

COMMONWEALTH OF KENTUCKY  
WARREN CIRCUIT COURT  
DIVISION I  
CASE NO. 17-CI-00233

WESTERN KENTUCKY UNIVERSITY

PLAINTIFF/APPELLANT

v.

COLLEGE HEIGHTS HERALD

AND

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

DEFENDANTS/APPELLEES

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**NOTICE**

Please take notice that the undersigned will make the following motion before the Warren Circuit Court, Division I on Monday, April 3, 2017 at 9:00 AM, CST.

**MOTION TO INTERVENE OF COMMONWEALTH OF KENTUCKY,  
*ex rel.* ANDY BESHEAR, ATTORNEY GENERAL**

Comes the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, by and through counsel, and moves this Court for leave to intervene as an Intervening Plaintiff in the above-styled action as a matter of right pursuant to CR 24.01 and KRS 418.075 and/or by permission pursuant to CR 24.02. The Attorney General provides the following Memorandum in Support of his Motion to Intervene.

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

This Court should grant leave to the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General to intervene in this action. Under CR 24.01, the Attorney General may intervene as a matter of right. Further, the Attorney General may intervene in this action by permission under CR 24.02.

As the duly-elected Attorney General of the Commonwealth of Kentucky, Attorney General Andy Beshear is a constitutional officer and is the chief law officer of the Commonwealth and all of its departments, commissions, agencies, and political subdivisions. *See* KY. CONST. §§ 91, 92, 93; KRS 15.020. The Attorney General is duly authorized to enforce Kentucky law, by bringing actions for injunctive relief and other relief, under the Kentucky Constitution, Kentucky statute, and the common law, including his *parens patriae* authority. In accordance with this authority, the Attorney General may bring an action for declaratory and injunctive relief against Kentucky state agencies such as Western Kentucky University. *See* KY. CONST. § 91; KRS 15.020.

On behalf of the Commonwealth, the Attorney General seeks to exercise his authority and intervene in this action to protect the Commonwealth from the unlawful acts of Western Kentucky University in failing to provide documentation, including the records involved, that the Attorney General lawfully requested pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3). The Attorney General requested the records in an attempt to substantiate Western Kentucky University's denial of the open records request of The Kernel Press, Inc., d/b/a *The Kentucky Kernel*, and the *College Heights Herald*, through a confidential review of the records the University claimed were exempt from public disclosure. The University's refusal to provide the Attorney General with the records he requested for confidential review severely impaired the Attorney General's ability to issue a reasoned open records decision in the matter. The Attorney General must protect the Commonwealth from the harm that the University's unlawful actions will cause.

## **FACTUAL BACKGROUND**

On October 18, 2016, Matthew Smith, a reporter with Defendant/Appellee, *The Kentucky Kernel*, submitted an open records request to the University for “all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years.” (See *The Kernel* Open Records Request, Oct. 18, 2016, attached as Exhibit A to Intervening Complaint.) The University denied the request on October 28, 2016. (See University Response to Open Records Request, Oct. 28, 2016, attached as Exhibit B to Intervening Complaint.) The University based its denial on grounds that the records were “preliminary” and therefore exempt from disclosure under KRS 61.878(1)(i) and (j) to the Open Records Act. (*Id.*)

On November 1, 2016, Nicole Ares, a reporter with the *College Heights Herald*, made a virtually identical open records request to the University for access “to all investigative records for all Title IX investigations into sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation and/or stalking against Western Kentucky University employees in the last five years.” (See *College Heights Herald*’s Open Records Request, Nov. 1, 2016, attached as Exhibit C.) The University denied the *College Heights Herald*’s request on November 2, 2016, using the identical exceptions and explanation she used in responding to *The Kernel*’s request. (See University Denial Letter to *College Heights Herald*, Nov. 1, 2016, attached as Exhibit D.)

On November 1, 2016, *The Kernel* filed an open records appeal with the Attorney General. The University responded to the *The Kernel*’s appeal by letter dated November 21, 2016. (See University Response to *The Kernel* Appeal, Nov. 21, 2016, attached as Exhibit E.) The *College Heights Herald* filed an open records appeal with the Attorney General on

November 21, 2016. On November 30, 2016, the University responded to the *Herald's* appeal. (See University Response to the *Herald* Appeal, Nov. 30, 2016, attached as Exhibit F.) Reciting KRS 61.878(1)(i) and (j), in its response, the University stated, in part:

The information contained in the requested sexual misconduct investigative files is the exact information exempted from disclosure under the Open Records Act. *City of Louisville v. Courier-Journal and Louisville Times*, 637 S.W.2d 658 (1982). The purpose of the exemption is to “protect the integrity of the agency’s decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency.” ... Consistent with this long-standing rationale, preliminary drafts, notes, correspondence and memorandum do not lose their exempt status simply because the investigation is complete. There must be overt action in adopting these preliminary documents as the basis for final agency action in order for the purpose of KRS 61.878(1)(i) and (j) to no longer be served.

The investigative materials requested ... did not result in adoption of these preliminary documents as the basis for final action at WKU.

In addition to the exemptions found in KRS 61.878(1)(i) and (j), WKU maintains that production of the requested records violate the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1)(a) and (k). Specifically, in complying with Title IX of the Education Amendments of 1972, WKU is required to respond to complaints of sex and/or gender based discrimination and to do so with the utmost discretion and confidentiality that can be afforded the investigative process. Disclosure of investigative materials would significantly stifle complainants from reporting sex and/or gender based discrimination and witness cooperation in the investigative process. On addition, FERPA and its implementing regulations protects student records contained within many of the files requested ... from disclosure.

Finally, disclosure of the requested records would constitute a clearly unwarranted invasion of personal privacy for all involved parties, an exemption within the Open Records Act at KRS 61.878(1)(a).

Moreover, merely redacting the names of the complainant does not shield the complainant and supporting witnesses from disclosure

(Exhibits E, F.)

Unable to resolve the issues on appeal based on the University’s original denial letters and Responses, by letter dated November 29, 2016 the Attorney General asked for copies of the

requested records, as well as additional information, pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3), in an attempt to substantiate the University's basis for denying *The Kernel's* request.

As KRS 61.880(2)(c) provides:

On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. *The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation.* (Emphasis added).

In addition, 40 KAR 1:030(3) states:

Section 3. Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which the complaint is made. *If the documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.* (Emphasis added).

In an abundance of caution, and with profound respect for personal privacy interests, the Attorney General further agreed to accept the responsive records with the names and personal identifiers of the student complainant(s) and student witness(es) redacted. (See Attorney General's KRS 61.880(2)(c) Requesting Additional Information and Records, Nov. 29, 2016, see attached as Exhibit G.) On December 21, 2016, the University responded to the Attorney General's request for additional documentation and copies of the records involved, but did not provide any of the requested, responsive records. (See University Response to Request for Additional Documentation, Dec. 21, 2016, attached as Exhibit H.) Specifically, the University stated that "federal law prohibits production of the request records for an *in camera* inspection ... . In addition to FERPA, WKU asserts that Title IX prohibits disclosure of all investigative files." (*Id.*)

On January 26, 2017, the Attorney General issued the Open Records Decision, *In re: Matthew Smith and Nicole Ares/Western Kentucky University*, 17-ORD-014 (attached as Exhibit I.) In his decision, the Attorney General noted that through KRS 61.880(2)(c) the Kentucky General Assembly assigned the burden of proof in an open records appeal to the agency resisting disclosure, and also provided the Attorney General the authority to request additional documentation, including the records at issue, from the agency for substantiation. 17-ORD-014. The Attorney General also stated that the decision of whether or not to request additional documentation, or a copy of the records involved, from the agency is discretionary and based on the facts specific to each appeal. *Id.* The Attorney General found that the University failed to meet its burden of proof in denying *The Kernel's* and the *College Heights Herald's* open records requests. *Id.*

On February 24, 2017, the University filed its Complaint and Notice of Appeal in the above-styled action.

### **ARGUMENT**

Through intervention in this action, the Attorney General seeks to uphold the laws of the Commonwealth and prevent the unlawful refusal of Western Kentucky University to abide by the Kentucky Open Records Act, specifically, KRS 61.880(2)(c) and 40 KAR 1:030. The University's unreasonable and unlawful withholding of the requested documents from the Attorney General, for the purpose of substantiating the University's denial of *The Kernel's* and *College Heights Herald's* open records requests, severely impairs the ability of the Attorney General to make a reasoned Open Records Decision. As the chief law officer of the Commonwealth, the Attorney General has the common law and statutory right to intervene in

this action. This Court should allow the Attorney General to intervene on behalf of the Commonwealth under CR 24.01 and KRS 418.075, or CR 24.02.

# **I. THE ATTORNEY GENERAL MAY INTERVENE AS A MATTER OF RIGHT.**

Pursuant to CR 24.01, the Attorney General may intervene in this action as a matter of right. As CR 24.01(1) provides:

Upon timely application anyone shall be permitted to intervene in an action (a) ***when a statute confers an unconditional right to intervene***, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

(Emphasis Added). The Attorney General has the right to intervene in this case based on his common law and statutory authority to protect the people of the Commonwealth.

## **A. The Attorney General has Common Law and Statutory Authority to Intervene to Maintain Actions on Behalf of the Commonwealth.**

Under KY. CONST. § 91, the Attorney General is a constitutional officer. As the Supreme Court of Kentucky has recognized, “[T]he source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people.” *Beshear v. Bevin*, 498 S.W.3d 355, 363 (Ky. 2016) (quoting *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973)). Further, KRS 15.020 mandates that the Attorney General, as the chief law officer of the Commonwealth, “shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law.”

“It is generally held that in the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public.” *Hancock*, 503 S.W.2d at 715 (quoting 7 Am. Jur. 2d *Attorney General* § 6). “The attorney general may intervene in civil actions

and proceedings pursuant to constitutional powers, statutory powers, rules of court, or common law powers. The attorney general may intervene as authorized for matters of compelling public interest or state interest ... .” 7A C.J.S. *Attorney General* § 54.

In *Commonwealth ex rel. Conway v. Thompson*, the Court reiterated the powers of the Attorney General, writing:

It is unquestioned that “[a]t common law, [the Attorney General] had the power to institute, conduct[,] and ***maintain*** suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.” Or, in other words, “[u]nder the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce the state's statutes.”

