COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION 8
CASE NO. 16-CI-03229

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

v.

THE KERNEL PRESS, INC., d/b/a THE KENTUCKY KERNEL — DEFENDANT/APPELLEE

and

UNIVERSITY OF KENTUCKY — INTERVENING DEFENDANT

INTERVENING PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes the Intervening Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General (hereinafter "Attorney General"), and submits this Memorandum of Law in support of its Motion for Summary Judgment.

MEMORANDUM IN SUPPORT OF THE INTERVENING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Attorney General is entitled to judgment as a matter of law. Under KRS 61.880(2), the Attorney General has the authority to request and review, *in camera*, documents from a public agency that denies an open records request. The General Assembly provided this authority to the Attorney General – without exception – because it is necessary to properly adjudicate open records appeals. Indeed, in some cases, the Attorney General cannot render a proper, reasoned decision without such a review. Moreover, without the "check" that the

statutory review provides, a public agency could withhold documents on false grounds, yet rarely be caught.

The Intervening Defendant, University of Kentucky (hereinafter "the University"), willfully violated KRS 61.880 in the underlying open records appeal when it refused to provide ***any*** records to the Attorney General upon his lawful request for *in camera* review, including 470 records that the University admittedly disclosed to the *Kentucky Kernel* in April 2016. The University's recent admission that it failed to provide the Attorney General even those 470 non-exempt records is dispositive. The University also provided inaccurate or incomplete information to the Attorney General.

The University violated the plain and unambiguous language of the Act, and intentionally subverted its intent. As such, the Attorney General respectfully requests that this Court grant his Motion for Summary Judgment and enter a judgment in his favor.

BACKGROUND

I. The Attorney General Adjudicates Initial Open Records Appeals

A. The Kentucky Open Records Act Favors Disclosure, Fosters Transparency, and Secures the Public Trust.

In 1976, the Kentucky General Assembly enacted the Open Records Act, KRS 61.870, *et seq.*, (hereinafter "the Act"). The Act established the public's right of access to public records in the Commonwealth. Under the law, the General Assembly declared "that free and open records is in the public interest… ." KRS 61.871.

The Kentucky Supreme Court has since recognized "[t]he [Open Records] Act was intended to make transparent the operations of the State's agencies." *Lawson v. Office of the Attorney General*, 415 S.W.3d 59 (Ky. 2013). As such, "[t]he statute exhibits a general bias favoring disclosure ... ." *Id.* As the Court held in *Cabinet for Health and Family Services v.*

Courier Journal: Public entities must permit inspection of public records as required or risk meaningful punishment for noncompliance. "Rigid adherence to this stark principle is the lifeblood of a law which rightly favors disclosure, fosters **transparency**, and secures the public trust." 493 S.W.3d 375, 389 (Ky. 2016).

B. The Attorney General Adjudicates Open Records Appeals So the Public May Secure Documents Without Incurring the Time and Costs of Going to Court.

Because of the strong public policy favoring transparency, a public agency denying a request must provide particular and detailed information to public requester. Under KRS 61.880(1), this information must include which records are being withheld, the specific exemption authorizing the withholding, and a brief explanation of how the exemption applies to each record.[1] *See* KRS 61.880(1).

A person whose open records request is denied may appeal that denial to the Attorney General. KRS 61.880(2)(a).[2] "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." *See Taylor v. Maxson*, 483 S.W.3d, 852, 857 (Ky. App. 2016) (*citing* KRS 61.880(5)(b)); 40 KAR 1:030. Specifically, KRS 61.880(2)(a) requires the Attorney General to adjudicate open records appeals, stating:

> "… The Attorney General shall review the request and denial and issue … a written decision stating whether the agency violated provisions of KRS 61.860 to 61.884."[3]

[1] While not the subject of this brief, the Attorney General believes that the University's refusal to provide any specific breakdown of the documents in the investigative file and its continued refusal to specifically state what claimed exemption applies to what document or portion of a document failed to meet these statutory requirements.

[2] Direct appeals may also be made to a Circuit Court, but that is not the case here. KRS 61.882.

[3] The Attorney General's authority to review open records appeals pursuant to KRS 61.880(2) encompasses any of a public agency's claimed exemptions under KRS 61.878.

The reasons for placing this adjudication with the Attorney General were voiced by Representative Joseph Clark, the Chairman of the Subcommittee on Open Records that led to the passage of the Act. Chairman Clarke remarked that as the law then existed, it was very difficult, if not impossible, for individuals and small newspapers to get access to a record through courts because of the time and cost involved. *See Interim Committee on State Gov't, Subcommittee on Open Records, Minutes of First Meeting of the 1974-76 Biennium*, p. 2 (February 25, 1975). The General Assembly therefore created a system where the Attorney General would have all necessary powers to render a proper decision.

