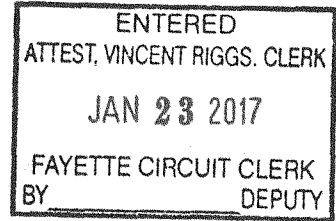


COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
EIGHTH DIVISION
CIVIL BRANCH
NO. 16-CI-3229



UNIVERSITY OF KENTUCKY

PLAINTIFF/ APPELLANT

v.

OPINION and ORDER

THE KERNEL PRESS, INC., d/b/a
THE KENTUCKY KERNEL

DEFENDANT/ APPELLEE

This matter has come before the Court upon the Appellant University of Kentucky's appeal made pursuant to the Attorney General's decision In re Lexington Kernel/University of Kentucky, 16-ORD-161 (2016). The Court having taken it under advisement and having duly considered the motions and responses, the arguments of counsel, and the applicable law, it is hereby **ORDERED** that the Office of the Attorney General's Order is **REVERSED**.

FACTS

In the summer of 2015, the University of Kentucky (hereinafter "UK") received complaints from two female graduate students concerning allegations of sexual assault committed by Dr. James Harwood (hereinafter "Harwood"), a tenured professor in their department of study, the College of Agriculture. At the time of the investigation, these allegations occurred in a department that had less than twenty graduate students, only

about half of whom were female. These instances of alleged misconduct both occurred at off-campus conferences related to the complaining witnesses' field of study. As required by Title IX of the United States Education Amendments of 1972, the University's Office of Institutional Equity and Equal Opportunity (hereinafter "Institutional Equity") launched an investigation of the allegations. Institutional Equity informed the two complaining witnesses that UK would endeavor to maintain the confidentiality of the investigation and accompanying records.

In the course of its investigation, UK assembled a file containing: the investigative report; letters from UK to the specific parties concerning the allegations and final outcome of the investigation; letters concerning status of and developments to the case; emails from Institutional Equity to complaining witnesses and other witnesses; Institutional Equity's interview notes; documents supplied by students and witnesses, including the complaining witnesses; and documents supplied by Harwood. This file is interwoven with student-specific information, including explicit details of the alleged misconduct, witness names and initials, phone numbers, email addresses, home addresses, travel plans, research projects, photographs, text messages, medical information about a party's family member, information about the parties' personal lives, and details about relationships and interactions among people in the department.

After UK presented its findings to Harwood, he chose to leave UK prior to a final adjudication on the matter. Harwood signed a resignation agreement providing that he would receive pay and benefits through August 31, 2016. After finding that Harwood could deny the allegations and seek academic employment elsewhere, the complaining

witnesses initially wanted to remedy a perceived flaw in the Title IX reporting and investigation process by drawing attention to the matter.

The complaining witnesses reached out to UK's student-run newspaper, the Kentucky Kernel (hereinafter "Kernel"), aiming to expose Harwood. On March 21, 2016, pursuant to the Kentucky Open Records Act (hereinafter "Open Records Act"), the Kernel sent a letter to UK 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, UK sent the Kernel records from its Human Resources Department and personnel records from the College of Agriculture, subject to redactions or omissions of personal information, such as home addresses and phone numbers. UK also furnished Harwood's separation agreement and resignation letter. UK declined to turn over records considered preliminary in nature (such as handwritten notes) and records containing personally identifiable student information under the Family Educational Rights and Privacy Act (hereinafter "FERPA"). On April 7, 2016, the Kernel once again requested copies of all records detailing UK's investigation of Harwood. UK refused, reasoning that the Kernel's requests were "preliminary records and contained information that would constitute an invasion of students' personal privacy."

The Kernel subsequently appealed the matter to the Office of the Attorney General pursuant to KRS 81.880(2). UK responded, repeating its objections to producing the

requested documents. The Attorney General thereafter asked UK to substantiate its denial by furnishing written responses to written inquiries as to the exceptions and privileges cited by UK. Additionally, the Attorney General asked UK to produce copies of the documents to which the Kernel was denied access, so that an *in camera* review might take place. UK declined to provide the documents and ultimately, on August 1, 2016, the Attorney General rendered a decision in favor of the Kernel. The Attorney General held that UK failed to meet its burden of proof in denying the Kernel's request by not providing records for an *in camera* review. The Attorney General ordered that UK "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...."