300 S.W.3d 152, 173 (Ky. 2009) (footnotes omitted) (emphasis added). The Attorney General, as a constitutional officer and the chief law officer of the Commonwealth, has the common law powers to control and maintain all litigation on behalf of the state, and to intervene in all suits or proceedings which are of concern to the general public.

The Attorney General’s common law and statutory authority includes not only the power to initiate suits, but to maintain actions already commenced in the public interest. *See Thompson*, 300 S.W.3d at 173. In *Hancock*, 503 S.W.2d 710, the former Kentucky Court of Appeals held that the Attorney General’s powers extend to intervention under CR 24.01(1) whenever the public interest is concerned. There, the Court considered the Attorney General’s motion to intervene under CR 24.01 in an action involving load limits on highways. *Id.* at 715. The Court wrote:

The Attorney General, as chief law officer of this Commonwealth, charged with the duty of protecting the interest of all the people, the traveling public, the school children in the school buses, and the very existence of the roads, had such a vital interest in this litigation that he had a right to intervene at least insofar as the public issues advanced in the action were involved.

*Id.*



The Court should treat this action as one governed by the Kentucky Declaratory Judgment Act, KRS Chapter 418.040, *et seq.* Under KRS 418.045, “[a]ny person . . . whose rights are affected by statute . . . may apply for and secure a declaration of his right or duties.” As the chief law officer of the Commonwealth, the Attorney General has broad discretion to sue for declaratory and injunctive relief against state actors like the University whose actions he believes lack legal authority or are unconstitutional. *Beshear*, 498 S.W.3d at 366.

In this case, the Attorney General acknowledges receipt of the notification required by KRS 418.075 and KRS 61.880, and respectfully wishes to exercise his discretion to protect the interests of the Commonwealth from the unlawful actions of the University in violating KRS 61.880(2)(c). The statute governing open records appeals, KRS 61.880, provides the Attorney General with the implied authority and discretion to join in actions such as the above-captioned matter. KRS 61.880(3) states the following:

(3) Each agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding the enforcement of KRS 61.870 to 61.884. The Attorney General shall not, however, be named as a party in any Circuit Court actions regarding the enforcement of KRS 61.870 to 61.884, *nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings.*

The General Assembly’s use of the phrase “nor shall he have any duty to defend his decision,” leaves open to the Attorney General the authority to intervene in such actions. Further, 40 KAR 1:030(5) reinforces the Attorney General’s discretionary position on permissive intervention in such matters by expressly precluding other parties from joining the Attorney General in such appeals, without the Attorney General’s consent. Specifically, 40 KAR 1:030(5) states:

Each public agency against which an appeal to circuit court is filed shall notify the Attorney General of the appeal. The Attorney General shall not be made a party to an open meetings or open records appeal.

As in *Beshear*, *Thompson*, and *Hancock*, the present action concerns the duty of the Attorney General to protect the public interest. The Attorney General seeks to exercise his statutory and common law authority to protect the interests of the Commonwealth from the University's unlawful action in withholding records from the Attorney General. The University's actions severely impaired the Attorney General's ability to render a reasoned Open Records Decision to determine, confidentially, whether the University's bases for denying the Open Records Request were substantiated and/or legitimate.

The public interest in this action is indisputable. The General Assembly tasked the Attorney General with the issuance of decisions in open records appeals. KRS 61.880(2); 40 KAR 1:030(1). In carrying out his responsibility, the Attorney General may request additional documentation, including the records at issue, in reviewing a state agency's denial of an open records request. KRS 61.880(2)(c). On appeal "[i]t has been, and remains, the [Attorney General's] practice, pursuant to KRS 61.880(2)(c) to conduct an *in camera* inspection of the records involved to determine if the agency, against which the appeal is brought, properly denied access to those records." 13-ORD-046 (citing 12-ORD-220 (quoting 08-ORD-052)).

In open records appeals, the public agency has the burden to prove its denial was lawful. KRS 61.880(2). When a public agency, such as Western Kentucky University, refuses to comply with the Attorney General's lawful request for substantiating documents, the Attorney General's office is "severely handicapped in conducting [its] review. 13-ORD-046. In addition, as the Court of Appeals observed in *Cabinet for Health & Family Servs. v. Todd County Standard, Inc.*, 488 S.W.3d 1, 8 (Ky. App. 2015):

By refusing to respond to the Attorney General's questions, the Cabinet certainly frustrated the Attorney General's statutory review under KRS 61.880... . The Cabinet cannot benefit for intentionally frustrating the Attorney General's review

of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General under KRS 61.880(5).

Further, relying on KRS 61.880(2)(c) and 40 KAR 1:030(3), the Attorney General has consistently determined that:

[T]he General Assembly has twice vested the Attorney General with the authority to require production of public records, for which a claim of exemption has been made, for in camera review. Without this authority, the Attorney General's ability to render a reasoned open records decision would be severely impaired. The Attorney General recognizes that he is bound to observe the confidentiality of the records, and does not share [the agency's] apparent view that disclosure to this office pursuant to KRS 61.880(2)(c) constitutes waiver as to any legitimate privilege [or exemption] asserted. Because he does not have authority to compel disclosure of the disputed records, his only recourse is to find against the public agency in the hope that the agency will more conscientiously discharge its duties under the Open Records Act in the future.

*See* 96-ORD-106; 04-ORD-031.

If the Attorney General is unable to confidentially records that public agencies claim are exempt or privileged, the Attorney General will be unable to substantiate denials of requests. In those case where the agency refuses to comply with KRS 61.880(2)(c) and 40 KAR 1:030(3), the University contends that an agency's simple invocation of such exceptions or privileges precludes the Attorney General's confidential review provided under KRS 61.880(2)(c) and 40 KAR 1:030(3). The University fails to recognize the different between the Attorney General, acting as the adjudicator of open records appeals brought before him, and a requester in an open records request. Moreover, the practical application of the University's argument would yield disastrous results, and would be the "silver bullet" to any Attorney General review of an open records appeal. It would provide another barrier to public, allowing bad actors to conduct business in secret, and, in doing so, would negate the General Assembly's intent that the basic policy of the statute is that free and open examination is in the public interest, and that the exceptions provided by law shall

be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials and others. KRS 61.871.

Thus, the Attorney General has a right to intervene as the chief law officer of the Commonwealth, charged with the duty of protecting the interest of the all the people of Kentucky.

**B. The Attorney General's Intervention in this Action is Timely.**

Moreover, the Attorney General timely seeks to intervene in this action. In *Hazel Enterprises, LLC v. Cmty. Fin. Servs. Bank*, 382 S.W.3d 65 (Ky. App. 2012), the Court specified the factors for when intervention as a matter of right is timely under CR 24.01:

(1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

*Id.* at 68.

Here, the Attorney General meets the factors pronounced in *Hazel*. This action is in its early stages, as the University commenced this action on February 24, 2017, and *The Kernel* and the *College Heights Herald* have not yet filed their respective Answers. The Attorney General files this motion less than three weeks after the commencement of this action, for the purpose of declaratory and injunctive relief against the University for its unlawful action in unlawfully withholding documents from the Attorney General that the Attorney General requested pursuant to KRS 61.880(2)(c). As such, the Attorney General's intervention in this action is timely.

## II. ALTERNATIVELY, THE ATTORNEY GENERAL MAY INTERVENE BY PERMISSION OF THE COURT.

Even if the Attorney General did not have authority to intervene in this action as a matter of right – which he does – this Court should allow his intervention under CR 24.02. In pertinent part, CR 24.02, which governs permissive intervention, provides:

Upon timely application anyone may be permitted to intervene in an action: ... (b) when an applicant's claim or defense and the main action have a question of law or fact in common ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Accordingly, CR 24.02 allows intervention by permission whenever the applicant for intervention has a claim in common with the main action. “Permissive intervention requires that the intervenor have an interest or claim *in common* with the litigants in the underlying action.” *Bailey v. Bertram*, 471 S.W.3d 687, 691 (Ky. 2015).

In this case, the University seeks to determine whether it may refuse to provide documents requested by the Attorney General pursuant to KRS 61.880(2)(c), on the basis of certain claims of privilege and exception. Specifically, the University contends in its Complaint and Notice of Appeal that the Attorney General’s authority to review documents pursuant to open records Act appeals is limited and subject to attorney-client privilege, other privileges, and federal law.

However, there is a notable absence of any such explicit or implicit limitation on the Attorney General’s authority to review under KRS 61.880(2)(c), 40 KAR 1:030(3). To the contrary, the statute supports the Attorney General’s continued assertion that the Attorney General may request additional documentation from the agency in question, to be confidentially reviewed, to substantiate whether the agency’s refusal to disclose records was proper, including the applicability of any statutory exceptions, with the burden of proof resting on the agency. KRS

61.880(1)-(2)(c); 40 KAR 1:030(2)-(3). Thus, this action is central to both the Plaintiff/Appellant's action and the matter for which the Attorney General seeks to intervene.

Further, the Attorney General's right to seek relief for the improper and unlawful actions of the University shares common questions of law and fact with the underlying action. The University refused to provide any responsive records to the Attorney General, pursuant to KRS 61.880(2)(c). The University impliedly acknowledges that the Attorney General has the authority to review records to substantiate the University's claimed exemptions, including records involving a sexual assault investigation leveled by a student against a University employee.

Through these actions, the University has explicitly recognized that the Attorney General interest shares common questions of law and fact with the both the parties in this action. Moreover, the University's assertions regarding the Attorney General's authority to review records pursuant to KRS 61.880(2)(c) directly effects the Attorney General's ability to fulfill his legal obligation to adjudicate open records appeals and issue open records decisions.

As such, this Court should resolve the Attorney General's Intervening Complaint and the Plaintiff/Appellant's action together. Furthermore, allowing the Attorney General to intervene in this action will not unduly delay or prejudice the adjudication of the rights of the original parties. This Court should allow the Attorney General to intervene in this action.

### **CONCLUSION**

For the foregoing reasons, the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, respectfully requests that this Court grant its Motion to Intervene in this action.

