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

COMMONWEALTH OF KENTUCKY, *ex rel.* ANDY BESHEAR, ATTORNEY GENERAL — **INTERVENING PLAINTIFF**

VS. — **OPINION and ORDER**

UNIVERSITY OF KENTUCKY — **APPELLANT/INTERVENING DEFENDANT**

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This matter came before the Court on the parties' cross-motions for summary judgment. The Intervening Plaintiff, the Attorney General, seeks a declaratory judgment regarding his authority under KRS 61.880(2)(c) and a permanent injunction to enjoin the Appellant/Intervening Defendant, the University of Kentucky, from refusing to provide the Office of the Attorney General with records it seeks to review in conjunction with requests under the Open Records Act. The University of Kentucky seeks a declaratory judgment that it is constitutionally prohibited from providing records to the Office of the Attorney General that are protected by federal privacy statutes or legal privileges, even for *in camera* review.[1] The issue before the Court is whether the University of Kentucky is required to

[1] "*In camera*" is a Latin phrase meaning "in chambers". It refers to private, confidential consideration of evidence. See Black's Law Dictionary (4th Pocket Ed. 2011), at 370.

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disclose documents which are covered by federal privacy law or legal privilege to the Attorney General for such *in camera* review under the Open Records Act.

The Court having taken the issues under advisement and having considered the motions and responses, the arguments of counsel, and the applicable law, it is hereby **ORDERED** that the Attorney General's motion for summary judgment is **OVERRULED**, and the University of Kentucky's motion for summary judgment is **GRANTED in part** and **OVERRULED in part.**

Facts

Many of the relevant facts are set out at length in the Court's prior Opinion and Order, entered January 23, 2017, and will only be revisited briefly here. The underlying controversy in this case involves allegations of sexual assault made by two female graduate students at the University of Kentucky ("UK") against a professor in the College of Agriculture. UK undertook an investigation and assembled a file containing numerous documents that included a great deal of material disclosing identifying information pertaining to the students and other witnesses. When it appeared that the professor would simply be entitled to resign without any further consequences, the students sought the help of the Kentucky Kernel (the "Kernel"), UK's student newspaper, to expose the professor.

The Kernel tendered a letter to UK seeking much of the contents of UK's investigative file. UK sent the Kernel many records with redactions of personal information but refused to turn over preliminary records and materials which contained personally identifiable student information under the Family Educational

Rights and Privacy Act ("FERPA")[2]. The Kernel requested those withheld documents, and UK again refused, prompting the Kernel to appeal the matter to the Office of the Attorney General.

The Attorney General ("AG") requested the records from UK pursuant to KRS 61.880(2) in order to substantiate the claimed privileges. UK declined, as it had done in prior Open Records cases.[3] The AG rendered a decision in favor of the Kernel in In re: Kentucky Kernel/University of Kentucky, 16-ORD-161 (2016), finding that UK failed to meet its burden of proof in denying the Kernel's request by not providing the AG with the requested documents for an *in camera* review and ordering UK to "make immediate provision for [the Kernel's] inspection and copying of disputed records, with the exception of the names and personal identifiers of the complainant and witnesses..." 16-ORD-161, at *2. UK appealed the AG's decision to this Court, which reversed 16-ORD-161 by Order entered January 23, 2017, and found that the disputed records were protected "education records" under FERPA that did not have to be disclosed to the Kernel.[4]

In the issue now before the Court, the AG has intervened, and the parties filed cross-motions for summary judgment seeking declaratory relief regarding the scope of the AG's role under KRS 61.880(2)(c) for him to review withheld documents *in camera*. The AG contends that it was granted the authority to view otherwise

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2 FERPA is codified at 20 U.S.C. §1232g and 34 C.F.R. Part 99.

3 See, e.g., In re: The Kentucky Kernel/University of Kentucky, 08-ORD-052 (2008); In re: Kentucky Kernel/University of Kentucky, 12-ORD-220 (2012).

