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**21-ORD-179**

September 23, 2021

In re: Austin Horn/Kentucky State University Foundation

**Summary:** The Kentucky State University Foundation (the “Foundation”) is a public agency and it violated the Open Records Act (“the Act”) when it denied a request to inspect records.

***Open Records Decision***

Austin Horn (“Appellant”) asked the Foundation to provide copies of records related to payments made to a specific individual for a two-year period, as well as “payments made for the purposes of parties celebrating [the specific individual’s] birthday[.]” The Appellant also sought to inspect “any records or documentation reflecting payments of more than \$1,500 made to any entity or individual[.]” In a timely response, the Foundation denied the Appellant’s request because it claims it “is not a public agency as defined by KRS 61.870(1) and is not subject to the [Act].” This appeal followed.

A public agency is defined in KRS 61.870(1)(j) as “[a]ny board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency . . . established, created, and controlled by a public agency as defined” under KRS 61.870(1). Likewise, “[a]ny entity where the majority of its governing body is appointed by a public agency” under KRS 61.870(1) is a “public agency.” KRS 61.870(1)(i). The Kentucky Supreme Court has specifically held that the Foundation is a public agency subject to the Act under a previous version of KRS 61.870(1). *See Frankfort Publ’g. Co. v. Kentucky State Univ. Found., Inc.*, 834 S.W.2d 681, 682 (Ky. 1992). This Office has also

previously found that the Foundation is a public agency. *See, generally* OAG 89-92; OAG 92-62.

To overcome this unfavorable precedent, the Foundation claims that it has changed its structure such that its Board of Directors is no longer selected by Kentucky State University (“the University”). Noticeably, however, the Foundation does not explain how its Board of Directors is now selected. From the evidence in this record, the Foundation appears to be the same entity it was in 1989, prior to the Court’s holding in *Kentucky State Univ. Found., Inc.* that the Foundation is a public agency subject to the Act. 834 S.W.2d at 682. The Foundation’s claim that it is a different entity than the one before the Court in 1992 is not supported by the record before this Office.

The Foundation next argues that the Supreme Court’s holding in *Kentucky State Univ. Found., Inc.* should no longer apply because the definition of “public agency” under KRS 61.870(1) has been since amended. However, in a 2003 unpublished decision, the Kentucky Court of Appeals rejected a similar argument raised by the University of Louisville’s Foundation that sought to distinguish itself from Kentucky State University’s Foundation. *Univ. of Louisville Found., Inc. v. Cape Publ’n, Inc.*, Case No. 2002-CA-001590, 2003 WL 22748265 (Ky. App. Nov. 21, 2003). The Court of Appeals held “this modification of KRS 61.870 would have no effect on the holding in” *Kentucky State Univ. Found., Inc. Id.* at \*7. This Office agrees that amendments to KRS 61.870(1) did not, on their own, convert the Foundation from a public agency into a private entity not subject to the Act. Nothing in this record warrants deviation from the unmistakable holding by the Kentucky Supreme Court that the Foundation is a public agency subject to the Act.<sup>1</sup>

Because it is a public agency subject to the Act, the Foundation was required to provide responsive records or explain how an exemption applied to

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<sup>1</sup> Specifically, KRS 61.870(1)(i) defines public agency to include “any entity where the majority of its governing body is appointed by a public agency.” The Foundation provides no evidence that clarifies how its Board of Directors is selected. And although the Foundation claims on appeal that none of its Board of Directors are themselves members of the University’s Board of Trustees, the Foundation never explains how its Board of Directors is actually selected. *Cf. Univ. Med. Cent., Inc., v. American Civil Liberties Union of Kentucky, Inc.*, 467 S.W.3d 790, 800 (Ky. App. 2014) (finding that a majority of the University’s Medical Foundation were appointed by a nominating committee that is itself selected by the University, which made the Medical Foundation a “public agency” under KRS 61.870(1)(i)).

deny the Appellant's request. KRS 61.880(1). But in response to the Appellant's request for records related to "payments of more than \$1,500 made to any entity or individual," the Foundation denied the request as being "vague, overly broad, unduly burdensome, and an unwarranted invasion of personal privacy[.]"

Under KRS 61.872(3)(b), a requester who seeks copies of public records to be delivered by mail must "precisely describe" the records which he or she wishes to receive. A requester seeking copies of public records by mail must frame his or her request with enough specificity that a public agency can determine which records are being sought and where such records are located. *See, e.g.*, 13-ORD-077; OAG 89-8. However, under KRS 61.880(1)(c), "[t]he burden of proof in sustaining the action shall rest with the agency." Under KRS 61.872(6), "if the application places an unreasonable burden in producing public records . . . the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence." In 21-ORD-126, an affidavit describing in detail how a request lacked precision, and the burden such a request posed, supported an agency's denial of a request that was imprecise and unreasonably burdensome.

Here, the Foundation's response is deficient in comparison. It may be true that the Appellant's request for any payment in the amount of \$1,500 to any person, with no limitation in temporal scope, does not precisely describe the records sought. To carry its burden, however, the Foundation just conclusory states the request is unreasonably burdensome without any analysis. Therefore, the Foundation's "limited and perfunctory response" violated the Act.<sup>2</sup> *See Edmondson v. Alig*, 926 S.W.3d 856, 858 (Ky. App. 1996).

Finally, the Foundation directed the Appellant to submit his request for payments made to a specific individual, and payments made for that person's birthday party, to the University. The Foundation claimed that historically, University "Presidents, faculty and staff have requested funding but such requests that were acted upon were subject to approvals and documentation by [the University]. All source documents relating to [University] expenditures are located at [the University]. Any expenditures for such activities, as travel

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<sup>2</sup> For the same reason, the Foundation's claim that the request implicated the personal privacy of unknown individuals was deficient. The Foundation neither cited KRS 61.878(1)(a), the basis of its claimed exemption, nor did it explain how any individual's personal privacy right would be implicated by providing the requested records.

and birthday parties, can be likewise addressed directly to” the University. But by addressing his request to the Foundation, the Appellant clearly sought any such payments made by the *Foundation* to the individual, not payments made by the *University* to the individual. If there are no responsive records in the Foundation’s possession, it should have affirmatively stated so. *See Bowling v. Lexington Urban County Gov’t*, 172 S.W.3d 333, 341 (Ky. 2005); *see also* 21-ORD-113; 21-ORD-004. The Foundation’s failure to do so violated the Act.

To summarize, in the absence of any evidence that explains how the Foundation’s Board of Directors are now selected, the Foundation is still a public agency under KRS 61.870(1)(i).<sup>3</sup> As a public agency, the Foundation had the burden of proving that exceptions to the Act applied that would allow it to deny the Appellant’s request. It failed to carry that burden on each of its claimed exemptions, and it therefore violated the Act.

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 proceedings.

**Daniel Cameron**  
**Attorney General**

/s/Matthew Ray  
Matthew Ray  
Assistant Attorney General

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Distributed to:

Austin Horn  
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<sup>3</sup> Whether the Foundation is a public agency under KRS 61.870(1)(j) would turn on whether its incorporator, Charles Whitehead, was a private individual when he formed the Foundation in 1989—another question of fact that has been unaddressed by the Foundation. *See Univ. Med. Cent., Inc.*, 467 S.W.3d at 799 (finding that the Medical Foundation was not a public agency under KRS 61.870(1)(j) because it had been “created” by private corporations, but the Foundation was nevertheless a public agency under KRS 61.870(1)(i) because its members were *de facto* selected by the University).