Respectfully Submitted

ANDY BESHEAR  
ATTORNEY GENERAL

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Motion to Intervene, and the Memorandum of Law in Support, and the Proposed Order, were filed electronically with the Court's electronic filing system, and was served on the following individuals by U.S. Mail, postage prepaid, on this the 23rd day of March, 2017:

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/s/ La Tasha Buckner  
La Tasha Buckner



**COMMONWEALTH OF KENTUCKY  
WARREN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 17-CI-00233**

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

INTERVENING PLAINTIFF

v.

THE COLLEGE HEIGHTS HERALD

DEFENDANT/APPELLEE

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

DEFENDANT/APPELLEE

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and

WESTERN KENTUCKY UNIVERSITY

INTERVENING DEFENDANT

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**INTERVENING COMPLAINT FOR DECLARATION OF RIGHTS  
AND A PERMANENT INJUNCTION**

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Comes now the Intervening Plaintiff, the Commonwealth of Kentucky, *ex rel.* Andy  
Beshear, Attorney General (hereinafter “Attorney General”), by and through counsel, and brings

this action for a declaration of rights and a permanent injunction against the Plaintiff/Appellant and Intervening Defendant, Western Kentucky University (hereinafter “the University”).

### **INTRODUCTION**

On December 21, 2016, Western Kentucky University refused the Attorney General’s lawful request for a confidential, *in camera* review of documents involved in the University’s denial of an open records request by The Kernel Press, Inc. d/b/a *The Kentucky Kernel* and the *College Heights Herald*. The University’s refusal to obey Kentucky law allowing for such a review severely impaired the Attorney General’s ability to provide a reasoned decision in *The Kernel* and the *College Heights Herald*’s appeals.

The underlying open records request sought documents related to Title IX investigations into University employees, not students. Moreover, in making his request for a legally confidential review, the Attorney General allowed the University to redact the names and personal identifying information of any student complainant and witness.

The University refused to comply with the request and review, thereby violating KRS 61.880(2)(c).

The Attorney General has a legal duty to uphold the Kentucky Open Records Act. The University’s position would severely impact that duty, creating a “silver bullet,” whereby a bad actor could falsely claim open records are exempt, and, without the Attorney General’s review, could successfully evade the law. Here, it would allow a University to hide virtually all information about how well it does or does not respond to sexual assault – information students, parents, and taxpayers deserve to know.

Through this action for declaratory and injunctive relief, the Attorney General seeks to uphold the laws of the Commonwealth, and respectfully asks this Court do the following:

- A. Declare the University's refusal to provide the additional documentation that the Attorney General requested for confidential review pursuant to KRS 61.880(2)(c) to be unlawful; and
- B. Enjoin the University from any further refusal to comply with the Attorney General's request for additional documentation and order the University to comply with any future requests for additional documentation pursuant to KRS 61.880(2)(c).

### **NATURE OF ACTION**

1. This Verified Complaint for a Declaration of Rights and Permanent Injunction is governed by the Kentucky Declaratory Judgment Act, KRS 418.010, *et seq.*, CR 57, and CR 65, and is initiated by the Attorney General pursuant to his authority under the Kentucky Constitution, KRS Chapter 15, and the common law.

2. KRS 418.040 provides this Court with the authority to "make a binding declaration of rights, whether or not consequential relief is or could be asked" when a controversy exists. An actual and justiciable controversy regarding violations of state law clearly exists in this action.

3. CR 65 permits this court, in a final judgment, to issue a permanent injunction which may restrict or mandatorily direct the doing of an act.

4. In addition, this justiciable controversy is capable of repetition but evading review as evidenced by the University's belief that it can continue to violate the laws of the Commonwealth in failing to provide additional documentation and a copy of the records involved to the Attorney General for confidential review pursuant to KRS 61.880(2)(c). Specifically, the University refused to provide the additional documentation that the Attorney General requested for confidential review pursuant to KRS 61.880(2)(c). The University's refusal to comply with the Attorney General's requests for substantiating documentation and a copy of the records involved violates Kentucky law, KRS 61.880(2)(c).

5. The Attorney General requests an expedited review pursuant to KRS 418.050, KRS 61.882(4), and CR 57. Time is of the essence, and this justiciable controversy presents an immediate concern that must be promptly resolved to so that the University will not unlawfully refuse future requests for substantiating additional documentation for the Attorney General's *in camera* review in an open records appeal.

### **PARTIES**

6. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

7. The Intervening Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, is the duly elected Attorney General of the Commonwealth of Kentucky, and is a constitutional officer pursuant to Sections 91, 92, and 93 of the Kentucky Constitution. Under KRS 15.020, the Attorney General is the chief law officer of the Commonwealth and all of its departments, commissions, agencies, and political subdivisions. The Attorney General is duly authorized by the Kentucky Constitution, Kentucky statutes, and the common law, including under his *parens patriae*, to enforce Kentucky law. The Attorney General has the authority to bring actions for injunctive relief to enforce the Kentucky Constitution and Kentucky statutes and regulations, including the authority to bring an action against Western Kentucky University and other state agencies for injunctive relief. *See* KY. CONST. § 91; KRS 15.020.

8. The Plaintiff/Appellant and Intervening Defendant, Western Kentucky University, is a state university and agency of the Commonwealth of Kentucky that exists and operates pursuant to the applicable provisions of KRS 164.290 and KRS Chapter 164, *et seq.*

9. The Defendant/Appellee, the Kernel Press, Inc. d/b/a *The Kentucky Kernel*, is a newspaper publication operating in Lexington, Kentucky. *The Kernel* is a proper party to this action pursuant to KRS 61.880(5) and KRS 61.882.

10. The Defendant/Appellee, the *College Heights Herald*, is a newspaper publication operating in Bowling Green, Kentucky. The *Herald*, is a proper party to this action pursuant to KRS 61.880(5) and KRS 61.882.

### **JURISDICTION AND VENUE**

11. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

12. An actual, justiciable controversy exists and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 23A.010, KRS 61.880(5), KRS 61.882, CR 57 and CR 65.

13. Venue is proper in this Court pursuant to KRS 61.880(5) and KRS 61.882, because Western Kentucky University has its principal place of business in Warren County, Kentucky, and because the withheld records are maintained, in whole or in part, in Warren County, Kentucky. Furthermore, this action generally relates to violations of various Kentucky statutes either determined or accomplished in Warren County, Kentucky.

14. Pursuant to KRS 418.040, *et seq.*, this Court may properly exercise *in personam* jurisdiction over the Plaintiff/Appellant and Intervening Defendant.

### **FACTUAL BACKGROUND**

15. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

16. On October 18, 2016, Matthew Smith, a reporter with *The Kentucky Kernel*, submitted an open records request to the University for "... all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years." (See *The Kernel* Open Records Request, Oct. 18, 2016, attached as Exhibit A.)

17. The University denied the request on October 28, 2016. (See University's Denial Letter to *The Kernel*, Oct. 28, 2016, attached as Exhibit B.) The University based its denial on grounds that the records were "preliminary" and therefore exempt from disclosure under KRS 61.878(1)(i) and (j) to the Open Records Act. (Exhibit B.)

18. On November 1, 2016, Nicole Ares, a reporter with the *College Heights Herald*, made a virtually identical open records request to the University for access "to all investigative records for all Title IX investigations into sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation and/or stalking against Western Kentucky University employees in the last five years." (See *College Heights Herald's* Open Records Request, Nov. 1, 2016, attached as Exhibit C.)

19. The University denied the *College Heights Herald's* request on November 2, 2016, using the identical exceptions and explanation she used in responding to *The Kernel's* request. (See University Denial Letter to *College Heights Herald*, Nov. 1, 2016, attached as Exhibit D.)

20. On November 1, 2016, *The Kernel* filed an open records appeal with the Attorney General. The University responded to the appeal by letter dated November 21, 2016. (See University Response to *The Kernel* Appeal, Nov. 21, 2016, attached as Exhibit E.) The *College Heights Herald* filed an open records appeal with the Attorney General on November 21, 2016. On November 30, 2016, the University responded to the *Herald's* appeal. (See

University Response to the *Herald* Appeal, Nov. 30, 2016, attached as Exhibit F.) Reciting KRS 61.878(1)(i) and (j), in its response, the University stated, in part:

The information contained in the requested sexual misconduct investigative files is the exact information exempted from disclosure under the Open Records Act. *City of Louisville v. Courier-Journal and Louisville Times*, 637 S.W.2d 658 (1982). The purpose of the exemption is to “protect the integrity of the agency’s decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency.” ... Consistent with this long-standing rationale, preliminary drafts, notes, correspondence and memorandum do not lose their exempt status simply because the investigation is complete. There must be overt action in adopting these preliminary documents as the basis for final agency action in order for the purpose of KRS 61.878(1)(i) and (j) to no longer be served.

The investigative materials requested ... did not result in adoption of these preliminary documents as the basis for final action at WKU.

In addition to the exemptions found in KRS 61.878(1)(i) and (j), WKU maintains that production of the requested records violate the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1)(a) and (k). Specifically, in complying with Title IX of the Education Amendments of 1972, WKU is required to respond to complaints of sex and/or gender based discrimination and to do so with the utmost discretion and confidentiality that can be afforded the investigative process. Disclosure of investigative materials would significantly stifle complainants from reporting sex and/or gender based discrimination and witness cooperation in the investigative process. On addition, FERPA and its implementing regulations protects student records contained within many of the files requested ... from disclosure.

Finally, disclosure of the requested records would constitute a clearly unwarranted invasion of personal privacy for all involved parties, an exemption within the Open Records Act at KRS 61.878(1)(a).

Moreover, merely redacting the names of the complainant does not shield the complainant and supporting witnesses from disclosure

(Exhibits E, F.)

21. By letter dated November 29, 2016, the Attorney General requested additional documentation and copies of the records involved from the University pursuant to his authority

under KRS 61.880(2)(c) and 40 KAR 1:030(3). (*See* Attorney General’s KRS 61.880(2)(c) Requesting Additional Information and Records, Nov. 29, 2016, see attached as Exhibit G.)

22. In pertinent part, KRS 61.880(2)(c) provides: “On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation.”

23. As 40 KAR 1:030(3) provides: “Additional Documentation. KRS 61.846(2) and 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which the complaint is made. If the documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.”