4 That ruling was appealed by the Kernel to the Kentucky Court of Appeals on February 27, 2017.

protected or privileged records by the General Assembly as part of its duty to adjudicate Open Records appeals, while UK argues that it is prohibited by FERPA from disclosing such records to the AG, even with the procedural safeguards set up under KRS 61.880(2)(c) and 40 KAR 1:030 §3.

Discussion

The policy behind the Open Records Act is that "free and open examination of public records is in the public interest". KRS 61.871. There are various statutory exceptions to requests made under the Open Records Act, but such exceptions "shall be strictly construed". Id. One relevant exception is found in KRS 61.878(1)(k), which exempts "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation". Therefore, FERPA presents an exception to Kentucky's Open Records Act. With regards to FERPA:

> Congress enacted FERPA to protect the privacy interests of students by prohibiting the release of education records or personally identifiable information contained therein without consent. Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press, 337 Mont. 229, 160 P.3d 482, 487 (2007); see also 20 U.S.C. §1232g; 34 C.F.R. §99.2. In relevant part, FERPA states "[n]o 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 other than directory information...) of students without ... written consent..." 20 U.S.C. §1232g(b)(1). FERPA defines "education records" as "those records, files, documents, and other materials (i) *which contain information directly related to a student*; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4) (emphasis added).

January 23, 2017 Order of Fayette Circuit Court, at 6.

When a public agency declines to turn over records to a public requester, the requesting party may appeal that denial to the AG pursuant to KRS 61.880. Under KRS 61.880(2)(a), the AG must review the request and issue a written decision within twenty (20) business days "stating whether the agency violated" the Open Records Act. KRS 61.880(2)(c) provides the authority for the AG's ability to review disputed records *in camera* in order to determine whether they are protected: "[T]he 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."

I. The disputed records are exempt under KRS 61.878(1)(k), even to disclosure to the AG.

A. FERPA must preempt contradictory state statutes.

The AG argues that KRS 61.880(2)(c) "plainly and unambiguously provide[s] the Attorney General with the discretionary authority to conduct a confidential, *in camera*, review of additional documentation, including the records involved[,] to substantiate an agency's claimed exemptions." (AG Memorandum in Support of Summary Judgment, at 15.) He contends that the unambiguous language of the statute "places the burden of proof on the agency [to show that the requested records are protected], provides the Attorney General with the discretionary authority to request both the records involved and additional documentation, and prohibits the Attorney General from disclosing the records involved." (Id. at 17.) He believes that the legislature "provided no qualifying language that would operate to limit the

Attorney General's authority to review under KRS 61.880(2)(c), or provide a public agency with the right to refuse the Attorney General's request" as the statute "does not subject the review to any superseding laws, no[r] does it reference other statutory conditions." (Id.)

In response, UK argues simply that regardless of the language the General Assembly chose when it drafted KRS 61.880, the Supremacy Clause of the U.S. Constitution requires that federal law, specifically FERPA, supersede conflicting state law, here Kentucky's Open Records Act.

The Court understands and appreciates the AG's role in resolving Open Records disputes. Through the Open Records Act, the General Assembly has shown its intent that public agencies should largely operate as transparently as possible and that any exceptions to this general idea should be limited so as to achieve the Act's stated goals. See KRS 61.871. The General Assembly clearly intended for the AG to serve as a "watchdog" to ensure that the public can remain informed of the actions of public agencies. See KRS 61.880.

However, the AG's request to a public university to review documents which assuredly fall within the scope of a federal privacy law is a different matter. KRS 61.878(1)(k) obviously contemplates situations in which information is sought by a public requester that cannot be disclosed pursuant to federal laws or regulations. While this does not address the issue of the AG's requesting of disputed records, UK points to a 2006 Family Policy Compliance Office ("FPCO") letter to the Texas Attorney General regarding the disclosure of education records by a Texas school

district (the "2006 FPCO Letter"), attached to UK's Memorandum in Support of Summary Judgment as Exhibit A. The 2006 FPCO Letter advised that FERPA does not allow a public educational institution to turn over education records without consent to the Texas AG to allow the AG to determine if the institution complied with the state's Public Information Act, since the AG is not a "state educational authority" or an "authorized representative" of a state educational authority.[5]

The 2006 FPCO Letter's instruction is not entirely dispositive of the issue, as it is ultimately a letter rather than a codified regulation or statute. However, to the extent that the letter accurately reflects the Department of Education's opinion on the issue, it is helpful in determining how this Court should view FERPA as it relates to Kentucky's Open Records Act.

