an explanation for delay beyond the three-business-day

[7] Ms. Sherri Pawson, Senior Compliance Officer, states in her responses to several of the requests, that she "respond[s] on behalf of the university to all requests made of UofL employees under the Kentucky Open Records Act and the federal Family Educational Rights and Privacy Act, as well as to subpoenas and other requests for the inspection of university records. This includes internal as well as external requests."

period under KRS 61.872(5). That statute requires "a detailed explanation of the cause ... for further delay and the place, time, and earliest date on which the public record will be available for inspection." The response gives neither an explanation for delay nor the "place, time, and earliest date" on which the records would be provided.

Expense Reports. On November 9, 2017, the University provided travel expense records for Rick Pitino, Kenny Johnson, and Jordan Fair. On appeal, the University states that it provided the expense reports of David Padgett on November 28, 2017. However, the University claimed, by e-mail dated November 9, 2017, that the records were redacted "relying on KRS 61.878(1)(a)" to remove "the locations of recruiting trips and names/identifying information of students and potential student athletes." The University also claimed that disclosure of the records would violate the federal Family Educational Rights and Privacy Act ("FERPA").

On appeal, the University stated that release of unredacted travel records could "link a specific recruit to his/her hometown. Even the NCAA prohibits schools from discussing specific players until they sign a letter of intent. These recruits are not university employees; rather they are potential student athletes. ... 16-ORD-261 upheld such redactions and deemed the non-disclosure appropriate ... ." The University relied on the privacy interest of "*potential* student athletes" (emphasis added) to justify the redaction of the locations from travel expense records.[8]

We disagree with the University's redaction of locations from the travel expense reports, and find its reliance on 16-ORD-261 to be misplaced. Our decision in 16-ORD-261 upheld the redaction of some travel destinations from travel records of an investigator hired by the University for an internal investigation. In upholding those limited redactions in that matter, this Office noted that the records essentially related to an ongoing criminal investigation, creating a heightened privacy expectation for persons who were interviewed merely as witnesses in the investigation. The University's travel expenditures in

[8] The appeal states that redaction of the locations from the travel expense records was a change in the practice from previous years by the University. By this, we understand that Appellant is not appealing the redaction of the names or other identifying information of the potential students.

recruiting student-athletes does not carry the same heightened privacy interest as travel expenditures to interview witnesses in an internal investigation.

In its November 9 explanation of its redactions of the coaches' travel expense reports, the University made passing reference to FERPA as a basis for the redactions. The University did not expand on that reliance on the federal law. To the extent that the travel records relate to potential students, those records are not protected by FERPA. In 06-ORD-145, we reviewed the denial of Northern Kentucky University for records of law school applicants. That decision concluded that only law school applicants who had been accepted for attendance could even be considered as students under FERPA. That decision reviewed a federal decision, *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989), that cited implementing regulations of FERPA. *Tarka* determined that those regulations do not protect records of a person who has "applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education." 891 F.2d, at 105. The University's response indicates that "specific players" are not allowed, by the NCAA, to be identified by schools "until they sign a letter of intent." From this statement, we gather that these persons, whose recruitment is the intended reason for the travel, have not yet signed a letter of intent to attend the University. Under the facts of this appeal and the *Tarka* holding, we conclude that these persons were not in attendance at any component of the University at the time of the coaches' travel, and so those travel expense records are not protected under FERPA.

Our review of FERPA indicates that the records in question also fall into another exception of the law. Under a specific section of FERPA, 20 U.S.C. § 1232g(a)(4)(B)(iii), the term "education records" does not include:

> [I]in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, 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[.]

From the facts on appeal, these travel records appear to fit the description of records made in the normal course of business which relate to the coaches' travel as employees of the University. Under this definition, these travel records are

not protected from disclosure by FERPA. We conclude that the balance of interests favors disclosure of the requested travel records without redacting the locations of travel.