C. To Properly Adjudicate Appeals, Kentucky Law Provides the Attorney General the Power to Confidentially Review the Documents at Issue.

The appeals process under the Act also favors transparency. During an appeal, the public agency that refuses to produce – not the requester – has the burden of proof to demonstrate that the records it claims to be exempt from disclosure to the public are, in fact, exempt under the Act. KRS 61.880(2). To determine if the public agency has met this burden, the General Assembly provided the Attorney General with the authority to review the withheld documentation, *in camera*, in order to substantiate the agency's claimed exemptions and to determine whether the agency has met its burden of proof. KRS 61.880(2)(c). As KRS 61.880(2)(c) provides:

> "… 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).

Importantly, this review is truly *in camera*, with no risk of public disclosure. State regulation, under 40 KAR 1:030(3), prohibits the Attorney General from disclosing any documents an agency claims are exempt from the Open Records Act, and requires that he destroy the copies when he renders the decision. Specifically, 40 KAR 1:030(3) provides:

> "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."

These provisions ensure complete confidentiality during and after the Attorney General's review. *Id*. Indeed, they expressly mandate a confidentiality that may not exist if an appeal was brought directly to the Circuit Court.

Although the University believes the exemptions to the public disclosure of records found in KRS 61.878 apply to the Attorney General's review under KRS 61.880(2)(c), the General Assembly expressly disagrees in KRS 61.871. That provision provides:

> "The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the *exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.*"

(Emphasis added.).

The exceptions are to be read narrowly towards the agency attempting to make use of them. The mandated strict construction applies to the exceptions to the disclosure of public records in KRS 61.878 or otherwise provided by law, including FERPA in the context of the public requester. By no operation of statutory construction can it extend to the Attorney General's authority to review records confidentially, *in camera*, under KRS 61.880(2)(c).

The Attorney General must issue a decision within twenty (20) days of the filing of the appeal. KRS 61.880(2)(a). If a party does not appeal the Attorney General's decision within thirty (30) days, the decision has the force and effect of law. KRS 61.880(5)(b). Either party may appeal the Attorney General's decision to the Circuit Court. KRS 61.880(5)(a), 61.882.

II. During Its Open Records Appeal, the University Refused to Provide Any Records – Including Non-Exempt Records – For Review Under KRS 61.880(2)(c).

In the Spring of 2016, the *Kernel* made an open records request for allegations of sexual assault against Professor James Harwood. The University provided the Kernel with certain records, but denied the remainder of the request. The *Kernel* appealed the denial to the Attorney General. After reviewing the University's Response to the appeal, the Attorney General requested a confidential review, pursuant to KRS 61.880(2)(c) of the records in dispute as well as the records provided to the *Kernel*. Having refused that request, the University failed to meet its burden of proof, and the Attorney General issued a negative decision.

A. Starting in 2015, the University Investigated a Professor For Sexual Harassment.

In the summer of 2015, the University received a complaint from a graduate student alleging sexual harassment by James Hardwood, a tenured faculty member. While initially the University claimed the existence of a written or "filed" complaint, it later reversed course, now claiming no such written complaint exists. (*See* University's Response to the Appeal, at 1, May 3, 2016) (attached as Exhibit A.); (University's Supplemental Response to the Appeal, at 15, n. 5, June 15, 2016) (attached as Exhibit B.). In response to either the oral or written complaint, the University's Office of Institutional Equity and Equal Opportunity launched an investigation into the complaint pursuant to Title IX, 20 U.S.C §§1681-88. (*See* Exhibit A, University's Response to the Appeal, at 1.). To be clear, this was an investigation into a professor, not a student.

The investigation culminated in February 2016, when the University entered into a settlement agreement with the professor, whereby he agreed to resign from the University, effective August 31, 2016. (Exhibit A, University's Response to the Appeal, at 2.).

B. The University Denied the University's Student Newspaper's Open Records Request Seeking Documents Related to the Investigation.

By letter sent on or about April 6, 2016[4] William Wright of the *Kernel* made a written request for documents related to this investigation. Pursuant to KRS 61.872, he requested:

> "copies of all records detailing the investigation by the University of Kentucky of the Office of Institutional Equity and Equal Opportunity of [former University of Kentucky professor] James Harwood and any allegations of sexual harassment, sexual assault, or any other misconduct by James Harwood."

(*See Kernel*'s Open Records Request, at 1) (attached as Exhibit D.).