24. On December 21, 2016, the University responded to the Attorney General’s request for additional documentation and copies of the records involved, but did not provide any of the requested, responsive records. (*See* University Response to Request for Additional Documentation, Dec. 21, 2016, attached as Exhibit H.)

25. In its response, the University stated that “federal law prohibits production of the request records for an *in camera* inspection . . . . In addition to FERPA, WKU asserts that Title IX prohibits disclosure of all investigative files.” (*Id.*)

26. On January 26, 2017, the Attorney General issued the Open Records Decision, *In re: Matthew Smith and Nicole Ares/Western Kentucky University*, 17-ORD-014 (attached as Exhibit I).



27. In his decision, the Attorney General noted that through KRS 61.880(2)(c) the Kentucky General Assembly assigned the burden of proof in an open records appeal to the agency resisting disclosure, and also provided the Attorney General the authority to request additional documentation, including the records at issue, from the agency for substantiation. 17-ORD-014. The Attorney General also stated that the decision of whether or not to request additional documentation, or a copy of the records involved, from the agency is discretionary and based on the facts specific to each appeal. *Id.* The Attorney General found that the University failed to meet its burden of proof in denying *The Kernel's* and the *College Heights Herald's* open records requests. *Id.*

28. On February 24, 2017, the University filed its Complaint and Notice of Appeal in the above-styled action.

## **CLAIMS**

### **Count I Violations of KRS Chapter 61**

29. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

30. KRS 61.880(2)(c) provides as follows: “On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency [Western Kentucky University], and the Attorney General may request additional documentation from the agency for substantiation.”

31. 40 KAR 1:030(3) provides as follows: “KRS 61.846(2) and KRS 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which complaint is made. If documents thus obtained are copies of documents claimed by the

agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.”

32. By refusing to provide the Attorney General with documents he lawfully requested for confidential review pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3), in order to substantiate the University’s denial of *The Kernel’s* and *College Heights Herald’s* open records request(s), the University violated KRS 61.880(2)(c).

## **Count II Injunctive Relief**

33. The Intervening Plaintiff adopts and reiterates each and every allegation and statement above as if fully set forth herein, and incorporates the same by reference.

34. CR 65.01 authorizes an injunction to “restrict or mandatorily direct the doing of an act.” The Attorney General asks this court to permanently enjoin the University from withholding the documents requested by the Attorney General with respect to *In re: Kentucky Kernel/Western Kentucky University*, 17-ORD-014, consistent with its prayer for relief below.

35. CR 65.05 provides: A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant’s rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such judgment ineffectual.

36. As this Complaint for Declaration of Rights and Permanent Injunction shows, the University unlawfully withheld potentially substantiating documents from the Attorney General upon his lawful request for additional documentation, which severely impaired the Attorney General’s ability to render a reasoned open records decision. *See e.g.*, 96-ORD-106, p. 5; 10-ORD-079, p. 5. The University’s actions violate Kentucky law, specifically, 61.880(2)(c).

37. The University's actions constitute a violation of the Commonwealth's rights. The Attorney General is the chief law officer of the Commonwealth, and is charged with reviewing the denial of open records request. KRS 61.880(2); 40 KAR 1:030(1). During an open records appeal, the Attorney General may request additional documentation from an agency. KRS 61.880(2)(c); 40 KAR 1:030(3). Despite the Attorney General's request to the University of documents, the University unlawfully withheld the documents, severely impairing the Attorney General's ability to issue a reasoned Open Records Decision. The University's unreasonable and unlawful failure to provide the requested additional documentation and records at issue established that the Commonwealth's rights have been violated, and that the University will continue its pattern of unlawful behavior in this manner unless the Court permanently enjoins the University from doing so.

38. The University's violation of Kentucky law is so flagrant that there is a high likelihood that the Attorney General will prevail in full trial on the merits of this action.

39. Additionally, no Circuit Court Judge has refused the requested relief and no injunction bond is required by the Attorney General pursuant to CR 81A.

### **PRAYER FOR RELIEF**

WHEREFORE, the Intervening Plaintiff, Commonwealth of Kentucky, through its Attorney General, demands as follows:

1. For an expedited review of this action pursuant to KRS 418.050, KRS 61.882(4), and CR 57;
2. For a judgment declaring Western Kentucky University's failure to provide the Attorney General with the additional documentation , including the records

involved, he requested on November 29, 2016, pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3), to be a violation of Kentucky law;

3. For a permanent injunction enjoining Western Kentucky University from any further refusal to comply with future requests by the Attorney General for additional documentation pursuant to KRS 61.880(2)(c) and 40 KAR 1:030(3);
4. For reasonable costs and attorneys' fees; and
5. For any and all further relief to which the Plaintiff may appear entitled.

Respectfully Submitted

ANDY BESHEAR  
ATTORNEY GENERAL

/s/ La Tasha Buckner  
La Tasha Buckner  
Executive Director  
Office of Civil and Environmental Law  
Sam Flynn  
S. Travis Mayo  
Assistant Attorneys General  
Capitol Building, Suite 118  
700 Capital Avenue  
Frankfort, KY 40601  
(502) 696-5300

# Exhibit A

Kentucky Kernel  
026 Grehan Journalism Building  
Lexington, Ky. 40506

Date: October 18, 2016

Western Kentucky University  
1906 College Heights Blvd  
Bowling Green, KY 42101

To Whom It May Concern:

Under the Kentucky Open Records Act § 61.872 et seq., I am requesting an opportunity to obtain all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years. Sexual misconduct includes but is not limited to sexual assault, sexual harassment, sexual exploitation and/or stalking.

If there are any fees associated with getting these records, please inform me if the cost will exceed \$100. However, I would also like to request a waiver of all fees.

The Kentucky Open Records Act requires a response within three business days. If access to the records will take longer than that time period, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny this request, or any portion of it, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Matthew Smith

Reporter, Kentucky Kernel

(502) 525-9919; smith\_matt44@yahoo.com

# Exhibit B



A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH  
OFFICE OF THE GENERAL COUNSEL

October 28, 2016

**VIA ELECTRONIC MAIL**

Mr. Matthew Smith  
Kentucky Kernel  
026 Grehan Journalism Building  
Lexington, KY 40506

In re: Open Records Request – Title IX investigative records into sexual misconduct  
allegations against WKU employees

Dear Mr. Smith:

Please consider this letter Western Kentucky University's ("WKU") response to your open records request of October 18, 2016. You requested all investigative records for all Title IX investigations into sexual misconduct allegations, which you defined as sexual assault, sexual harassment, sexual exploitation and/or stalking, levied against WKU employees in the past five years.

In reviewing the information you requested and using your definition of sexual misconduct from 2013 (the first year WKU began investigating sex and gender based discrimination complaints under Title IX) to the present, WKU conducted 20 investigation with WKU employees as the responding party. Nine of those investigations were of WKU faculty and eleven investigations were of WKU staff. Of the twenty total investigation conducted, six of the investigations resulted in a finding of a WKU policy violation. All six employees of those employees resigned from their respective positions prior to any final action by the University.

Kentucky Revised Statute 68.878 (1) (i) provides that preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency is exempted from inspection. In addition, KRS 68.878 (1) (i) provides that preliminary recommendations and preliminary memorandum in which opinions are expressed or policies formulated or recommended is likewise exempt from public disclosure.

*The Spirit Makes the Master*

Western Kentucky University | 1906 College Heights Blvd. #11001 | Bowling Green, KY 42101-1001  
phone: 270-745-5398 | fax: 270-745-4492 | web: [www.wku.edu](http://www.wku.edu)

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The Attorney General has long recognized that public records that are preliminary in nature forfeit their exempt status only after they are adopted by the agency as part of its final action. 00-ORD-139; City of Louisville v. Courier-Journal and Louisville Times, 637 S.W.2d 2d 658 (Ky. App. 1982); Kentucky State Board of Medical Licensure v. Courier-Journal and Louisville Times Co., 663 S.W.2d 953 (Ky. App. 1983); University of Kentucky v. Courier-Journal and Louisville Times Co., 830 S.W.2d 373 (Ky. 1992). 05-ORD-210.

The information you requested falls within the two above referenced exceptions to disclosure under the Kentucky Open Records Act. The University is denying your request for the electronic mail records on the basis that these are exempt under KRS 61.878(j) in that the records do not pertain to any final agency action, nor were they adopted as part of a final agency action.

Further, WKU is aware of the ongoing litigation between the Kentucky Kernel and the University of Kentucky ("UK") over disclosure of the very records requested from WKU. Should this matter resolve with the court ordering production of UK's Title IX investigative files, WKU will supplement this response.

If you have any questions or concerns, please feel free to contact me at your convenience.

Sincerely,



Andrea P. Anderson

# Exhibit C

11/01/2016

Deborah Wilkins  
Chief of Staff/General Counsel  
Western Kentucky University

**PUBLIC RECORDS REQUEST**

Dear Ms. Wilkins,

Pursuant to Kentucky Revised Statutes 61.870 to 61.884, I request access to all investigative records for all Title IX investigations into all sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation and/or stalking levied against Western Kentucky University employees in the last five years.

If you have questions regarding this request, I would appreciate you communicating with me by telephone, rather than by mail. My number is 859-685-5086.

I look forward to your compliance within three business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Nicole Ares  
College Heights Herald  
(859) 685-5086

# Exhibit D



A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH  
OFFICE OF THE GENERAL COUNSEL

November 2, 2016

**VIA ELECTRONIC MAIL**

Ms. Nicole Ares  
College Heights Herald

In re: Open Records Request – Title IX investigative records into sexual misconduct  
allegations against WKU employees

Dear Ms. Ares:

Please consider this letter Western Kentucky University's ("WKU") response to your open records request of November 1, 2016. You requested all investigative records for all Title IX investigations into sexual misconduct allegations, which you defined as sexual assault, sexual harassment, sexual exploitation and/or stalking, levied against WKU employees in the past five years.

In reviewing the information you requested and using your definition of sexual misconduct, from 2013 (the first year WKU began investigating sex and gender based discrimination complaints under Title IX) to the present, WKU conducted 20 investigation with WKU employees as the responding party. Nine of those investigations were of WKU faculty and eleven investigations were of WKU staff. Of the twenty total investigation conducted, six of the investigations resulted in a finding of a WKU policy violation. All six of those employees resigned from their respective positions prior to any final action by the University.