To the extent the University relied on KRS 61.878(1)(a)[9] in withholding the locations of travel by the coaches, the University failed to provide an explanation, beyond its claim of FERPA protection, as to why the locations of travel should not be provided. KRS 61.880(1) requires the public agency to provide "a brief explanation of how the exception applies to the record withheld." Mere recitation of the language of the exception relied upon has, in past open records decisions, been deemed insufficient to meet the agency's statutorily assigned burden of proof.[10] *See, e.g.*, 96-ORD-100 (recognizing that mere recitation of the language of KRS 61.872(6) to support denial of request was inadequate); 09-ORD-007 (agency's response was deficient because "it parroted, without citing, the language of the statute upon which it relied."); 11-ORD-076 (agency failed to meet its statutorily assigned burden of proof when it "merely parroted the language of the statutory exception it relied upon"). *Accord, Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 82 (Ky. 2013) (recognizing that an agency's denial of open records request must be "detailed enough to permit the [reviewer] to assess its claim and the opposing party to challenge it"). Based on the omission of "particular and detailed information" supporting the University's denial of Ms. Lerner's request pursuant to KRS 61.878(1)(a), we must conclude that it did not meet its burden of proof in denying the request for expense reports under that exception.

Phone records. Ms. Lerner, also on October 6, 2017, requested phone records (including call logs, message logs and text messages) of Jordan Fair, Kenny Johnson, Rick Pitino, and David Padgett. Ms. Lerner received a response on October 20, 2017, from Ms. Pawson, who stated she was "reviewing the documents now . . . [and] expect [it] will take a significant amount of time to complete the review and redact, up to two weeks or more." Ms. Lerner received

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[9] KRS 61.878(1)(a) permits the nondisclosure of: "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]"

[10] KRS 61.880(2)(c) states that "[t]he burden of proof in sustaining [agency] action [in responding to an open records request/appeal] shall rest with the agency …. ."

no further response to this request and Appellant states that the University has not addressed this particular request on appeal.

We note that the University's initial response failed to comply with several requirements of the Open Records Act. In particular, the University did not comply with KRS 61.872(5). *See supra*, n. 4. A general response, such as the one given here, that "[it] will take a significant amount of time to complete the review and redact, up to two weeks or more[,]" does not meet the requirements of KRS 61.782(5). The University did not state the earliest date on which the public record would be available for inspection, nor did it provide a detailed explanation of the cause for delay. Our review of the record on appeal finds no indication that records responsive to this request have been provided to Appellant. The failure to provide the requested records also constitutes a substantive violation of the Act.

Records for Lacrosse Coach Kelly Young. On November 7, 2017, Ms. Lerner requested "[a]ny notice of termination delivered to former women's lacrosse coach Kellie Young" and "[a]ll electronic communications between Vince Tyra and Kellie Young from Oct. 25, 2017 – Nov. 6, 2017." On December 1, 2017, Ms. Lerner received a copy of the termination letter regarding Ms. Young, and also was informed that no such communications between Ms. Young and Mr. Tyra exist. From the record on appeal, it appears that the University committed a procedural violation of KRS 61.880(1) by failing to respond to the request within three days. We concur with Appellant's observations that this Office has repeatedly held that late responses constitute violations of the Open Records Act. *See* 17-0RD-029 (concluding that failure to respond within the three-day time period is a violation of KRS 61.880(1)); 16-0RD-230 (reminding "that the procedural requirements of the Open Records Act 'are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request.'" (quoting 93-ORD-134, p. 9).

Ms. Lerner requested a copy of Ms. Young's personnel file on October 24, 2017. Appellant's complaint regarding this issue is that redactions were made of the "names of former players (or parents) and members of the public who wrote to the University to express support or opposition to Coach Young," and that the redactions were without any explanation from the University to support the

redactions. "Some of those emails, which have been redacted by the University, were copied to members of the media and are in no way private."

The University stated, on appeal, that the redactions of the personnel file were made pursuant to KRS 61.878(1)(a) and that redaction of "letters from private individuals (including former players and parents) is analogous to the redaction of the names/locations in the recruiting expense records." The University explained that the redacted letters "contained all substantive facts, except for identifying information of the authors. ... The identity of those individuals reveals no additional information as to the performance of the university in these activities. The substance of the records was provided in total." Our review of the University's response indicates, without expressly so stating, that, in addition to relying on KRS 61.878(1)(a), it also relied upon KRS 61.878(1)(i). The University contends that the authors of the letters could not have foreseen that their letters could become public.

KRS 61.878(1)(a). KRS 61.878(1)(a) excludes from the application of the Open Records Act "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." This language "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," while the Open Records Act as a whole "exhibits a general bias favoring disclosure" and places the burden of establishing an exemption on the public agency. *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This necessitates a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327-28.