The Kernel's narrow request sought records "detailing the University's investigation *of Professor James Harwood,* and allegations of sexual harassment, sexual assault, or any other misconduct *by Professor Harwood*." (*Id*.) (Emphasis added). Importantly, the *Kernel*'s request did not seek documents related to the investigation of any student, nor did it seek documents related to any alleged victims or witnesses. It focused solely on records directly related to the University's investigation against Professor James Harwood.[5]

On April 11, 2016, the University acknowledged, by way of letter, that it had received the *Kernel*'s Open Records Request on April 7, 2016. (*See* University's Denial Letter, at 1) (attached as Exhibit E.). The University's letter advised that all records the *Kernel* requested were "unable to be released," citing KRS 61.878(1)(a), (i), and (j). (*Id*.) The University stated that it considered ***"all"*** the requested documents preliminary and exempt under KRS 61.878(1)(i) and (j), **"*some*"** of the records of a personal nature and exempt under KRS § 61.878(1)(a), and ***"some"*** of the records subject to KRE 503 on the basis that they were attorney-client and work

[4] Although the Kernel's request letter is dated January 18, 2016, its appeal letter suggests that the request was not sent to the University before April 6, 2016. (*See* Kernel's Open Records Appeal) (attached as Exhibit C.).

[5] Although claiming the Kernel's request to be "extensive," the University later acknowledged that the scope of the Kernel's request was in fact limited to materials "related to the accused professor, the allegations, and the investigation." (*See* Exhibit A, University's Response to the Appeal, at 2.).

product privileged. (*Id*.) (Emphasis added). The University did not, however, claim the documents were protected under FERPA or any other federal law.

C. The Kernel Filed an Appeal With the Attorney General's Office, Which Requested Review the Withheld Documents *In Camera*

On April 22, 2016, the Kernel appealed the University's denial of its request to the Attorney General pursuant to KRS 61.880(2). (*See* Exhibit C, the *Kernel*'s Open Records Appeal.). On May 3, 2016, the University responded to the *Kernel*'s Appeal. (*See generally*, Exhibit A, University's Response to the Appeal.).

In this initial response, the University argued that every investigation it undertakes is "preliminary" and thus never subject to open records, or that every portion of every investigation invokes "personal privacy," and thus none of its records are or will ever be open. (*See id*.) Specifically, the University argued that all "investigative reports of the University's Office for Institutional Equity and Equal Opportunity are preliminary."[6] The University next claimed that "***all*** the investigative records" are exempt from disclosure under KRS 61.878(1)(a), despite its earlier, April 11, 2016, contention that only "***some*** of the documents in the file" are exempt under KRS 61.878(1)(a). (*Id*., at 3-5.) (Emphasis added).

This was but the first example of what would become an expanding list of new or different reasons that were not provided to the *Kernel* in the official denial, but would be later added in a seemingly desperate attempt to avoid transparency. Indeed, in its response, the University now argued that the "Attorney Client/Work Product Privilege [a]pplies to the [i]nvestigative [m]aterials," on the basis that University Counsel "relied heavily on the

[6] Interestingly, in its, May 3, 2016, Response to the Kernel's Appeal, the University limits its assertion of the exemption to "investigative reports of the University's Office for Institutional Equity and Equal," not foreclosing the possibility that other responsive non-exempt records exist relating to the University's investigation of Professor James Harwood. (*See* Exhibit A, University's Response to the Appeal, at 3.).

investigative reports in formulating legal advice to senior administrators." (*Id*., at 5-6.). This position directly contradicted the April 11, 2016 denial letter, wherein the University said only ***"some"*** of the records were protected by the attorney-client privilege/work product doctrine. (*See* Exhibit E, University's Denial Letter.) (Emphasis added). Like the investigative record claims, the University's attorney-client privilege somehow expanded on appeal, meaning the University could refuse to produce any documents.

In a footnote, the University also – for the first time – claimed that some records *might* be FERPA-protected "education records," stating: "[t]o the extent the investigative records are educational records within the meaning of 20 U.S.C. § 1232g, federal law prohibits the University from disclosing the records." (*See* Exhibit A, University's Response to the Appeal, at 5, n. 2.). However, the University failed to argue whether any of the "investigative records" were, in fact, "educational records," or to further expound on this claim. (*See id.*).

In order to clarify the University's expanding arguments, on May 26, 2016, the Attorney General requested additional information pursuant to KRS 61.880(2)(c), by way of written responses and documentation from the University, to "substantiate" the University's denial. (*See* Attorney General's Request Letter, at 2) (attached as Exhibit F.). The Attorney General requested both the disputed and undisputed records, as well as other information. (*Id*.) Specifically, the Attorney General requested the following documents:

> 6. Please provide the Office of the Attorney General with a copy of all records released to Mr. Wright [Report for the Kernel] and a copy of all responsive records to which he was denied access, clearly identifying each set of records. 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 identified… . Pursuant to KRS 61.880(2)(c), we will maintain the confidentiality of those records.

