

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
FOURTH DIVISION
CASE NO. 15-CI-2595

ENTERED ATTEST, VINCENT RIGGS, CLERK FEB 28 2017 FAYETTE CIRCUIT CLERK BY _____ DEPUTY
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UNIVERSITY OF KENTUCKY

PLAINTIFF/APPELLANT

v.

OPINION AND ORDER

PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.

DEFENDANT/APPELLEE

This is an administrative appeal of the Attorney General's Open Records Decision in 15-ORD-108, wherein the Attorney General found that Plaintiff/Appellant, University of Kentucky ("UK") failed to meet its burden of proof in denying an open records request on the basis of KRS 61.878(1)(a), (b), (c)1, (c)2, (i), (j), and (k), and the Fayette Circuit Court's opinion in *Ky. Coalition for Animal Protection, Inc. v. UK*, 87-CI-2728 (Fayette Circuit Court, January 5, 1989). *Ky. Op. Att'y Gen. 15-ORD-108 (2015)*

This matter was submitted to this Court to rule on the merits on January 30, 2017. The parties had oral arguments on Defendant/Appellee, People for the Ethical Treatment of Animals, Inc.'s, ("PETA") Motion to Compel Discovery on January 19, 2016 to which this Court entered an Order March 30, 2016 setting forth the arguments of both sides and the procedural posture of this case. The Order of March 30, 2016 is incorporated by reference and portions are cited for reference herein. Additionally, on August 18, 2016, the Court issued an Order declaring the Vaughn Index produced by UK in response to PETA's discovery requests sufficient and ruling that UK's stated exemptions were preserved for the record. The Court, having reviewed both parties' briefs on the merits, and documentation filed in support and opposition thereto, the

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Office of Legal Counsel

relevant case law, the regulations and being otherwise duly and sufficiently advised, **IT IS HEREBY ORDERED** that Plaintiff/Appellant's appeal of Attorney General's Open Records Decision in 15-ORD-108 is **DENIED**. This Court agrees with the Attorney General's finding that UK's denial of PETA's request constituted a violation of the Kentucky Open Records Act and that UK failed to meet its burden of proof with respect to the exemptions it asserted.

FACTS AND PROCEDURAL HISTORY¹

1. On August 1, 2014, PETA requested copies in writing from UK of "[a]ll active Institutional Care and Use Committee (IACUC) approved protocols for the use of animals in teaching exercises." A copy of PETA's request is attached to the Complaint and Notice of Appeal as Exhibit A.
2. UK contends that the records PETA seeks concern animal use protocols confidentially submitted by UK faculty and that these protocols are obtained, compiled and maintained in whole or in part for the purposes of conducting scientific research.
3. On August 13, 2014, by letter, UK provided PETA with a list of the protocols that met PETA's description of records sought. UK denied PETA's request for the actual protocols by letter dated September 4, 2014, citing, among other things, statutory exemptions. A copy of UK's letters in response to PETA's request are attached to the Complaint and Notice of Appeal as Exhibit C.
4. PETA appealed UK's denial to the Office of the Attorney General by letter and memorandum dated January 8, 2015. A copy of same is attached to the Complaint and Notice of Appeal as Exhibit D.

¹ This information was taken from Plaintiff/Appellant's Complaint and Notice of Appeal.

5. UK responded to PETA's appeal by memorandum to the Attorney General dated February 2, 2015. A copy of that memorandum is attached to the Complaint and Notice of Appeal as Exhibit E.
6. On June 16, 2015, the Attorney General issued the Decision (15-ORD-108), finding that UK's denial of PETA's request constituted a violation of the Kentucky Open Records Act. The Attorney General further found that UK had failed to meet its burden of proof with respect to the exemptions it had asserted. A copy of the Decision is attached to the Complaint and Notice of Appeal as Exhibit F.
7. On January 19, 2016, the parties argued the issues of whether this was to be considered an original action and whether discovery should commence before the Court and the matter was taken under advisement.
8. On March 30, 2016 this Court issued an Order holding specifically...

KRS 61.822(3) explains that in an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the Court shall determine the matter de novo. Given the relevant case law and statutes cited herein, the Court finds and concludes that this is an original action that should be reviewed de novo without giving consideration or deference to the Attorney General's decision.