UK appealed the Attorney General's decision, arguing that the documents to which they have denied the Kernel access are considered an exemption to the Open Records Act and thus are exempt from disclosure. On November 17, 2016, the two complaining witnesses filed an *amicus* brief. The complaining witnesses' position in the matter now aligns with UK's position. The complaining witnesses contend that what began as a "well-intended journalistic search for information" has devolved into a public dispute that ignores the interests of the victims. They argue the Kernel has now published more than twenty articles about the story, despite the complaining witnesses' requests to stop, thereby forcing them to relive the trauma they have suffered. The confidentiality offered to the complaining witnesses during Institutional Equity's investigation was integral to the decision to come forward and report in the first place. The complaining

witnesses feel that relinquishing the documents to the Kernel, even with redactions, would allow the public to quickly deduce their identities.

DISCUSSION

I. Standard of Review

When the Attorney General renders a decision with respect to an Open Records Act request, a movant has thirty (30) days to bring an action in Circuit Court pursuant to KRS 61.882(3). Once an action has commenced, the proceeding is treated as an original action and the Circuit Court is not bound by the Attorney General's decision, "nor is it limited to the 'record' offered to the Attorney General." See City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842, 849 (Ky. 2013). Thus, the Circuit Court will "determine the matter de novo." KRS 61.882(3).

II. The Documents Are Educational Records Under FERPA

The policy analysis behind the Open Records Act is that "free and open examination of public records is in the public interest." KRS 61.871. Accordingly, one can request the disclosure of public records from an official custodian of a public agency. The right to examine public records under the Open Records Act is not absolute and KRS 61.878 provides exemptions from inspection. Two such exemptions are relevant to the case at hand. First, "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are exempted from the application of the Open Records Act. KRS 61.878(1)(a). Second, "[a]ll public records or information the disclosure of

which is prohibited by federal law or regulation” are exempted from the application of the Open Records Act. KRS 61.878(1)(k). Thus, FERPA, a federal law, is incorporated into the Open Records Act’s list of exemptions. Therefore, documents constituting “education records” under FERPA’s definition are exempt from requirements of the Open Records Act.

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. Bd. of Tr., Cut Bank Pub. Sch. 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).

The Kernel contends the documents at issue are not “educational records” pursuant to FERPA because they do not “directly relate to a student.” The Kernel argues the documents at issue are “employment records” and are, therefore, exempt from FERPA requirements; a UK employee committed the alleged assault, not another student. In supporting its position, the Kernel relies on the holdings from Ellis v.

Cleveland Municipal School District and Wallace v. Cranbrook Educational

Community, 309 F.Supp.2d 1019 (N.D. Ohio 2004); No. 05-73446, 2006 WL 2796135 (E.D. Mich. Sept. 27, 2006). Both cases maintain the same rationale by classifying documents as either “directly relating to a student” or directly relating to a teacher (whereby a student is only “peripherally or tangentially related”). Rhea v. Dist. Bd. of Trustees of Santa Fe Coll., 109 So. 3d 851, 858 (Fla. Dist. Ct. App. 2013). The cases hold that documents directly relating to a teacher are not “education records,” and thus, are not covered under FERPA.

FERPA exempts employment records from its prohibitions against disclosure, but it will only do so if “records [are] 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(a)(4) (emphasis added). This Court is persuaded by the reasoning of Rhea, which holds that a plain reading of FERPA defines “directly related” broadly. Rhea, 109 So. 3d at 851. “Directly related” is not a “primarily related” test. Id. at 857-58. A record can both relate directly to a student and a teacher.

The investigative documents at issue not only relate to a former UK professor, but also to the complaining witnesses, who were UK students during the time of the alleged events. These documents describe complaining witness perceptions of the alleged events and the investigation that took place consequently. “The student’s knowledge of, and connection to, the information conveyed in the [record] is not merely peripheral or tangential.” Rhea, 109 So. 3d at 858. This is particularly true because the

complaining witnesses claimed to have experienced the conduct described in the records. The complaining witnesses' connections directly relate to the investigative documents at issue. Further, the records contain information about classes, area of study, and matters specifically relating to the complaining witnesses' educational process. Accordingly, this Court holds that the documents at issue are "educational records" pursuant to FERPA.

III. The Records Cannot Be Reasonably Redacted To Support The Privacy Rights Of The Complaining Witnesses

The U.S. Constitution prevents the government from disclosing the intimate details of a sexual assault survivor when "no penological purpose is being served." Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998). Congress has enacted federal regulations to safeguard one's constitutional right to privacy. Relevant to the case at hand, Congress enacted FERPA to prohibit universities from violating a student's right to privacy by controlling the use and disclosure of education records. FERPA prohibits an agency from releasing "education records (*or personally identifiable information contained therein other than directory information...*) of students without... written consent...." 20 U.S.C. § 1232g(b)(1) (emphasis added). Personally identifiable information includes students' names, addresses, initials, personal identifiers, as well as "[o]ther 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.” 34 C.F.R. § 99.3.