(*Id*.).

On June 15, 2016, the University supplemented its May 3, 2016, response, again adding new reasons for its refusal to produce the records. (*See generally*, Exhibit B, University's Supplemental Response to the Appeal.). Specifically, the University introduced a **new** argument stating, "multiple federal laws prohibit disclosure of the records," citing FERPA, the Clery Act, Violence Against Women Act ("VAWA"), and implementing regulations. *See* 20 U.S.C §1232g, 20 U.S.C. § 1092(f)(8)(B)(v), 34 C.F.R. Part 99, and 34 C.F.R. § 668.46(b)(11)(iii). (*Id*. at 9.).

D. The University Refused to Provide the Attorney General Documents Requested Under KRS 61.880(2)(c), Resulting In a Negative Ruling Based on the Burden of Proof.

The University failed to provide the Attorney General with **any** of the requested records, whether disputed or undisputed, to substantiate its claims, including some 470 pages of records the University admittedly provided to the *Kernel*.[7] Those records included, for example, the University's policies on sexual harassment and sexual assault.

In an unprecedented move, the University argued that the Attorney General did not have authority to conduct a confidential, *in camera*, review of the disputed documents. Invoking FERPA and the attorney-client privilege, the University argued that the Attorney General has a limited role under KRS 61.880(2)(c). (*See generally*, Exhibit B, University's Supplemental Response to the Appeal.). Specifically, the University contended that providing the records to the Attorney General for *in camera* review and substantiation of the University's numerous claimed exemptions would waive privilege and/or violate federal law, would disrupt the

[7] The University earlier claimed that it has provided the Kernel with "a wide variety of materials – including the agreement with the accused professor, but withheld the investigation materials [on the basis of the University's claim exemptions and privileges]." (*See* Exhibit A, University's Response to the Appeal, at 2.). The Attorney General was not provided the 470 pages disclosed to the *Kernel*.

separation of powers between executive branch components, and finally that *in camera* review is inappropriate except in extraordinary circumstances, and then only by a Court. (*Id*.).

As a result of the University's refusal to provide **any** records to substantiate its claims, on August 1, 2016, the Attorney General issued the Open Records Decision, *In re Kentucky Kernel/University of Kentucky*, 16-ORD-161. In 16-ORD-161, the Attorney General found that:

"[T]he University failed to meet its burden of proof in denying the Kernel's request, and the University must make immediate provision for [the Kernel's] inspection and copying of the disputed records with the exception of the names and personal identifiers of the complainant and witnesses per KRS 61.878(1)(a)."[8]

III. The University's Appeal to Fayette Circuit Court, During which it Admitted to Refusing to Provide Even Non-Exempt Documents for Review.

On August 31, 2016, the University commenced this action by filing its Complaint and Notice of Appeal. In its Complaint, the University continued to expand its positions, now asserting that, along with FERPA, additional federal privacy laws, including VAWA, the Clery Act, and HIPAA, "trump" the University's obligations under the Open Records Act.[9] The University specifically argued:

> "*While the Attorney General has the authority to review additional records as part of his resolution of an Open Records Act appeal*, this authority is limited to documents that are not protected by attorney-client privilege, a similar privilege, or federal law."

(*See* University's Complaint and Notice of Appeal, at 3, Aug. 31, 2016.) (Emphasis added).

[8] The Attorney General observed that 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. *See* 16-ORD-161.

[9] The University did not state how VAWA, the Clery Act, and/or HIPAA limit the authority of the Attorney General to review disputed records. *See generally*, (Complaint and Notice of Appeal.).

However, despite the University's acknowledgement that the Attorney General has the authority to review additional records as part of his resolution of an Open Records Appeal, the University refused to provide to the Attorney General even the **undisputed** records that it had already disclosed to the *Kernel* – some 470 pages of non-exempt public records. Moreover, although the Attorney General disagrees with the University's contention that his authority is limited, the University implicitly recognizes that even if such limits exist, the Attorney General's authority to review disputed records in Open Records Appeals is broad.[10] Further, the University impliedly acknowledges that the Attorney General has the authority to review the documents it claims are exempt under KRS 61.878(1)(a), (i), and (j), which do not implicate the work-product or attorney-client privileges, or federal law. The University did not provide those documents either.