Kentucky Revised Statute 68.878 (1) (i) provides that preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency is exempted from inspection. In addition, KRS 68.878 (1) (j) provides that preliminary recommendations and preliminary memorandum in which opinions are expressed or policies formulated or recommended is likewise exempt from public disclosure.

The Attorney General has long recognized that public records that are preliminary in nature forfeit their exempt status only after they are adopted by the agency as part of its final action. 00-ORD-139; City of Louisville v. Courier-Journal and Louisville Times, 637 S.W.2d 2d 658 (Ky. App. 1982); Kentucky State Board of Medical Licensure v. Courier-Journal and Louisville Times Co., 663 S.W.2d 953 (Ky. App. 1983); University of Kentucky v. Courier-Journal and Louisville Times Co., 830 S.W.2d 373 (Ky. 1992). 05-ORD-210.

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The information you requested falls within the two above referenced exceptions to disclosure under the Kentucky Open Records Act. The University is denying your request for the investigative records on the basis that these are exempt under KRS 61.878(j) in that the records do not pertain to any final agency action, nor were they adopted as part of a final agency action.

Further, WKU is aware of the ongoing litigation between the Kentucky Kernel and the University of Kentucky ("UK") over disclosure of the very records requested from WKU. Should this matter resolve with the court ordering production of UK's Title IX investigative files, WKU will supplement this response.

If you have any questions or concerns, please feel free to contact me at your convenience.

Sincerely,

A handwritten signature in black ink, reading "Andrea P. Anderson". The signature is fluid and cursive, with the first name "Andrea" and last name "Anderson" clearly legible.

Andrea P. Anderson  
Assistant General Counsel/Title IX Coordinator

# Exhibit E



Kentucky Kernel  
026 Grehan Journalism Building  
Lexington, KY 40506  
Phone: (859) 257-1915

November 1<sup>st</sup>, 2016

This letter serves as an appeal to the Kentucky Attorney General on behalf of the Kentucky Kernel.

On October 19, 2016, I filed an open records request with Western Kentucky University. The request asked for the following: "all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years. Sexual misconduct includes but is not limited to sexual assault, sexual harassment, sexual exploitation and/or stalking."

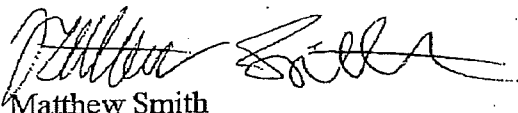
WKU Title IX Coordinator Andrea Anderson issued the following response: "The University is denying your request for the electronic mail records on the basis that these are exempt under KRS 61.878 (j) in that records do not pertain to any final agency action, nor were they adopted as part of a final agency action."

We disagree with WKU's decision to withhold these records. KRS 61.872, under the Kentucky Open Records Act, gives us the right to inspect these records, given WKU's status as a public institution. In a similar case, your office found that the University of Kentucky was in violation of this statute, when they recently refused to release documents relating to sexual harassment by a professor. Even Western understands the similarities, acknowledging the current litigation between the Kentucky Kernel and UK, and labeling the documents asked for from UK to be "the very records requested from WKU."

In saying that their records are preliminary and therefore exempt from disclosure, Western is using part of the very same argument that UK made, which the Attorney General disagreed with and is now litigating.

The Kentucky Kernel appeals to the Attorney General to review the information provided in this letter, and to decide whether or not the requested information qualifies as public record. I have attached the entirety of the school's letter of denial.

Sincerely,



Matthew Smith

Smith [matt44@yahoo.com](mailto:matt44@yahoo.com); 502-525-9919



# COLLEGE HEIGHTS HERALD

Western Kentucky University — 1906 College Heights Blvd. #11084 — Bowling Green, KY 42101-1084  
Phone: 270.745.2653 — Fax: 270.745.2697  
www.wkuherald.com

11/21/16

Open Records / Open Meetings decisions  
700 Capitol Avenue, Suite 118  
Frankfort, KY 40601

Dear Kentucky Office of the Attorney General,

Good afternoon, my name is Nicole Ares, and I am an editor for the College Heights Herald newspaper. I am writing to request a legal opinion of my recent open records request denial.

On 11/01/16, I sent an open records to request to Western Kentucky University (along with seven other Kentucky public universities) requesting access to "all investigative records for all Title IX investigations into all sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation and/or stalking levied against Western Kentucky University employees in the last five years."

On 11/02/16, I received an open records request denial from the WKU Office of the General Counsel. The office cited the ongoing litigation between the University of Kentucky and its student newspaper, the Kentucky Kernel, as its reasoning. It also cited KRS 61.878(j) "in that the records do not pertain to any final agency action, nor were they adopted as part of a final agency action."

Since receiving the denial, I reached out to attorney Jon Fleischaker for his legal counsel. He informed me of several reasons why I should not have been denied my open records request:

- 1) Western Kentucky University is not involved in the ongoing litigation between the Kentucky Kernel and the University of Kentucky.
- 2) I sent the same records request to the University of Kentucky, and it did not deny my request and said it will be sending the records soon.
- 3) The records I seek are by no means preliminary. Of the 20 complaints filed at WKU in the last three years, six resulted in an employee resignation. Mr. Fleischaker said the Herald is entitled to the initial complaint (by the student or whomever) as well as to the document that completed the case (whether those be resignation papers or more formal). If a formal investigation was conducted, I am entitled to those records as well. He said if a complaint results in the resignation of an employee, that is the final action, and the case is no longer preliminary stages because "once it's done it's done."

**WKU**

A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH

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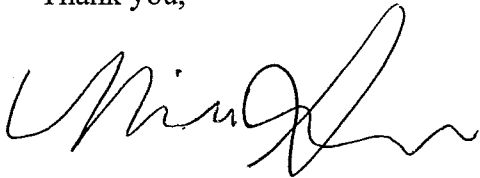
On 11/16/16, I sent an email response to Ms. Lauren Ossello, WKU executive legal assistant and adjunct instructor. I gave her the same reasonings listed above for the Herald believes its request should not have been denied.

On 11/17/16, I received a brief email response from Andrea Anderson, WKU assistant general counsel. She again denied my request stating, "When the judge issues a decision in the University of Kentucky v. Kentucky Kernel litigation, we will immediately revisit your request."

If by any means possible your decision could be expedited due to the timeliness of this open records request, I would appreciate it.

Please feel free to contact me if you have any questions.

Thank you,



Nicole Ares  
Assistant News Editor  
College Heights Herald Newspaper  
859-685-5086  
nicoleares95@gmail.com

**WKU**

A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH



A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH  
OFFICE OF THE GENERAL COUNSEL

November 21, 2016

**VIA ELECTRONIC AND USPS MAIL**

Gordon Slone  
Attorney General's Office  
700 Capital Avenue  
Frankfort, Kentucky 40601

In re: Student Publications—Open Records Appeal Log No. 201600456

Dear Mr. Slone:

Please allow this letter to serve as Western Kentucky University's ("WKU") response to the appeal filed by Matthew Smith, Kentucky Kernel.

Mr. Smith requested copies of all investigative records into Title IX investigations for sexual misconduct complaints made against WKU employees in the past five years. You have been provided with a copy of WKU's response to this request dated October 28, 2016. The statements contained in that letter are incorporated herein by reference.

As you are aware, the Kernel made a similar, if not identical, request to the University of Kentucky and upon information and belief, to all public universities within the state. The issue of whether Title IX investigative records are exempt from disclosure under the Kentucky Open Records Act is currently being litigated in Fayette Circuit Court and is a matter of first impression. WKU respectfully requests that this appeal be held in abeyance pending the outcome of this litigation.

In WKU's response to the Kentucky Kernel's Open Records Request, WKU disclosed that during the relevant time period, it conducted 20 investigations with WKU employees as the responding party. Those 20 files contain notes from meetings/interviews with the reporting and responding parties and witnesses, witness lists, calendar entries, and email communications between university employees, predominately between the Title IX Coordinator or Investigator and his/her staff as to the strategy to utilize in conducting the investigation, requests for legal advice involving WKU's General Counsel and the exchange of opinions, observations, and/or recommendations for conducting the investigation. In addition, some files contain memorandum, including draft versions of the memorandum, of opinions as to whether a WKU employee violated

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internal policies; however, of the six investigations that resulted in a finding of a WKU policy violation, all six employees resigned or retired before any action was taken by WKU. Likewise, the remaining 14 investigative files did not result in any action or inaction on behalf of WKU; the matter concluded with the opinion that there was no internal policy violation, an opinion held by a particular individual, not the University's determination on the issue.

Kentucky Open Records Act, KRS 61.878 provides that certain public records are exempt from inspection except on order of court--

(1)(i): Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.

(1)(j): Preliminary recommendations, and preliminary memorandum in which opinions are expressed or policies formulated or recommended.

The information contained in the requested sexual misconduct investigative files is the exact information exempted from disclosure under the Open Records Act. City of Louisville v. Courier-Journal and Louisville Times, 637 S.W.2d 658 (1982). The purpose of the exemption is to "protect the integrity of the agency's decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency." 04-ORD (citing 94-ORD-118 and 93-ORD-125). Consistent with this long-standing rationale, preliminary drafts, notes, correspondence and memorandum do not lose their exempt status simply because the investigation is complete. There must be overt action in adopting these preliminary documents as the basis for final agency action in order for the purpose of KRS 61.878 (1) (i) and (j) to no longer be served. 04-ORD-226 citing Louisville Times, 637 S.W.2d 658.

The investigative materials requested by the Kernel did not result in adoption of these preliminary documents as the basis for final action at WKU. With regard to resignation and/or notice of retirement documentation for the six individuals found in violation of WKU's Sexual Misconduct Policy and/or Discrimination/Harassment Policy, the former WKU employees resigned or retired prior to undergoing the disciplinary process, and in some instances, even before the investigation was complete without WKU expressing a final decision or action.