The Kernel relies on Kleinert v. Bureau of Land Management, to support its position that KRS 61.878(1)(a) grants an unlimited privacy interest. 132 F. Supp. 3d 79 (D.D.C. 2015). Thus, the complaining witnesses’ privacy interests must be balanced against the public’s interest in accountability of governmental entities. The Kernel further argues that the complaining witnesses’ privacy interests will remain constitutionally protected if UK turns over the documents in redacted form. While this Court does not argue there are instances in which redactions can both protect one’s fundamental privacy interests and allow for the examination of records in the public interest, this is not one of those instances.

This Court is persuaded by Nw. Mem’l Hosp. v. Ashcroft, which quashed a subpoena due to privacy concerns based on the Health Insurance Portability and Accountability Act. 362 F.3d 923 (7th Cir. 2004). In part, it found that “‘skillful Googlers’, sifting the information contained in the medical records concerning each patient’s medical sex and history, will put two and two together, [and] ‘out’ the 45 women, and thereby expose them to threats, humiliation, and obloquy.” Id. The circumstances between this case and the one at hand are similar. After conducting an *in camera* review, this Court finds that, given the nature of the documents in the record, coupled with the nature of the facts underlying this request, disclosure would not offer adequate protection, even in redacted form.

The record at issue is thoroughly interwoven with explicit details of the alleged sexual assault and other facts submitted by parties and witnesses. Although the record also contains information such as names, addresses, and phone numbers, which could reasonably be redacted, the record is so extensively laced with details of the alleged assault that redaction alone would not protect these complaining witnesses. Further, size of the graduate program from which these allegations stem is small; the pool of female graduate students in this program is even smaller. When also factoring in that both allegations originated at specific dates and at specific off-campus conferences, the possible identity of a complaining witness becomes even easier to pinpoint. For instance, it would be simple for one to deduce the identities of the complaining witnesses by requesting financial records from the off-campus conferences. Analyzing the totality of the specific facts at hand, if the records are turned over, even in (redacted form), the identities of the complaining witnesses will be known with reasonable certainty.

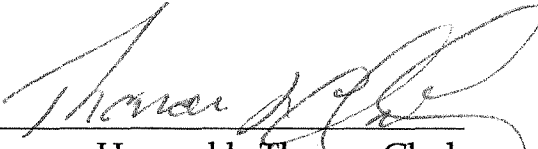
The Court, under seal, will include the investigative records reviewed *in camera* by the Court to assist in any appellate review of this matter.

CONCLUSION

For the foregoing reasons, it is clear that the Attorney General's decision must be reversed. First, this Court finds that the investigative documents at issue are "educational records" under FERPA. Second, subsequent to an *in camera* review of the records in question, this Court holds that the records cannot reasonably be redacted to support the

privacy rights of the complaining witnesses. Thus, it is hereby **ORDERED** that the Attorney General's decision in In re Lexington Kernel/University of Kentucky, 16-ORD-161 (2016) is **REVERSED**.

Entered this 20th day of January 2017.


Honorable Thomas Clark
Fayette Circuit Court, 8th Division

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

BY  DEPUTY

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing has been mailed on

JAN 23 2017

_____ to the following:

Thomas W. Miller
Elizabeth C. Woodford
Miller, Griffin & Marks P.S.C.
271 West Short Street, Ste. 600
Lexington, KY 40507


Stephen L. Barker
Joshua M. Salsburey
Bryan H. Beauman
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Ste. 1500
Lexington, KY 40507

William E. Thro
General Counsel
University of Kentucky
Office of Legal Counsel
301 Main Building
Lexington, KY, 40506

LaTasha Buckner
Samual Flynn
S. Travis Mayo
Commonwealth of Kentucky
Office of the Attorney General
700 Capital Avenue, Ste. 118
Frankfort, KY, 40601

Dana R. Howard
Stoll Keenon Ogden PLLC
300 West Vine Street, Ste. 2100
Lexington, KY, 40507

Daniel A. Cohen
Madeleine Kvalheim
Baker Donelson
Monarch Plaza, Ste. 1600
3414 Peachtree Road N.E.
Atlanta, GA, 30326



~~BA~~ ~~DC~~
Clerk of Fayette Circuit Court