Notably, the University represented to the Attorney General and the *Kernel* that this open records appeal involved records related to "***a graduate student's*** allegations of sexual assault against a tenured professor." (Exhibit B, University's Supplemental Response to the Appeal, at 2.) (emphasis added). The University further claimed that its search of the records was for "all allegations… [and that] …There were no other allegations." (*Id.* at 2, n. 1). However, the University later acknowledged that there were at least two, and potentially more, victims. Morgan Watkins, *Trustees Criticize UK's Suit Against Newspaper*, USA TODAY, Sept. 9, 2016 http://sports.usatoday.com/2016/09/09/trustees-criticize-uks-suit-against-newspaper/ (last accessed on Jan. 30, 2017).

[10] The University argues that the Attorney General's authority to review documents is limited only by "attorney-client privilege, a similar privilege, or federal law." (*See* Complaint and Notice of Appeal at 3.).

On September 2, 2016, the *Kernel* filed its Answer to the University's Complaint and Notice of Appeal. The Attorney General filed his Motion to Intervene and the Intervening Complaint on September 7, 2016.

On Friday, September 9, 2016, despite the University's pronouncements that disclosure of the records would, "represent [a] clear disregard for victims' and witnesses' privacy rights ...," the University held an open meeting of the Board of Trustees, wherein the University distributed letters of the alleged victims' to the entire board, the press, and visitors, which were then read. Morgan Watkins, *Trustees Criticize UK's Suit Against Newspaper*, USA TODAY, Sept. 9, 2016 http://sports.usatoday.com/2016/09/09/trustees-criticize-uks-suit-against-newspaper/ (last accessed on Jan. 30, 2017). However, the University failed to redact the name of one of the alleged victims from the letters. *Id*. To date, the University is the **only party** to this action that has disclosed the name of any of the alleged victims.[11]

On September 13, 2016, the University filed its Response to the Attorney General's Motion to Intervene. Pursuant to an Agreed Order, the Court deemed the Attorney General's Intervening Complaint filed as of September 20, 2016.

LEGAL STANDARDS

Under CR 56.01, "[a] party seeking to recover upon a claim . . . or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action . . ., move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Pursuant to CR 56.03, summary judgment, "shall be rendered forthwith if the

[11] President Capilouto stated on August 9, 2016, exactly one month prior to the "inadvertent" disclosure of one of the victims' names to the media, "[f]or example we will never disclose the name of a victim of violence who comes forward to reveal a traumatic experience with an expectation of confidentiality." University of Kentucky President, Eli Capilouto, *President's Blog, Tension of Competing Values* (Aug. 9, 2016) available at https://uknow.uky.edu/president-capilouto%E2%80%99s-blog/tension-competing-values (last visited Feb. 2, 2017).

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is designed precisely for a case like this, "when no genuine issues of material fact are raised." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).Under KRS 418.040, the Court may make a binding declaration of rights. Further, pursuant to CR 65.01, the Court may issue a permanent injunction in a final judgment.

ARGUMENT

The Attorney General is entitled to judgment as a matter of law. The University's refusal to provide **any** records or additional documentation to the Attorney General, pursuant to KRS 61.880, for his confidential, *in camera* review willfully violated Kentucky law. The Kentucky General Assembly provided the Attorney General with the unqualified authority to review records that a public agency claims are exempt under the Act. Refusal to provide those records violates the plain language of the Act, subverts its intent, and frustrates – if not eviscerates – the Attorney General's ability to properly adjudicate its appeals. Indeed, in this case, the Court required a virtually identical *in camera* review to render its decision.

Moreover, the University's position creates a clear path for a "bad actor" to avoid the Open Records Law. An agency merely needs to (1) refuse to identify any specific documents, (2) claim FERPA or another exemption, and then (3) refuse the Attorney General's review. The public or press would then be required to hire a lawyer and go to court to secure open records, exactly what the General Assembly sought to avoid.

No genuine issue of material fact exists in this case. The University openly acknowledges that it did not produce any records to the Attorney General, including 470 records that all parties

agree are not-exempt. The University could not carry its burden of proof in the underlying appeal, while refusing statutory review. The University's actions are contrary to law and display a willful disregard for the Act. Accordingly, this Court should declare the University's brazen refusal to comply with KRS 61.880(2)(c) as unlawful, and permanently enjoin the University from further refusals to comply with this vital provision of the Open Records Act.

I. The Plain Language of KRS 61.880(2)(c) Provides The Attorney General With Authority To Request And Review Records.

Under KY. CONST. § 91, the Attorney General is a constitutional officer. "The source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people." *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, except when modified by statutory enactment."

The Attorney General is statutorily required to issue open records decisions pursuant to KRS 61.880. Under that provision, the Kentucky General Assembly plainly and unambiguously provided the Attorney General with the discretionary authority to conduct a confidential, *in camera*, review of additional documentation, including the records involved to substantiate an agency's claimed exemptions. KRS 61.880; *Commonwealth v. Chestnut*, 250 S.W. 3d 655, 660-63 (Ky. 2008); *Taylor v. Maxson*, 483 S.W. 3d 852, 857 (Ky. App 2016). The Act provides no exception allowing public agencies to refuse the Attorney General's confidential *in camera* review.

