COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DANIEL CAMERON
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

22-ORD-260

December 7, 2022

In re: *College Heights Herald*/Western Kentucky University

Summary: Western Kentucky University ("the University") violated the Open Records Act ("the Act") when it failed to cite an exception to the Act and explain how it applied to the record withheld. The University also did not meet its burden to support redacting information from a contract under KRS 61.878(1)(c)1. Such information is only exempt when it is confidentially disclosed to an agency and generally recognized as confidential or proprietary, and its disclosure would permit an unfair commercial advantage to competitors.

Open Records Decision

On October 26, 2022, the *College Heights Herald* ("Appellant") requested "access to all contracts . . . signed by [the University] with Celebrity Talent International, Wasserman Music and any and all agencies representing Shaquille O'Neal, also known as 'DJ Diesel.'" In response, the University provided a redacted version of the contract but gave no reason for the redactions. When the Appellant asked the University to provide a legal basis for redacting one portion of the contract, the "Hospitality Rider," in its entirety, the University replied that the "information is considered proprietary and is redacted pursuant to KRS 61.878(1)(c)." This appeal followed.

Under KRS 61.880(1), "[a]n agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." Here, the University's initial response failed to note that it had redacted the record or cite any exception authorizing its redactions. Thus, the University violated KRS 61.880(1). Further, the agency's explanation must "provide particular and detailed information," not merely a "limited and perfunctory

response." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. 1996). "The agency's explanation must be detailed enough to permit [a reviewing] court to assess its claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 81 (Ky. 2013). Because the University merely stated that the information was "considered proprietary" without explanation, the University violated the Act.

On appeal, the University maintains its reliance on KRS 61.878(1)(c)1 to support its redactions. KRS 61.878(1)(c)1 exempts from disclosure "[r]ecords confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records." The burden of proof rests with the public agency to sustain its denial of a request to inspect public records. KRS 61.880(2)(c). When a public agency invokes KRS 61.878(1)(c)1 on behalf of a private entity, this Office will permit "argument and input from the non-party to the appeal" to assist the public agency in meeting its burden. *See, e.g.,* 09-ORD-010.

Here, the University states that "the information contained in the Hospitality Rider relates to artist preference for specific products, transportation and accommodation which contain actual or anticipated business relationships, and upon information and belief is generally recognized in the entertainment industry as confidential." This "information and belief" is based on representations to the University by Wasserman Music/Mine o' Mine Holdings. The University states it has requested that entity to provide information in support of the "confidential" nature of the Hospitality Rider, but has received no response.

To sustain its denial under KRS 61.878(1)(c)1, the University must first prove the Hospitality Rider was "confidentially disclosed to" it. Section 9 of the contract, "Equipment and Hospitality," does not mention confidentiality, nor has the University indicated any other part of the contract referring to the hospitality provisions expressly refers to those sections as "confidential." The University merely states the private entity requested it to redact the Hospitality Rider *after* receiving notification of the Appellant's request. This, without more, is insufficient to show that the information was "confidentially disclosed" to the University.

Even if the University had demonstrated these provisions were confidentially disclosed to it, the University must also establish that the terms of the Hospitality Rider are "generally recognized as confidential or proprietary." KRS 61.878(1)(c)1. In *Hoy v. Kentucky Industrial Revitalization Authority,* 907 S.W.2d 766, 768 (Ky. 1995), the Supreme Court of Kentucky considered the applicability of KRS 61.878(1)(c)2[1] to

[1] KRS 61.878(1)(c)2 contains the identical language, "generally recognized as confidential or proprietary," that appears in KRS 61.878(1)(c)1.

required disclosures of "a financial history of [a] corporation, projected cost of the project, the specific amount and timing of capital investment, copies of financial statements and a detailed description of the company's productivity, efficiency and financial stability." The Court concluded, "[i]t does not take a degree in finance to recognize that such information concerning the inner workings of a corporation is 'generally recognized as confidential or proprietary.'" *Id.* Therefore, the Court found that those categories of information satisfied the second element of the exception.

This Office has generally recognized as confidential or proprietary "private financial affairs" (01-ORD-143); "trade secrets, investment strategies, economic status, or business structures" (17-ORD-198; 16-ORD-273; 07-ORD-166); "the method for determining [a] contract price" and "business risks assumed" (17-ORD-002); "costing and pricing strategy" (92-ORD-1134; OAG 89-44); and "corporate assets of a non-financial nature that have required the expenditure of time and money to develop and *concern the inner workings of the private entity"* (10-ORD-001 (emphasis added)). The common factor in these categories of information is "the insight they provide into the *internal* operations of the entity making the disclosure to the public agency." 20-ORD-019 (emphasis added).

Here, the University merely alleges "upon information and belief" that the Hospitality Rider is generally recognized as confidential. It bases that "information and belief" on a representation by the private entity without any explanation or evidence. Furthermore, the types of information in the Hospitality Rider are not similar to those previously affirmed as confidential or proprietary under KRS 61.878(1)(c)1, as they do not tend to disclose the inner workings or financial status of any private entity. Therefore, the University has not met its burden of showing the redacted information is generally recognized as confidential or proprietary.

Finally, to support its denial under KRS 61.878(1)(c)1, the University must show that the Hospitality Rider, if disclosed, "would permit an unfair commercial advantage to competitors of the entity that disclosed" it. But the University has not even alleged this to be the case. A "bare statement that [a private entity has] asked the [agency] to treat . . . records as confidential" is insufficient to sustain a denial under KRS 61.878(1)(c)1. *See* 09-ORD-050. Accordingly, the University has failed to meet its burden of proof that the Hospitality Rider is exempt from disclosure. Thus, the University violated the Act when it redacted the Hospitality Rider from the contract.

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 within 30 days from the date of this decision. 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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
Attorney General

s/ James M. Herrick
James M. Herrick
Assistant Attorney General

#418

Distribution:

Mr. Charles Jacob Moore
Andrea Anderson, Esq.
Lindsey A. Carter, Esq.