In addition to the exemptions found in KRS 61.878(1) (i) and (j), WKU maintains that production of the requested records violate the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1)(a) and (k). Specifically, in complying with Title IX of the Education Amendments of 1972, WKU is required to respond to complaints of sex and/or gender based discrimination and to do so with the utmost discretion and confidentiality that can be afforded the investigative process. Disclosure of investigative materials would significantly stifle complainants from reporting sex and/or gender based discrimination and witness cooperation in the investigative process. In addition, FERPA and its implementing regulations protects student records contained within many of the files requested from the Kernel from disclosure.

Finally, disclosure of the requested records would constitute a clearly unwarranted invasion of personal privacy for all involved parties, an exemption within the Open Records Act at KRS 61.878 (1)(a). See Kentucky New Era, Inc. v. City of Hopkinsville, 415 S.W.3d (Ky. 2013), public privacy exemption becomes more viable the more "intimate and sensitive" the information and "as the possible consequences of disclosure become more adverse." Unquestionably sexual misconduct investigative files contain allegations and details which are by their very nature

"intimate and sensitive" and there are serious consequences for all parties in disclosure of such information including, but not limited to, re-victimization for the reporting party, threat of retaliation, and social and economic stigma. See also Cape Publications, Inc. v. University of Louisville Foundation, Inc., 260 S.W.3d 818 (Ky. 2008) wherein the court instituted a two part test to determine the applicability of the personal privacy exception: (1) whether the requested information is of a personal nature and (2) whether the privacy interest outweighs the public interest in disclosure. Certainly, if monetary contributions to a foundation are deemed of a "personal nature" as established in Cape then allegations of sexual misconduct defined by the Kernel as sexual assault, sexual harassment, sexual exploitation and/or stalking are "personal in nature." Secondly, the public has no legitimate interest in disclosure of this information. The six employees found to be in violation of WKU policy are no longer employed at the University. The remaining 14 employees accused of violation of WKU's Sexual Misconduct Policy were not found to be in violation of WKU's policy. To produce the investigative files for those complaints would be a grave injustices to those individuals whose names would become irretrievably linked to a complaint of sexual misconduct which no such finding was made—particularly when the involved parties had and retain an expectation of privacy as the anonymous donors did in Cape. Id. at 824.

Moreover, merely redacting names of the complainant does not shield the complainant and supporting witnesses from disclosure. There is significant detail in the files (dates, department, classes, physical descriptions, locations, etc.) which are specific to each complaint and that would certainly allow for discovery of those affected with even a cursory inquiry from an interested party.

WKU respectfully requests that the Kernel's appeal be held in abeyance pending the outcome of the litigation over this very open records request. Alternately, WKU requests that the Kernel's appeal be denied on the basis that the records requested are preliminary in nature and were not incorporated into a final agency action and further, that the requested records are exempt from disclosure by federal and state law in addition to the personal privacy exemption of the Kentucky Open Records Act.

Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,



Andrea P. Anderson  
Assistant General Counsel

Cc: Matthew Smith, Kentucky Kernel

# Exhibit F



A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH  
OFFICE OF THE GENERAL COUNSEL

November 30, 2016

**VIA ELECTRONIC AND USPS MAIL**

Gordon Slone  
Attorney General's Office  
700 Capital Avenue  
Frankfort, Kentucky 40601

In re: Student Publications—Open Records Appeal Log No. 201600482

Dear Mr. Slone:

Please allow this letter to serve as Western Kentucky University's ("WKU") response to the appeal filed by Nicole Ares, College Heights Herald ("Herald").

Ms. Ares requested copies of all investigative records into Title IX investigations for sexual misconduct complaints made against WKU employees in the past five years. You have been provided with a copies of WKU's responses to these requests dated November 3, 2016 and November 17, 2016. The statements contained in the letter and email are incorporated herein by reference.

As you are aware, the Kentucky Kernel made a similar, if not identical, request to the University of Kentucky and upon information and belief, to all public universities within the state. The issue of whether Title IX investigative records are exempt from disclosure under the Kentucky Open Records Act is currently being litigated in Fayette Circuit Court and is a matter of first impression. The College Heights Herald has followed the University of Kentucky in their requests for identical information from the public universities in the state. WKU respectfully requests that this appeal be held in abeyance pending the outcome of this litigation.

In WKU's response to the Herald's Open Records Request, WKU disclosed that during the relevant time period, it conducted 20 investigations with WKU employees as the responding party. Those 20 files contain notes from meetings/interviews with the reporting and responding parties and witnesses, witness lists, calendar entries, and email communications between university employees, predominately between the Title IX Coordinator or Investigator and his/her staff as to the strategy to utilize in conducting the investigation, requests for legal advice involving WKU's General Counsel and the exchange of opinions, observations, and/or recommendations for

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conducting the investigation. In addition, some files contain memorandum, including draft versions of the memorandum, of opinions as to whether a WKU employee violated internal policies; however, of the six investigations that resulted in a finding of a WKU policy violation, all six employees resigned or retired before any action was taken by WKU. Likewise, the remaining 14 investigative files did not result in any action or inaction on behalf of WKU; the matter concluded with the opinion that there was no internal policy violation, an opinion held by a particular individual, not the University's determination on the issue.

Kentucky Open Records Act, KRS 61.878 provides that certain public records are exempt from inspection except on order of court--

(1)(i): Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.

(1)(j): Preliminary recommendations, and preliminary memorandum in which opinions are expressed or policies formulated or recommended.

The information contained in the requested sexual misconduct investigative files is the exact information exempted from disclosure under the Open Records Act. City of Louisville v. Courier-Journal and Louisville Times, 637 S.W.2d 658 (1982). The purpose of the exemption is to "protect the integrity of the agency's decision-making process by encouraging the free exchange of opinions and ideas, and to promote informed and frank discussions of matters of concern to the agency." 04-ORD (citing 94-ORD-118 and 93-ORD-125). Consistent with this long-standing rationale, preliminary drafts, notes, correspondence and memorandum do not lose their exempt status simply because the investigation is complete. There must be overt action in adopting these preliminary documents as the basis for final agency action in order for the purpose of KRS 61.878 (1) (i) and (j) to no longer be served. 04-ORD-226 citing Louisville Times, 637 S.W.2d 658.

The investigative materials requested by the Herald did not result in adoption of these preliminary documents as the basis for final action at WKU. With regard to resignation and/or notice of retirement documentation for the six individuals found in violation of WKU's Sexual Misconduct Policy and/or Discrimination/Harassment Policy, the former WKU employees resigned or retired prior to undergoing the disciplinary process, and in some instances, even before the investigation was complete without WKU expressing a final decision or action.

In addition to the exemptions found in KRS 61.878(1) (i) and (j), WKU maintains that production of the requested records violate the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1)(a) and (k). Specifically, in complying with Title IX of the Education Amendments of 1972, WKU is required to respond to complaints of sex and/or gender based discrimination and to do so with the utmost discretion and confidentiality that can be afforded the investigative process. Disclosure of investigative materials would significantly stifle complainants from reporting sex and/or gender based discrimination and witness cooperation in the investigative process. In addition, FERPA and its implementing regulations protects student records contained within many of the files requested from the Herald from disclosure.

Finally, disclosure of the requested records would constitute a clearly unwarranted invasion of personal privacy for all involved parties, an exemption within the Open Records Act at KRS 61.878 (1)(a). See Kentucky New Era, Inc. v. City of Hopkinsville, 415 S.W.3d (Ky. 2013), public privacy exemption becomes more viable the more "intimate and sensitive" the information and "as



the possible consequences of disclosure become more adverse.” Unquestionably sexual misconduct investigative files contain allegations and details which are by their very nature “intimate and sensitive” and there are serious consequences for all parties in disclosure of such information including, but not limited to, re-victimization for the reporting party, threat of retaliation, and social and economic stigma. See also Cape Publications, Inc. v. University of Louisville Foundation, Inc., 260 S.W.3d 818 (Ky. 2008) wherein the court instituted a two part test to determine the applicability of the personal privacy exception: (1) whether the requested information is of a personal nature and (2) whether the privacy interest outweighs the public interest in disclosure. Certainly, if monetary contributions to a foundation are deemed of a “personal nature” as established in Cape then allegations of sexual misconduct defined by the Herald as sexual assault, sexual harassment, sexual exploitation and/or stalking are “personal in nature.” Secondly, the public has no legitimate interest in disclosure of this information. The six employees found to be in violation of WKU policy are no longer employed at the University. The remaining 14 employees accused of violation of WKU’s Sexual Misconduct Policy were not found to be in violation of WKU’s policy. To produce the investigative files for those complaints would be a grave injustice to those individuals whose names would become irretrievably linked to a complaint of sexual misconduct which no such finding was made—particularly when the involved parties had and retain an expectation of privacy as the anonymous donors did in Cape. Id. at 824.

Moreover, merely redacting names of the complainant does not shield the complainant and supporting witnesses from disclosure. There is significant detail in the files (dates, department, classes, physical descriptions, locations, etc.) which are specific to each complaint and that would certainly allow for discovery of those affected with even a cursory inquiry from an interested party.

WKU respectfully requests that the Herald’s appeal be held in abeyance pending the outcome of the litigation over this very open records request. Alternately, WKU requests that the Herald’s appeal be denied on the basis that the records requested are preliminary in nature and were not incorporated into a final agency action and further, that the requested records are exempt from disclosure by federal and state law in addition to the personal privacy exemption of the Kentucky Open Records Act.

Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,



Andrea P. Anderson  
Assistant General Counsel

Cc: Nicole Ares, College Heights Herald

# Exhibit G



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR  
ATTORNEY GENERAL

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

November 29, 2016

Ms. Andrea P. Anderson  
Assistant General Counsel  
Office of Legal Counsel  
Western Kentucky University  
1906 College Heights Boulevard, #11001  
Bowling Green, Kentucky 42101-1001

Re: Open Records Appeal - Log Number 201600456

Dear Ms. Anderson:

As you are aware, Matthew Smith, *Kentucky Kernel*, has appealed Western Kentucky University's denial of his October 18, 2016, request "to obtain all investigative records for all Title IX allegations of sexual misconduct allegations levied against university employees in the past five years." On behalf of Western Kentucky University ("WKU"), you denied Mr. Smith's request on the grounds that the investigations are exempt from disclosure as they are preliminary records pursuant to KRS 61.878(1)(i) and (j); are exempt from disclosure pursuant to KRS 61.878(1)(a) and (k) due to FERPA confidentiality requirements; and are exempt under KRS 61.878(1)(a) as the requested records contain information of a personal nature where the public release thereof would constitute a clearly unwarranted invasion of personal privacy. Your letter states that mere redaction of the complainants' names would not shield the complainants or witnesses from disclosure due to the level of detail contained in the requested records.