A. KRS 61.880(2)(c) Clearly and Unambiguously Provides the Attorney General With Discretionary Authority to Confidentially Review Records *In Camera.*

The Kentucky General Assembly provided the Attorney General with the discretionary authority to confidentially review records that a public agency claims are exempt from the Open Records Act. KRS 61.880(2)(c). The meaning and intent of KRS 61.880(2)(c) is plain and unambiguous.

"The proper standard of review of a question of law does not require the adoption of the decision of the trial court as to the matter of law, but does involve the interpretation of a statute according to its plain meaning and its legislative intent." *See Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001) (internal citations omitted).The plain meaning of statutory language is presumed to be what the legislature intended; if the meaning is plain, then one cannot base its interpretation on any other method or source. *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). Only when it would produce an injustice or absurd result should the plain meaning be ignored. *See Johnson v. Frankfort & Cincinnati R.R.*, 197 S.W.2d 432, 434 (1946).

> We "ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed." In other words, we assume that the "[Legislature] meant exactly what it said, and said exactly what it meant." Only "when [it] would produce an injustice or ridiculous result" should we ignore the plain meaning of a statute.

O'Daniel, 153 S.W.3d 815 at 820.

Under the Act, when a public agency denies an open records request, it must assert that the records are exempt from public disclosure under one or several of the exemptions listed under KRS 61.878. The Attorney General's role as adjudicator in open records appeals is to "… issue … a written decision stating whether the agency violated the provisions of *KRS 61.870 to 61.884*." KRS 61.880(2)(a) (emphasis added). KRS 61.878 falls within that range. Therefore,

during appeals under KRS 61.880, the Attorney General is required to determine whether the records, if any, fall within any exemption the public agency has asserted. KRS 61.880.

KRS 61.880(2)(c) provides:

> "…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).

There is no room for interpretation of this provision, and it is therefore unambiguous. "Because the statute is not ambiguous, the plain meaning of the text controls." *Dept. Rev., Finance and Admin. Cabinet v. Comm. of Kentucky*, 497 S.W.3d 771, 775 (Ky. App. 2016). KRS 61.880(2)(c) plainly and unambiguously places the burden of proof on the agency, provides the Attorney General with the discretionary authority to request both the records involved and additional documentation, and prohibits the Attorney General from disclosing the records involved. KRS 61.880(2)(c). The statute even presupposes that confidential review may justify an extension of time to issue a decision. *See* KRS 61.880(2)(b)(1) (stating the "Attorney General may extend [20] day time limit … to obtain additional documentation from the agency or a copy of the records involved.").

Moreover, the General Assembly provided no qualifying language that would operate to limit the Attorney General's authority to review under KRS 61.880(2)(c), or provide a public agency with the right to refuse the Attorney General's request. KRS 61.880(2)(c) does not subject the review to any superseding laws, not does it reference other statutory conditions. Accordingly, the KRS 61.880 plainly and unambiguously provides Attorney General with the discretionary authority to confidentially review records that a public agency claims are exempt from the Open Records Act. KRS 61.880(2)(c).

B. Federal Privacy Laws and the Attorney-Client Privilege Do Not Create an Exception to the Attorney General's Authority to Confidentially Review Records Under KRS 61.880(2)(c).

Neither federal privacy laws nor the attorney-client privilege limit the Attorney General's discretionary authority to review records pursuant to KRS 61.880, because the Attorney General has the express authority to request and review records in order to substantiate an agency's claimed exemption(s) under the Act. In the underlying appeal, the University claimed that FERPA and the attorney-client privilege prevent the University from doing so. The University is simply mistaken. Records protected by FERPA and/or the attorney-client privilege are incorporated as exempt from disclosure under KRS 61.878(1)(k) and (l). Accordingly, pursuant to KRS 61.880(2)(c), the Attorney General may review records a public agency claims are exempt from disclosure to a public requester under the Act, to determine if the records are, in fact, exempt from disclosure to a public requester.