And on the matter of discovery, UK was ordered to produce to PETA "a more in-depth Vaughn index pursuant to 32 CFR 701.39 within 30 days from the date of entry of this Order."
9. On April 29, 2016, UK provided the Court with its Vaughn Index.
10. PETA filed a Request for Ruling, on June 13, 2016 and UK responded. PETA also filed a Notice of Filing on July 11, 2016 and UK responded. This Court entered an Order on August 18, 2016 finding that the Vaughn Index provided by UK in response

to PETA's discovery requests was sufficient and that UK's stated exemptions were sufficiently preserved for the record.

11. UK filed their brief on the merits on October 17, 2016 and PETA filed their response brief on December 15, 2016. UK's reply brief was filed January 13, 2017 and the case was deemed submitted to the Court for decision on January 30, 2017.

LEGAL ANALYSIS

The Court incorporates its legal analysis in the March 30, 2016 Order and its August 18, 2016 Order, and further states that after review of UK's tendered Vaughn Index, the Court is satisfied that its stated exemptions have been properly preserved for the record, however, this Court agrees with the Attorney General and the analysis in *Ky. Op. Att'y Gen. 15-ORD-108 (2015)* which found that UK failed to meet its burden of proof in denying an open records request on the basis of KRS 61.878(1)(a), (b), (c)1, (c)2, (i), (j), and (k), and the Fayette Circuit Court's opinion in *Ky. Coalition for Animal Protection, Inc. v. UK*, 87-CI-2728 (Fayette Circuit Court, January 5, 1989). *Ky. Op. Att'y Gen. 15-ORD-108 (2015)*.

This Court shall determine an appeal of an Attorney General's decision de novo pursuant to KRS 61.882. PETA has argued and this Court agrees that Kentucky courts regard the Attorney General's opinion as highly persuasive, but not binding and Kentucky courts give great weight to the reasoning and opinion expressed by the Attorney General. *York v. Com.*, 815 S.W.2d 415 (Ky. Ct. App. 1991). PETA points the Court specifically to the caselaw that suggests a great weight given to the Attorney General in open records decisions. *Commonwealth, Cabinet for Health & Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. Ct. App. 2008).

As described in 15-ORD-108, the question presented is

whether the University of Kentucky violated provisions of the Open Records Act in denying Samantha Suiter's August 1, 2014, request for copies of "[a]ll active Institutional Animal Care and Use Committee (IACUC) approved protocols for

the use of animals in teaching exercises.” Ms. Suiter is identified as a Science Education Specialist affiliated with People for the Ethical Treatment of Animals which pursued this appeal on her behalf. We find that the University failed to meet its burden of proof in denying Ms. Suiter’s request on the basis of KRS 61.878(1)(a), (b), (c)1, (c)2, (i), (j), and (k), and the Fayette Circuit Court’s opinion in *Ky. Coalition for Animal Protection, Inc. v. UK*, 87-CI-2728 (Fayette Circuit Court, January 5, 1989). *Ky. Op. Att’y Gen. 15-ORD-108 (2015)*

The Attorney General briefly described the arguments made by both UK and PETA and addressed each exemption claimed by UK under KRS 61.878. This Court has reviewed the analysis, finds it is sound and agrees with the Attorney General’s assessment of the arguments in 15-ORD-108. The Attorney General explains that “Kentucky’s Open Records Act contains a legislative presumptive favoring access to public records unless the records are subject to one or more of the exemptions codified at KRS 61.878(1)(a) through (n) as ‘strictly construed.’” *Ky. Op. Att’y Gen. 15-ORD-108 (2015)*.

Addressing KRS 61.878 (1)(a), UK asserts an argument that the teaching protocols requested contain information of a personal nature, to which PETA responds to the contrary that the public is entitled to know the names of public employees carrying out the public’s business at public expense. The Attorney General applied a weighing of non-disclosure versus the underlying policy for openness for the public good, citing *Zink v. Com., Dep’t of Workers’ Claims, Labor Cabinet*, 902 S.W.2d 825 (Ky. Ct. App. 1994).

whether request for information under Open Records Act constitutes clearly unwarranted invasion of personal privacy entails comparative weighing of antagonistic interests in which privacy interest in nondisclosure is balanced against general rule of inspection and its underlying policy of openness for general good, and circumstances of given case will affect balance. *See Id.* The Attorney General ultimately found and this Court agrees that “because no open records related to public interest sufficient to overcome the faculty and staff’s privacy interest in their contact information, both public and private, is articulated, the University may redact this information before disclosing the protocols.” *Ky. Op. Att’y Gen. 15-ORD-108 (2015)*.