Your letter requests that our office put Mr. Smith's request in abeyance until there is an outcome in the litigation between the University of Kentucky and the *Kentucky Kernel*. We cannot hold the appeal in abeyance as there simply is no provision in the

Letter to Andrea P. Anderson  
November 29, 2016  
Page Two

Open Records Act that would permit such a delay. Pursuant to KRS 61.880(2)(a), our office has only 20 days to issue a decision in an Open Records appeal, unless that period is extended an additional 30 business days due to unusual circumstances. One of those unusual circumstances occurs when this office needs to obtain additional documentation from the agency and/or a copy of the records involved.

KRS 61.880(2)(c) states that the burden of proof is on the agency to sustain its action in withholding public records. That statute also gives the Office of the Attorney General the authority to request "additional documentation from the agency for substantiation" and "[t]he Attorney General may also request a copy of the records involved but they shall not be disclosed." In order to carry out its statutory duty, pursuant to KRS 61.880(2)(a), to issue a written decision stating whether the agency violated provisions of the Open Records Act, this office requires that WKU provide a copy of the records involved in Mr. Smith's request, including any records that you do not contend are exempt. Pursuant to KRS 61.880(2)(c) and 40 KAR 1:030 Section 3, the records will be held confidentially, will not be disclosed to the public, and will be destroyed at the time the decision is rendered. If the University asserts FERPA protection for the identity of students, we will accept redacted copies of the records withheld but only to protect names and personal identifiers of students.

In addition to providing copies of the requested records, please describe, in general terms, the process of investigation/disciplinary proceedings by which a WKU professor or employee, against whom allegations of sexual misconduct are made by a WKU student or another WKU employee, is conducted. Please provide me with a copy of any WKU regulations or policies implicated in the records involved in Mr. Smith's request. Please include in your description the types of records generated during such an investigation, who creates those records, to whom the records are sent, and who receives the records. If any other written materials exist addressing this process, please provide me with a copy of those materials and identify the pertinent portions.

In addition to providing copies of the requested records, please provide answers to the following requests for information:

1. In your letter you stated: "Likewise, the remaining 14 investigative files did not result in any action or inaction on behalf of WKU; the matter concluded

Letter to Andrea P. Anderson  
Page Three  
November 29, 2016

with the opinion that there was no internal policy violation, an opinion held by a particular individual, not the University's determination on the issue."

Please explain:

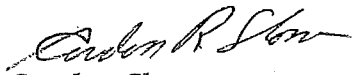
- a. Who the individual is whose opinion it was that there was no internal policy violation; and
- b. Why that person's opinion was relevant in concluding each of those matters.

In light of statutory time constraints imposed on this office by KRS 61.880(2), please ensure that your written response is received in this office **on or before December 21, 2016**, and provide Mr. Smith with a copy of your response excluding, of course, the records in dispute.

We appreciate your cooperation in this matter.

Sincerely,

Andy Beshear  
Attorney General

  
Gordon Slone  
Assistant Attorney General

#456

cc: Matthew Smith

# Exhibit H



A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH  
OFFICE OF THE GENERAL COUNSEL

December 21, 2016

**VIA ELECTRONIC AND USPS MAIL**

Gordon Slone  
Attorney General's Office  
700 Capital Avenue  
Frankfort, Kentucky 40601

In re: Student Publications—Open Records Appeal Log No. 201600456

Dear Mr. Slone:

Please allow this letter to serve as a response to your letter of November 29, 2016 requiring Western Kentucky University's ("WKU") to produce all investigative files for an *in camera* inspection and requesting additional information about WKU's investigative process for sexual misconduct complaints.

WKU respectfully requests that you affirm WKU's response of withholding the requested records pending resolution of the litigation between the University of Kentucky and the Kentucky Kernel. WKU has every intention to comply with the court's order in the litigation between the University of Kentucky and the Kentucky Kernel.

WKU respectfully contends that federal law prohibits production of the requested records for an *in camera* inspection. While your letter states that to the extent WKU asserts Family Educational Rights and Privacy Act ("FERPA") protection for student records, WKU could produce redacted copies of the affected records; however, WKU is not aware of any exception contained with FERPA for production of records under such circumstances. WKU must have consent from the student complainants or witnesses in order to release the request records unless the records are being released for a "legitimate educational interest," "health or safety emergency," or other exception contained within 34 CFR 99.31, none of which is applicable to Kentucky Open Records Act.

In addition to FERPA, WKU asserts that Title IX prohibits the disclosure of all investigative files. Even when confidentiality is not specifically requested by the parties, the Office of Civil Rights provides that information regarding alleged incidents of sexual misconduct should only be disclosed to individuals responsible for handling the institutional response. See April 29,

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2014 OCR's Questions & Answers on Title IX and Sexual Violence. In this document, OCR warns institutions of the "chilling effect" failing to maintain confidentiality will have on the institutions' ability to respond effectively to sexual misconduct complaints.

For a number of years, the established precedent in this state has been to avoid required submission of protected materials for *in camera* inspection with the expectation that universities can properly interpret and apply federal law to ensure that "public records are not improperly withheld in the name of student privacy." See 12-ORD-220, Kentucky Kernel/University of Kentucky. The recent deviation from this precedent in 16-ORD-113, Hatemi/Kentucky Medical Services Foundation, places WKU in a precarious position-- be complaint and risk certain violation of federal law.

Moreover, merely redacting student names and personal identifiers of students would not be sufficient to protect the identity of student reporting parties or witnesses who should be afforded privacy under both federal and state law. Sexual misconduct investigations contain detailed information about the involved parties and the respective witnesses such as how and where the reporting and responding parties met, prior course of dealing between the parties, if any, details about a particular course of instruction, employment position, field of study and/or department, and specifics regarding the location(s) of the alleged act(s) of discrimination which could easily lead to the identity of those sought to be protected.

For the above stated reasons, WKU respectfully requests that you affirm WKU's response of withholding the requested records.

As you requested, please allow the remaining portion of this letter to explain the investigation process and disciplinary proceedings for sexual misconduct allegations. The requested WKU policies are attached.

The investigation into allegations of sexual misconduct made against WKU employees is conducted by a Title IX Investigator and/or Coordinator. An investigation is conducted when the complaint, having passed an initial inquiry or gatekeeping analysis, could rise to level of a policy violation. Meetings are conducted with the reporting and responding parties as well as witnesses. Demonstrative evidence is collected, to the extent it is available, often in the form of emails or text messages. Additional meetings are held with reporting and responding parties to allow parties to refute witness statements and for the Investigator or Coordinator to follow up on any additional matters raised during the investigation.

Once the investigation is complete, the Title IX Investigator and/or Coordinator performs an analysis of the evidence noting corroborating statements, unsubstantiated allegations and credibility assessment, and determines, using the preponderance of evidence standard established by the Office of Civil Rights, whether the WKU employee violated WKU's Sexual Harassment/Discrimination Policy and/or Sexual Misconduct/Assault policy.

As required by Title IX, simultaneous notification of the outcome of the investigation is shared with the reporting and responding parties. Notice of the outcome is also shared with the responding party's department head, human resource director, and if the responding party is a



faculty member, provost and/or vice provost. The notices contain a statement assuring the reporting and responding parties of the confidentiality of the investigation and subsequent findings, an essential element of Title IX investigations. See April 29, 2014 Questions & Answers on Title IX and Sexual Violence, OCR.

With regard to your request for clarification on the statement that there was no internal policy violation for 14 of the 20 investigations during the relevant time period, the Title IX Investigator and/or Coordinator was responsible for making the finding, based upon the preponderance of evidence, whether WKU's policy was violated. His or her opinion is relevant only in the context of institutional obligations under Title IX. The Title IX Investigator and Coordinator do not have authority to institute disciplinary proceedings, take employment action or other final agency action. At no point during the relevant five year time period did the Title IX Investigator and/or Coordinator make a determination as to whether an employee accused of sexual misconduct could remain employed or must be terminated or resign from his or her position.

Please see [www.wku.edu/academicaffairs/documents/master-wku-faculty-handbook-22nd-edition](http://www.wku.edu/academicaffairs/documents/master-wku-faculty-handbook-22nd-edition), section VII, outlining the disciplinary process for tenured and non-tenured faculty. With regard to the for-cause procedures set forth therein, these policies were not utilized in any of the twenty sexual misconduct investigations.

WKU does not have an established disciplinary process for non-faculty employees, the majority of which serve as at-will employees at the discretion of the University.

The requested investigative files do not contain disciplinary records, settlement agreements, resignation documentation, retirement records or other personnel documents, and specifically with regard to settlement agreements, such documentation does not exist because no such agreement were reached in any of the twenty investigations conducted in the relevant time period.

WKU must respectfully decline to produce the requested records for *in camera* inspection due to concern that doing so would violate federal law.

Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,



Andrea P. Anderson  
Assistant General Counsel

Cc: Matthew Smith, Kentucky Kernel

# Exhibit I



COMMONWEALTH OF KENTUCKY  
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR  
ATTORNEY GENERAL

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

17-ORD-014

January 26, 2017

In re: Matthew Smith and Nicole Ares/Western Kentucky University

*Summary:* Records relating to university's investigations into allegations of sexual misconduct were not shown to be protected by exceptions relied upon by the university where Attorney General was not given records to review under authority of KRS 61.880(2)(c).

*Open Records Decision*

Matthew Smith, *Kentucky Kernel*, by letter dated October 18, 2016, made an open records request to Western Kentucky University ("WKU" or "University") "to obtain all investigative records for all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years." Andrea P. Anderson, Assistant General Counsel, WKU, denied Mr. Smith's request by letter dated October 28, 2016, explaining:

In reviewing the information you requested and using your definition of sexual misconduct from 2013 (the first year WKU began investigating sex and gender based discrimination complaints under Title IX) to the present, WKU conducted 20 investigation [sic] with WKU employees as the responding party. Nine of those investigations were of WKU faculty and eleven investigations were of WKU staff. Of the twenty total investigation [sic] conducted, six of the investigations resulted in a finding of a WKU policy violation. All six employees of those employees

resigned from their respective positions prior to any final action by the University.