The General Assembly intended to incorporate the attorney-client privilege into the Open Records Act, thus allowing an agency to claim the exemption in response to an open records request. By doing so, the legislature also allowed the same records to be reviewed by the Attorney General in an appeal under KRS 61.880. In Kentucky, the provisions of KRE 503 govern the attorney-client privilege. *See generally*, *Hahn v. University of Louisville*, 80 S.W.3d 771, 775 (Ky. 2001). Specifically, KRS 61.878(1)(l) incorporates KRE 503 into the Open Records Act by exempting from disclosure, "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[;]." *See, e.g.*, *Cabinet for Health and Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008) (recognizing "the burden of proof of demonstrating a requested public record falls within the attorney-client privilege falls upon the [agency]"). *See also Hahn*, 80 S.W.3d at 774. The attorney-client privilege is incorporated as an exemption under KRS 61.878(1)(l), and

the Attorney General has authority to review an agency's claims of exemption pursuant to KRS 61.880(2).

In *Scorsone*, the Kentucky Court of Appeals recognized that the burden of proving whether records are attorney-client privileged is placed on the public agency withholding the records from a public requester. 251 S.W.3d at 330. As is often the case, whether a record is an attorney-client privileged communication requires a fact-based analysis of both the nature of the record, and the content of the record. Under KRS 61.880(2)(c), the Attorney General has authority to conduct a confidential, *in camera*, review for that very purpose.

Likewise, FERPA does not limit or otherwise create an **exception** to the Attorney General's authority to review disputed records confidentially and *in camera* pursuant to KRS 61.880(2)(c). This Court has recognized that, as federal law, FERPA is incorporated as an exemption under the Kentucky Open Records Act. *University of Kentucky v. The Kernel Press, Inc., d/b/a The Kentucky Kernel*, Case No: 16-CI-3229, Opinion and Order, p. 6 (Fayette Circuit Ct. January 23, 2017). *See also*, KRS 61.878(1)(k). Under KRS 61.878(1)(k), "[a]ll public records or information the disclosure of which is prohibited by *federal law or regulation*," are exempt from disclosure. (Emphasis added).[12] Both the Kentucky Supreme Court and the Attorney General recognize that FERPA operates as a bar to disclosure of education records, and that FERPA is incorporated into the Open Records Act by KRS 61.878(1)(k). *Hardin County Sch. v. Foster*, Ky., 40 S.W.3d 865 (2001).

[12] Notably, the University did not assert KRS 61.878(1)(k) in its April 11, 2016 denial letter, the University's May 3, 2016 Response to the Kernel's Open Records Appeal, or even in its voluminous June 15, 2016 Supplemental Response, in which the University asserts FERPA as a basis for refusing the Attorney General's request for documents.

The Attorney General has the express authority to request and review records in order to substantiate an agency's claimed exemption(s) under the Act, and FERPA does not limit the Attorney General's authority to request and review claims of exemption based on FERPA. KRS 61.880(2)(a).[13] Notably, courts have recognized that FERPA is not a greater bar to disclosure than the attorney-client privilege.[14] Specifically, courts have held that the statute did not intend to create a "school-student privilege analogous to the doctor-patient privilege or attorney-client privilege." *Ellis v. Cleveland Municipal School Dist*., 309 F. Supp. 1019, 1023 (N.D. Ohio 2004) (*citing Bauer v. Kincaid*, 759 F.Supp. 575, 591 (W.D. Mo. 1991)). Rather, FERPA was designed to "address systemic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records." *Ellis v. Cleveland Municipal School Dist*., 309 F. Supp. 1019, 1023-24 (N.D. Ohio 2004).

The University claims that the records at issue are exempt from Open Records as being FERPA protected "education records" and "attorney-client privileged." Both FERPA and the attorney-client privilege are incorporated as exemptions under the Open Records Act under KRS 61.878(1)(l) and (k), respectively. Moreover, numerous public agencies in the Commonwealth,[15]

[13] Several other Kentucky statutes require educational institutions to release student records without parental consent in other contexts. *See, e.g.*, KRS 164.283(5) (stating "[a]ll student records shall be made available to any federal, state, or local law enforcement agency, the Department of Juvenile Justice, and any court of law upon written request."). *See also* KRS 160.720(2)(c) and (d) (allowing educational institutions to release student records to "federal, state, and local officials who carry out a lawful function and who are authorized to receive this information pursuant to statute or regulation…and [f]ederal, state, and local officials to whom the information is required to be disclosed or reported.").

[14] As discussed *supra*, the attorney-client privilege is incorporated into the Open Records Act. *Scorsone*, 251 S.W.3d at 330.

[15] *See e.g.*, 05-ORD-210 (Office of the Governor); 07-ORD-147 (City of Frankfort); 05-ORD-144 (Office of the Governor); 1-ORD-143 (University of Kentucky); 14-ORD-158 (University of Kentucky); 16-ORD-026 (University of Louisville); 06-ORD-094 (University of Louisville); 07-ORD-108 (University of Louisville); 10-ORD-075 (Kentucky State Police); 01-ORD-92 (Department of Insurance); 08-ORD-013 (Department of Juvenile Justice); 07-ORD-161 (Department of Education); 04-ORD-153 (County Attorney); 05-ORD-221 (Office of the Governor).

including the Office of the Governor,[16] have complied with the Attorney General's requests for *in camera* review, including the 61.880(2)(c) requests for documents a public agency has withheld from a public requester as exempt on the basis of federal privacy law [17] and attorney-client privilege.[18] Finally, the Act expressly provides that the provisions of the Act, "in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function." KRS 61.878(5).