The context, in this instance, includes letters and emails written by persons, "including former players and parents," in support of Ms. Young who was fired by the University from her position as lacrosse coach. Within this context, we can see that the identity of the authors of the letters may be of importance to the public. If some of authors of the letters and emails have knowledge of facts regarding Ms. Young, unknown to the general public, then

their identity would be important in judging the content of those letters and emails. In this instance, the balance between an expectation of privacy by the authors, and the public's right to know how the University is executing its functions, weighs in favor of disclosure, rather than redaction, of the names of the authors of the letters and emails.

The University's brief explanation of why it redacted, relying on FERPA by analogy, and KRS 61.878(1)(a), the names of persons writing in support of Ms. Young, does not meet the burden of proof assigned to the public agency by KRS 61.880(2)(c)[11]. This decision has already determined that the redaction of travel locations in expense records is not justified under FERPA, and we fail to see how the names of people, including former players and parents, writing in support of Ms. Young are student records. We do not agree that there is an analogous relationship between the names (of the authors of letters or emails in support of Ms. Young) and the travel destinations of coaches. The University has failed to adequately explain its redactions pursuant to KRS 61.878(1)(a).

KRS 61.878(1)(i). Finally, the University implicitly invoked KRS 61.878(1)(i), which creates exceptions to the Open Records Act for:

> (i) Preliminary drafts, notes, correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency; [and]

We conclude that the University was alluding to the exception's provision for "correspondence with private individuals," as a basis for redacting the names of the authors of correspondence in support of Ms. Young. However, that category of records "is generally reserved for that narrow category of public records that reflects 'letters exchanged by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality.'" 00-ORD-168, p. 2. There is nothing in the record to suggest that the authors relied on any assurances of confidentiality. Accordingly, we find KRS 61.878(1)(i) inapplicable, and that the names of the authors of the letters and emails must be disclosed.

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[11] KRS 61.880(2)(c) states, in relevant part: "The burden of proof in sustaining the action [of redacting the names of persons writing in support of Ms. Young, in this instance] shall rest with the agency[.]"

Tim Sullivan's Open Records Requests.

In an August 25, 2017, e-mail, Courier-Journal reporter Tim Sullivan requested records relating to money paid by Adidas to the University and records relating to coaches' athletically related income. The University responded on August 28, 2017, stating that it expected to have a response regarding money received from Adidas by "early next week, if not before[,]" but Appellant had not received that response prior to filing its appeal. The University's response to the appeal, January 17, 2018, stated that it expected to have a response to this request in the "next 2-3 days."

Regarding the request for records detailing coaches' "athletically related income," the University requested that Mr. Sullivan narrow his request. On September 5, 2017, Mr. Sullivan narrowed his request to "any coach who received endorsement income from Adidas in any year and any coach who showed more than $50,000 in outside income in any year." The appeal states that Mr. Sullivan did not receive a response to the narrowed request prior to this appeal being filed, but, on appeal, the University stated the "outside income forms for various Athletics staff were provided December 1, 2017." [12]

As explained above in our analysis of the University's response to Jeff Greer's requests, KRS 61.872(5) required the University to provide a detailed explanation for the delay in providing the requested records, and to also state the earliest date on which the records would be provided. The University's response, regarding the Adidas contract (that it expected to have a response for Mr. Sullivan by "early next week, if not before"), meets neither of those requirements. Likewise, and in the same manner, the University's disposition of of the request for records regarding coaches' outside income also violated KRS 61.872(5). Without a detailed explanation of the reason for the delay in producing the requested records, beyond the three-business day period, we find that the University did not provide timely access to the records as required by KRS 61.880(1).

[12] We trust that the University has provided both sets of records requested by Mr. Sullivan, to Appellant's satisfaction.

Christopher White's Follow-Up Requests. On November 6, 2017, Courier-Journal Sports Director Christopher White sent an e-mail to Sherri Pawson at the University of Louisville which included a chart showing the various requests from the three reporters which remained outstanding at that time. Mr. White asked for a review of these requests and whether "there is an issue with any of these?" Appellant stated that, "To date, Mr. White has received no response from the University." Having determined that the University's responses to the requests set forth above violated, procedurally and substantively, the requirements of the Open Records Act, we see no point in further belaboring this analysis by commenting on the University's lack of response to Mr. White's follow-up requests.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

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