The fundamental issue seems to be one of differing and conflicting policies. The Open Records Act supports disclosure of records kept by a public agency in order to allow the public to ensure that the agency operates as intended. FERPA favors a policy of privacy in which only select groups of individuals can access a student's "education records" without the consent of a student or his or her parent or guardian. Are there sufficient safeguards in place for the AG to operate under the Open Records Act without violating FERPA so that he may also conduct an *in camera* review of the records, or is the privacy interest underlying FERPA so significant that there is no room for the AG to work in the manner he seeks?

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[5] "For these reasons, FERPA does not permit an educational agency or institution in Texas to disclose, without parental consent, education records to the OAG for the purpose of determining whether it has complied with the [Public Information Act] or whether it has redacted more than is necessary under FERPA." 2006 FPCO Letter, at *2.

Ultimately, the Court concludes that federal law must trump state law. As is specific to this case, the requested documents are "education records" such that they are covered by FERPA. The Department of Education, through the FPCO, has indicated its belief that such private records may not even be disclosed to a state AG to effectuate his or her role under the state's Open Records laws. Although the outcome for the requester may be unsatisfactory, records that fall under the federal law exception to the Open Records Act as set forth in KRS 61.878(1)(k) are generally outside the purview of public requests, even by the AG for *in camera* review.

The AG is understandably concerned that such a result makes his task under KRS 61.880(2)(c) more difficult and that agencies may lack the necessary accountability. However, as UK notes, "the non-disclosure prohibitions of FERPA and the risks of waiving privilege do not apply to judicial review in Circuit Court." (UK Response, at 8.) While this undoubtedly provides an outcome which the AG will find to be less than ideal, the Court holds that, at least as it pertains to the AG's requests to an educational institution to disclose education records which are covered by FERPA, federal law must prevail over the authority given to the AG under KRS 61.880(2)(c).[6] See U.S. Const., Art. VI, cl. 2; see also, e.g., PLIVA, Inc. v. Mensing, 564 U.S. 604, 617-18 (2011); Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

B. Previous Open Records Decisions justify UK's position.

[6] The Court makes no ruling with regards to how other exceptions under the Open Records Act should affect the AG's request to review documents *in camera*. The Court's ruling herein is limited to the AG's request under KRS 61.880(2)(c) to review education records *in camera* without consent from the student or the student's parent or guardian.

The Court is unaware of any specific case law, in Kentucky or elsewhere, which addresses whether a public agency may permissibly decline to turn over disputed records to the AG to allow the AG to substantiate whether the records are protected by some law or privilege. However, the Court notes that the AG has previously decided Open Records appeals in UK's favor in instances where UK has refused to turn over certain records based on FERPA.

In 08-ORD-052, the then-Managing Editor of the Kernel submitted a request to UK on February 5, 2008, for "access to or copies of all emails sent through Student Government's executive branch listserv since April 25, 2007." 08-ORD-052, at *1. UK denied the Editor's request, and when the Editor appealed to the AG, UK declined to allow the AG to review the requested documents *in camera*, citing to the 2006 FPCO Letter. Id. at *2. Despite the fact that UK did not provide the AG with the requested records in order to substantiate the claimed protection, the AG nonetheless found that UK "properly denied [the] request in supplemental correspondence when it invoked [FERPA], incorporated into the Open Records Act by KRS 61.878(1)(k)."[7] Id. at *1.