KRS 61.878 (1)(a). PETA notes in its Response Brief on the merits herein that it is not interested in such contact information, but argues that the University has published on its website the names of faculty and staff involved in courses in which animals are used for teaching purposes. *Response Brief of Defendant/Appellee PETA*, p7.

Additionally, the Attorney General cited *Zink* finding that UK's privacy interest does not turn on the identity of the records requestor, *See supra*, at 828. Further explaining that any member of the public has just as much right to access as another. UK made arguments about the faculty and staff's safety concern if their identity and these teaching protocols were disclosed based on the argument that there are extreme groups that have created violent video games and/or that threats to individuals made in other cases.² However, the fact that UK publishes their faculty and staff contact information on their website "weakens" their privacy argument.

Regarding KRS 61.878(1)(b), the Attorney General found that the teaching protocols at issue were not proven to be confidentially disclosed to it by an outside entity, such as in 14-ORD-158. The Attorney General found and this Court agrees that KRS 61.878(1)(b) is inapplicable to the protocols at issue herein. This Court agrees with the sound analysis in 15-ORD-108 regarding the review of KRS 61.878(1)(c) 1 and 2, finding that the teaching protocols have not been shown to have been generated by an outside entity and thereafter disclosed to the University for purposes of KRS 61.878(1)(c) 1 and neither were the teaching protocols "Compiled and maintained" for purposes of KRS 61.878(1)(c) 2.

² PETA has renewed their Motion to Strike filed on February 22, 2016 as to UK's Statement of Points and Authorities, to apply to Sections IV and V of UK's Opening Brief at 5-13 arguing the statements contained therein are "irrelevant, hyperbolic, prejudicial, and founded on hearsay," *Response Brief*, p10, ft nt 4. The Court considers the Motion to Strike moot as it has already been considered and the Court is ruling in favor of PETA. The Court would have overruled the Motion to Strike as the Court errs on the side of having more information to make its decision and does not find the arguments made by UK to be prejudicial to PETA because PETA had every opportunity to respond.

The Attorney General found and the Court agrees that the approved teaching protocols at issue herein are not drafts or preliminary as the language of KRS 61.878 (1)(i) and (j) describes.

“[T]he teaching protocols have been vetted *and approved* by the University’s IACUC. That committee has taken final action on them and they have forfeited their preliminary character.”

Ky. Op. Att’y Gen. 15-ORD-108 (2015).


UK invokes KRS 61.878 (1)(k) as an exception in tandem with the Animal Welfare Act, 7 U.S.C.A. § 2131. The Attorney General analyzed this exception in terms of whether the teaching protocols at issue constitute “trade secrets” as defined by Kentucky legislation and find that there is no proof that the teaching protocols constitute trade secrets to create a federal confidentiality requirement and therefore reliance on KRS 61.878(1)(k) is misplaced and this Court agrees.

Finally, the Attorney General distinguishes a case relied upon by UK, *Ky. Coalition for Animal Protection, Inc. v. UK*, (Fayette Circuit Court, January 5, 1989). The Attorney General finds and the Court agrees that the issue herein is a matter of first impression and it is distinguishable from the issue in *Ky. Coalition for Animal Protection* because the facts there involved “research protocols” that had been submitted to IACUC and not approved, that contained some processes that may have commercial value. Therefore, *Ky. Coalition for Animal Protection* is not controlling herein.

Based on the foregoing analysis, this Court agrees with the Attorney General’s finding that UK’s denial of PETA’s request constituted a violation of the Kentucky Open Records Act and that UK failed to meet its burden of proof with respect to the exemptions it asserted. **IT IS HEREBY ORDERED** that Plaintiff/Appellant’s appeal of Attorney General’s Open Records Decision in 15-ORD-108 is **DENIED** and UK shall honor PETA’s August 1, 2014 request for

"[a]ll active Institutional Animal Care and Use Committee approved protocols for the use of animals in teaching exercises." In compliance with 15-ORD-108, "because no open records related public interest sufficient to overcome the faculty and staff's privacy interest in their contact information, both public and private, is articulated, the University may redact this information before disclosing the protocols, but must otherwise make full disclosure of the protocols."

SO ORDERED this 28th day of February, 2017.


JUDGE, FAYETTE CIRCUIT COURT
FOURTH DIVISION

A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT

BY  DEPUTY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was mailed, first class, postage prepaid, on this 28 day of February, 2017, to the following:

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VINCE RIGGS, CLERK
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BY:  _____ D.C.