WKU cited KRS 61.878(1)(i) and (j) as exceptions<sup>1</sup> to the Open Records Act which allow a public agency to withhold certain records. In citing these exceptions, WKU explained:

The information you requested falls within the two above referenced exceptions to disclosure under the Kentucky Open Records Act. The University is denying your request for the electronic mail records on the basis that these are exempt under KRS 61.878(j) in that the records do not pertain to any final agency action, nor were they adopted as part of a final agency action.

Nicole Ares, *College Heights Herald*, by letter dated November 1, 2016, made an Open Records request to WKU that was virtually identical to Mr. Smith's request. Ms. Ares requested access "to all investigative records for all Title IX investigations into sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation and/or stalking against Western Kentucky University employees in the last five years." By letter dated November 2, 2016, Ms. Anderson denied the request by Ms. Ares using the identical exceptions and explanation as she used in responding to Mr. Smith's request. As with Mr. Smith's Open Records request, the University provided no records in response to Ms. Ares' request.

Mr. Smith appealed WKU's denial to the Office of the Attorney General by letter dated November 1, 2016, and Ms. Ares appealed WKU's denial by letter dated November 21, 2016. Ms. Anderson, on behalf of WKU, replied to Mr. Smith's appeal on November 21, 2016, and replied to Ms. Ares' appeal on November 30, 2016. The responses by WKU were identical in substance. In

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<sup>1</sup> KRS 61.878(1) (i) and (j) state:

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.

those responses, WKU broadly<sup>2</sup> explained the types of records that were being withheld.

After briefly describing the types of files withheld, WKU again cited KRS 61.878(1)(i) and (j) as exceptions allowing the investigative files to be withheld. The University maintained that, in the six cases where a WKU employee resigned or retired, "[t]he investigative materials requested by the Kernel did not result in adoption of these preliminary documents as the basis for final action at WKU." WKU further maintained that the resignation/retirement of those employees did not result in the adoption of the preliminary records as the basis for final action at WKU, and therefore those records did not lose their preliminary status and therefore need not be disclosed.

The University also claimed that production of the requested records would violate the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1)(a)<sup>3</sup> and (k).<sup>4</sup> WKU also stated: "The issue of whether Title IX investigative records are exempt from disclosure under the Kentucky Open Records Act is currently being litigated in Fayette Circuit Court

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<sup>2</sup> WKU disclosed that during the relevant time period, "it conducted 20 investigations with WKU employees as the responding party. Those 20 files contain notes from meetings/ interviews with the reporting and responding parties and witnesses, witness lists, calendar entries, and email communications between university employees, predominately between the Title IX Coordinator or Investigator and his/her staff as to the strategy to utilize in conducting the investigation, requests for legal advice involving WKU's General Counsel and the exchange of opinions, observations, and/or recommendations for conducting the investigation. In addition, some files contain memorandum, including draft versions of the memorandum, of opinions as to whether a WKU employee violated internal policies; however, of the six investigations that resulted in a finding of a WKU policy violation, all six employees resigned or retired before any action was taken by WKU. Likewise, the remaining 14 investigative files did not result in any action or inaction on behalf of WKU; the matter concluded with the opinion that there was no internal policy violation, an opinion held by a particular individual, not the University's determination on the issue."

<sup>3</sup> KRS 61.878(1)(a) provides an exception to the Open Records Act for: "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

<sup>4</sup> KRS 61.878(1)(k) provides an exception for: "All public records or information the disclosure of which is prohibited by federal law or regulation."

and is a matter of first impression. WKU respectfully requests that this appeal be held in abeyance pending the outcome of this litigation.”<sup>5,6</sup>

Unable to resolve the issues on appeal based on WKU’s original denials and responses to the appeals, on November 29, 2016, this office requested additional documentation and copies of the records involved in Mr. Smith’s request<sup>7</sup> from WKU pursuant to the authority granted this office by KRS 61.880(2)(c). In order for this office to meet the statutory deadline imposed by KRS 61.880(2)(b) for issuance of its decision on the appeal, the documentation was to be provided no later than December 21, 2016. WKU responded on December 21, 2016, but did not provide the requested records for our *in camera* review. WKU claimed that “federal law prohibits production of the requested records for an *in camera* inspection...In addition to FERPA, WKU asserts that Title IX prohibits disclosure of all investigative files.”<sup>8</sup>

In its request for the records at issue to be provided for *in camera* review, this office allowed: “If the University asserts FERPA protection for the identity of students, we will accept redacted copies of the records withheld but only to protect the names and personal identifiers of students.” WKU’s response to that allowance was:

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<sup>5</sup> As a matter of clarification, we note that the issue being litigated in Fayette Circuit Court is not whether Title IX investigative records are categorically exempt under the Open Records Act, as WKU asserts. The issue is whether The Family Educational Rights and Privacy Act, 20 U.S.C. 1232g (or “FERPA”), prohibits disclosure of specific investigative records either collected for or generated as a result of a Title IX sexual assault investigation. The issue between the University and the *Kentucky Kernel*, as it relates to FERPA, is determining whether the specific investigative records are, in fact, FERPA-protected “education records,” and therefore exempt under the Act, and/or whether such “education records,” if any, can be sufficiently redacted as to allow disclosure to the *Kernel*.

<sup>6</sup> KRS 61.880(2)(b) does not permit this office to hold a decision in abeyance. An extension of the 20 business day deadline for issuing a decision can only be extended for an additional 30 business days for three reasons: 1. The need to obtain additional documentation from the agency or a copy of the records involved; 2. The need to conduct extensive research on issues of first impression; or 3. An unmanageable increase in the number of appeals received by the Attorney General.

<sup>7</sup> By letter of December 7, 2016, this office advised WKU that it would not request a separate copy of the records based on Ms. Ares’ request as her request was virtually identical to Mr. Smith’s Open Records request. Review of the records provided in Mr. Smith’s appeal would suffice for the review necessary to advise this office regarding Ms. Ares’s request.

<sup>8</sup> WKU cited, for support of this claim, “Questions & Answers on Title IX and Sexual Violence,” April 29, 2014, Office of Civil Rights, U.S. Department of Education.

Moreover, merely redacting student names and personal identifiers of students would not be sufficient to protect the identity of student reporting parties or witnesses who should be afforded privacy under both federal and state law. Sexual misconduct investigations contain detailed information about the involved parties and the respective witnesses such as how and where the reporting and responding parties met, prior course of dealing between the parties, if any, details about a particular course of instruction, employment position, field of study and/or department, and specifics regarding the location(s) of the alleged act(s) of discrimination which could easily lead to the identity of those sought to be protected. For the above stated reasons, WKU respectfully requests that you affirm WKU's response of withholding the requested records.

When an agency's denial of an Open Records request is appealed to the Office of the Attorney General, this office is statutorily tasked by KRS 61.880(2)(a) to "issue . . . a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884." KRS 61.880(2)(c) provides:

On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. *The burden of proof in sustaining the action shall rest with the agency, and the 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. (Emphasis added.)

Within a single sentence, the legislature assigns the burden of proof to the agency resisting disclosure, and invests the Attorney General with the authority to "request additional documentation *for substantiation.*" (Emphasis added.) As we observed at page 2 of 12-ORD-220, "when denied the opportunity to review the [disputed] records [or documentation necessary 'for substantiation'] 'the Attorney General's ability to render a reasoned open records decision [is] severely impaired.'" Citing 96-ORD-106, p. 5, and 10-ORD-079, p. 5. Such is the case in the appeal before us. It is the Attorney General's duty to conduct a meaningful review and issue an informed and reasoned decision, guided by the statutorily assigned agency burden of proof.

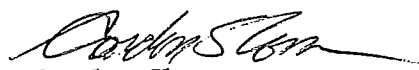
"The Kentucky Open Records Act provides for an '*adjudicatory process*' where an individual who receives an unsatisfactory response to an open records request may appeal to the Attorney General. At the conclusion of the process, the Attorney General issues an opinion, which if not appealed to the circuit court, has the 'force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.'" *Taylor v. Maxson*, 483 S.W.3d 852, 857 (Ky. Ct. App. 2016), *citing* KRS 61.880(5)(b). As the Office of the Attorney General is charged with issuing decisions that have the full force and effect of law (unless appealed), it must have access, as needed, to the records at issue in order to make a fully informed decision.

The Attorney General's decision of whether or not to request additional documentation from the agency for substantiation, or a copy of the records involved, is discretionary and based on the facts specific to each appeal.

Accordingly, we find that WKU failed to meet its burden of proof in denying the requests of Mr. Smith and Ms. Ares and must make immediate provision for them to inspect and copy the disputed records with the exception of the names and personal identifiers of the complainant and witnesses per KRS 61.878(1)(a) as construed in 99-ORD-39 and 02-ORD-231 (copies enclosed).

The parties herein may appeal this decision 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 must be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Andy Beshear  
Attorney General

  
Gordon Slone  
Assistant Attorney General



17-ORD-014

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Distributed to:

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Matthew Smith

Nicole Ares

**COMMONWEALTH OF KENTUCKY  
WARREN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 17-CI-00233**

WESTERN KENTUCKY UNIVERSITY

PLAINTIFF/APPELLANT

v.

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

DEFENDANT/APPELLEE

AND

THE COLLEGE HEIGHTS HERALD

DEFENDANT/APPELLEE

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**ORDER**

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This matter having come before the Court on the motion of the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, to intervene as a matter of right as a Plaintiff herein, the Court having considered the record and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the motion is GRANTED, and the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, is joined as an Intervening Plaintiff herein. The tendered Intervening Complaint is deemed FILED as of the date of the entry of this Order. The Intervening Plaintiff shall have the right to submit a brief herein on the issues raised in the Intervening Complaint.

This is a final and appealable order and there is no just cause for delay.

So ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

\_\_\_\_\_  
HON. STEVE WILSON  
JUDGE, WARREN CIRCUIT COURT

DATE: \_\_\_\_\_

Tendered by:

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