Also, in 12-ORD-220, the Kernel's then-Editor-in-Chief made a request to UK on August 23, 2012, for "any correspondence with UK and UK Athletics about [incoming UK basketball player] Nerlens Noel, including memoranda, paperwork,

[7] The Court notes that the Assistant AG who investigated and issued 08-ORD-052 apparently also telephoned FPCO of the Department of Education to verify whether the documents that UK withheld were indeed considered "education records" by the Department such that UK could not disclose them. The AG stated that "the University's position was confirmed" during talks with a Program Specialist within the FPCO. This would seem to have been a route which would have been available to the AG in reaching his determination in 16-ORD-161 as well.

and any other correspondence in the past two years ... [as well as] any correspondence with the NCAA about Nerlens Noel." 12-ORD-220, at *1. While expressing disapproval with the fact that UK once again withheld the disputed records from the AG for *in camera* review in order to substantiate the claims of FERPA protection, the AG noted that it "defer[red] to the University's characterization of the record identified in [the] request as 'education records' based on 08-ORD-052" and the Supreme Court of Ohio's reasoning in State ex rel. ESPN v. Ohio State University, 970 N.E.2d 939 (Ohio 2012).[8] Id. at *2.

Citing these two examples, UK contends that the AG has inexplicably changed his position and "has never explained why his decision in 2016 is at variance with his prior opinions from 2008 and 2012, which respected FPCO's discretion and decided Open Records disputes based on descriptions of and information about the records provided by the University consistent with the standard established in City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013)". (UK Memorandum in Support of Summary Judgment, at 6.) The AG argues that neither of the two cited Open Records Decisions follows UK's interpretation that FERPA prohibits the AG from reviewing the requested documents *in camera*, but instead "found the University met its burden in proving the records were FERPA-protected 'education records,' based on the language and content of the request, and through a substantive analysis of FERPA as it might apply to the records that would be responsive to such a request." (AG Response, at 16.)

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[8] State ex rel. ESPN v. Ohio State University discussed "education records" in the context of an NCAA investigation of student athletes; the reasoning in that case is not relevant here.

The Court agrees with UK that the AG's ruling in 16-ORD-161 appears at odds with the prior two referenced decisions. While the AG in both decisions strongly held to the notion that "when denied the opportunity to review records, 'the Attorney General's ability to render a reasoned open records decision [is] severely impaired'"[9], he has now seemingly decided not to defer to UK's characterization of the disputed records as protected. The AG argues that UK's "desire that the Open Records Act, and KRS 61.880(2)(c) become a 'trust me' law is palpable"[10]; however, the AG has clearly previously chosen to "trust" UK in earlier decisions. In 12-ORD-220, the AG stated: "Since we were unable to review the relevant documents *in camera*, we rely on the University's interpretation and application of the federal law, and its professed appreciation for the value of transparency, to ensure that public records are not improperly withheld in the name of student privacy." 12-ORD-220, at *3. Additionally, in 08-ORD-052, the AG "deferred to the University in its characterization of the email as an 'education record' based on FPCO's concurrence in this view".[11] 12-ORD-220, at *2. Thus, although the AG noted in both decisions his "prerogative under KRS 61.880(2)(c) [to conduct] an *in camera* inspection of the requested [records] to determine if the agency against which the appeal was brought properly denied access to those records"[12], UK was justified in its expectation that the

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9 12-ORD-220, at *1 (citation omitted).

10 AG Response, at 18.

11 It is noteworthy that the "FPCO's concurrence in this view" was apparently ascertained by a phone call from the Assistant Attorney General in charge of investigating 08-ORD-052 to a Program Specialist within the FPCO regarding what the FPCO considered to be "education records" under FERPA. In theory, this is an avenue that would have been available to the AG in reaching his conclusion in 16-ORD-161 as well, although it is unclear from that decision whether the AG chose to pursue that option.

12 08-ORD-052, at *4.

AG would "trust" it when it denied direct access to the requested documents and instead submitted supplemental material to explain its position.[13]

II. The AG's requested relief is too expansive.

The AG requests that this Court

> declare the University's refusal to comply with KRS 61.880(2)(c) unlawful, enter a declaratory judgment for the Attorney General regarding his authority under KRS 61.880(2)(c), and permanently enjoin the University from violating the Open Records Act by refusing to provide records the Attorney General lawfully requests in open records appeals.

