

ELECTRONICALLY FILED
COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION 4
CASE NOS. 16-CI-3065 & 16-CI-3594

UNIVERSITY OF KENTUCKY,

PLAINTIFF,

v.

ORDER

LEXINGTON H-L SERVICES, INC.,
d/b/a LEXINGTON HERALD LEADER,

DEFENDANT.

* * * * *

This matter is before the Court on the Herald-Leader's Renewed Motion for an Award of Attorney's Fees, Costs, and Statutory Amounts, and Motion to Reconsider Judge Reynolds's September 30, 2019, Order. The Court having reviewed the file, considered the arguments of counsel, and being otherwise fully advised, ORDERS as follows:

With the exception of portions of invoices sent to the University by its outside counsel, which were found to be properly redacted, the University's position that the documents requested in the Herald-Leader's May 16, 2016, and May 31, 2016, Open Records Act requests were exempt from disclosure was rejected at each level of review. Nevertheless, the Court recognizes that the University had a right to fully exhaust its remedies following the Attorney General's determination that it had failed to meet its burden to establish any of its claimed exemptions in response to those requests. The Court therefore finds and concludes that the University did not act in bad faith or otherwise willfully through August 21, 2019, the date on which the Kentucky Supreme Court denied the University's Motion for Discretionary Review. The Herald-Leader's

request for an award of attorney's fees and costs prior to that date will therefore be denied.

However, the Court finds and concludes that the University did act in bad faith and otherwise willfully with regard to its refusal to provide documents responsive to the Herald-Leader's September 24, 2019, Open Records Act request. Despite receiving clear direction from the Court of Appeals' Opinion and Order (and from Judge Goodwine's Order) regarding the inapplicability of the attorney client privilege, the work product doctrine, and claimed exemptions under the Act to the documents created during the audit and investigation of the Hazard Clinic, the University continued to withhold the requested documents based upon the very same arguments that had been rejected by the Court of Appeals. The Court finds and concludes that the University's refusal to provide documents in response to the Herald-Leader's September 24, 2019, Open Records Act request constituted a willful violation of the Open Records Act, and therefore exercises its discretion to award the Herald-Leader its attorney's fees and costs pursuant to KRS 61.882(5).

The Court exercises its discretion in accordance with the factors set out in *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013). More specifically, the Court finds and concludes that the University withheld thousands of pages of documents responsive to the Herald-Leader's request by continuing to rely on arguments that had already been rejected by Court of Appeals and by this Court in this case. That withholding was egregious, and created expense and other harm to the Herald-Leader, including but not limited to the expense of litigating this matter. The Court further finds and concludes that the request served an important public purpose, specifically, the

University's use of taxpayer money to refund Medicare and Medicaid after finding billing irregularities by the Clinic. The Herald-Leader's request for an award of attorney's fees and costs subsequent to the Supreme Court's denial of discretionary review will therefore be granted.

The Court declines to exercise its discretion to award the \$25 per day statutory penalty authorized by KRS 61.882(5).

Accordingly, for the reasons set forth above, IT IS ORDERED that the Herald-Leader's Renewed Motion for an Award of Attorneys' Fees, Costs, and Statutory Amounts and to Reconsider Judge Reynolds's September 30, 2019, Order is GRANTED in part and DENIED in part.

The Herald-Leader's Motion is DENIED insofar as it seeks an award of attorneys' fees and costs prior to the Supreme Court's August 21, 2019, denial of the University's Motion for Discretionary Review, and for an award of the statutory penalty authorized by KRS 61.882(5) for any period of time during the pendency of this action.

The Herald-Leader's Motion is GRANTED insofar as it seeks an award of its attorneys' fees and costs subsequent to the Supreme Court's August 21, 2019, denial of the University's Motion for Discretionary Review. The Herald-Leader is hereby ORDERED to submit an Affidavit of Attorney's Fees and Costs within ten (10) days of the entry of this Order.

This the 10th day of June, 2020.


JUDGE, FAYETTE CIRCUIT COURT

CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was served on all counsel of record through the Court's electronic filing system.

CLERK, FAYETTE CIRCUIT COURT

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ORDER

LEXINGTON H-L SERVICES, INC.,
d/b/a LEXINGTON HERALD LEADER,

DEFENDANT.

* * * * *

This matter is before the Court following the University of Kentucky's submission of documents for supplemental *in camera* review. The Court having now reviewed the sixty-six (66) submitted documents, considered the arguments of counsel, reviewed the file, and being otherwise sufficiently advised, IT IS ORDERED as follows:

1. The Court ORDERS that, with the exception of the documents addressed below, the documents submitted for supplemental *in camera* review shall be produced to the Herald-Leader for the reasons set out in the Court of Appeals' Opinion and Order and prior Orders entered by this Court. The Court finds and concludes that these documents are not subject to the attorney-client privilege, the work product doctrine, nor any exemption to the Open Records Act.

2. Notwithstanding the foregoing, the Court finds and concludes that the documents submitted for in camera review at Tab numbers thirteen (13) through seventeen (17) qualify as peer review records within the meaning of KRS 311.377(2). Although the Court recognizes that the peer review privilege is limited to suits for actions taken in the course of performing a peer review, *Sisters of Charity Health Sys., Inc. v.*

Raikes, 984 S.W.2d 464, 469 (Ky. 1998), as amended (Mar. 3, 1999), and that these documents are therefore subject to production under the Open Records Act, the Court ORDERS that they shall be produced to the Herald-Leader only after the University gives notice of this Order to the practitioners who are the subject of those documents of the Court's Order.

IT IS FURTHER ORDERED that the University shall file a Notice with the Court confirming the giving of notice to the practitioners within ten (10) days of the entry of this Order.

IT IS FURTHER ORDERED that the practitioners shall have a period of thirty (30) days from the date of the University's notice in which to intervene in this action for the sole purpose of filing any objection they have to the disclosure of the documents. Until the thirty-days have elapsed without intervention by the practitioners, or until the Court has resolved any objection raised by the practitioners, whichever occurs first, these documents shall remain under seal. If the thirty-day time period elapses without intervention by the practitioners, the University shall produce these documents to the Herald-Leader.

This the 10th day of June, 2020.


JUDGE, FAYETTE CIRCUIT COURT

CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was served on all counsel of record through the Court's electronic filing system.

CLERK, FAYETTE CIRCUIT COURT