(AG Memorandum, at 30.) However, the Court believes that the relief that the AG requests is too broad at this time.

This Court making a ruling regarding the AG's authority under KRS 61.880(2)(c) would have a limited practical effect, as such a ruling would not be binding upon any court in this or any other county in the Commonwealth. Entering a declaratory judgment here would amount to little more than a persuasive advisory opinion which other courts could choose to disregard for any (or no) reason. The Court thus believes that the more appropriate course of action is to decide such issues on a case-by-case basis, resolving an actual controversy, until the Court of Appeals or Supreme Court issues a ruling on this question. See Barrett v. Reynolds, 817 S.W.2d 439, 441 (Ky. 1991) ("An actual controversy for purposes of the declaratory judgment statute requires a controversy over present rights, duties and liabilities; it does not

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[13] The Court notes that UK did in fact produce many documents to the Kernel and "went to great lengths with affidavit testimony and other information to explain the nature of the investigative file at issue, the legal exemptions that precluded disclosure, and in turn, how those exemptions applied." UK Response, at 13.

involve a question which is merely hypothetical or an answer which is no more than an advisory opinion."); Dravo v. Liberty National Bank & Trust Co., 267 S.W.2d 95, 97 (Ky. 1954) ("[A] declaratory judgment should not or cannot be made as to questions which may never arise or which are merely advisory, ore are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy.").

Further, a permanent injunction against UK is also inappropriate given the Court's ruling that UK may refuse to provide records to the AG when such records are protected by federal law. See La Vielle v. Seay, 412 S.W.2d 587, 591 (Ky. 1966) ("[A] permanent injunction should be granted by means of summary judgment only in those cases where the showing is very clear and convincing" of an existing equitable right.); Geveden v. Commonwealth, ex rel. Ernie Fletcher, 142 S.W.3d 170, 171-72 (Ky. App. 2004) ("[A]n injunction is an extraordinary remedy not to be granted unless the movant establishes both that without it he is likely to suffer the immediate and irreparable abrogation of a concrete personal right and that grant of the injunction will not unduly prejudice either the public or the non-movant.").

Additionally, the Court herein makes no decision as to the AG's authority to review records which are claimed by a public agency to be protected by a privilege, such as the attorney-client privilege. As an aside, it seems much more reasonable to permit the AG under KRS 61.880(2)(c) to inspect such documents to allow for substantiation of the claimed privilege; however, UK did note the possible concerning situation in which the AG is permitted to review allegedly privileged documents in an action to which the AG is a party. Ultimately, though, the Court need not reach a

decision on this issue, as the fact that the disputed records are governed by FERPA is controlling in this case. Further, as stated above, a ruling by this Court that the AG may always view supposedly privileged records for purposes of substantiation would not bind other courts in this Commonwealth and, in the Court's view, is inappropriate in the absence of precedent from the Court of Appeals or the Supreme Court.

Finally, the Court is similarly unable to grant the entirety of the relief that UK requests. This Court issuing a declaratory judgment that UK is constitutionally prohibited from providing any records to the Office of the Attorney General for *in camera* review that are protected by federal privacy laws or legal privileges would be equally inappropriate given the prospective and theoretical nature of such a conclusion. See Barrett and Dravo, supra. In addition, such relief would likely be far too expansive and is more appropriately decided on a case-by-case basis. As it pertains to the facts of this case only, UK's motion for summary declaratory judgment is granted.

Conclusion

For the aforementioned reasons, the Court finds that as it pertains to the AG's requests to UK in this case to disclose education records which are covered by FERPA, federal law must prevail over the authority given to the AG under KRS 61.880(2)(c). Therefore, the Attorney General's Motion for Summary Declaratory Judgment must be **OVERRULED**, and the University of Kentucky's Motion for Summary Declaratory Judgment is **GRANTED in part** and **OVERRULED in part.**

There being no just cause for delay, this is a final and appealable Order.

Entered this 9th day of August, 2017.

HON. THOMAS L. TRAVIS
Fayette Circuit Court, 8th Division

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing has been mailed on AUG 10 2017 to the following:

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