Accordingly, the Act does not create an exception for either FERPA-protected or attorney-client privileged records, whereby a public agency may simply refuse to provide such records to the Attorney General. The plain and unambiguous language does not allow for FERPA or the attorney-client privilege to be inserted as exceptions to Attorney General review, nor does the Act restrict transfer of records and information between governmental agencies when it is necessary in the performance of a legitimate governmental function. KRS 61.878(5) Rather, it is the public agency which must meet its burden of proof that certain records are, in fact, FERPA-protected or attorney-client privileged, and thus exempt from disclosure to the

[16] 16-ORD-039 (Attorney General requested Governor Bevin turn over records that his office refused to disclose to Louisville Public Media, claiming, *inter alia*, that the records at issue were attorney-client privileged. The Governor's office properly complied with the Attorney General's request, and provided the records for *in camera* review. Having reviewed the records, the Attorney General determined that the Governor's office properly withheld some of the records, but violated the Act when it failed to release two (2) emails that were not attorney-client privileged. (*Id*. at 12). The records reviewed by the Attorney General were destroyed concurrent with the issuance of the Attorney General's decision in accordance with 40 KAR 1:030(3). (*Id*., n. 2)).

[17] *See e.g.*, 7-ORD-145 (where the Attorney General requested the Cabinet for Health and Family Services provide him with documents pursuant to KRS 61.880(2)(c) that the Cabinet claimed were exempt from disclosure under HIPAA pursuant to KRS 61.878(l)(l), for purposes of comparison and to facilitate review of the issue on appeal. The Cabinet provided the documents, and the Attorney General issued his Decision. The Attorney General further stated, "[t]hese records were not disclosed and have been destroyed per 40 KAR 1:030 Section 3.")

[18] *See supra*, 16-ORD-039.

public requester. The public agency does so by providing the records to the Attorney General, when requested under KRS 61.880(2)(c), for confidential, *in camera*, review and substantiation.

II. The University Willfully Violated The Open Records Act By Refusing To Provide Any Records To The Attorney General.

Consequently, the University of Kentucky willfully violated the Act when it refused to provide any records to the Attorney General for confidential review under KRS 61.880(2)(c). It is unlawful to refuse to provide records to the Attorney General pursuant to KRS 61.880(2)(c). By refusing to provide **any** records, including 470 non-exempt records, to the Attorney General, the University failed to meet its burden of proof, and severely and unlawfully impaired the Attorney General's ability to render a decision. As a result, the University violated the Act.

A. It is Unlawful for a Public Agency to Refuse to Provide Records to the Attorney General Under KRS 61.880(2)(c).

When a public agency refuses to provide records to the Attorney General, which the agency claims are exempt from disclosure under the Open Records Act, the agency severely impairs the Attorney General's ability to issue open records decisions. Such refusal also subverts the Open Records Act, and absurd results may occur. This Court should declare that an agency may not withhold records from the Attorney General upon his lawful request when fulfilling his statutory duty to review open records appeals and issue decisions under KRS 61.880.

On appeal, the agency denying disclosure of records bears the burden of proof. KRS 61.880. *See, e.g.*, *Cabinet for Health and Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008). *See also* KRS 61.882(3). In order to substantiate an agency's claimed exemption under the Act, the Attorney General may request additional documentation, including the records at issue, but the records are not disclosed to the public at any time, and are destroyed after the Attorney General issues his decision. KRS 61.880(2)(c); 40 KAR 1:030(3). *See Cabinet for Health*

and Family Servs. v. Todd County Standard, Inc., 488 S.W. 3d 1, 4 (Ky App. 2016). Moreover, "[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," when necessary, on a case-by-case basis. 13-ORD-046 (*citing* 12-ORD-220 (*quoting* 08-ORD-052)).

Despite the University's contention that an agency may refuse to provide the records to the Attorney General, Kentucky courts have determined that such refusals severely impair the Attorney General's ability to render open records decisions. More broadly, the Court of Appeals has determined that an agency's refusal to provide substantiating documents and information for confidential *in camera* review, pursuant to KRS 61.880(2)(c), subverts the General Assembly's intent behind requiring the Attorney General to issue open records decisions. *Todd County Standard, Inc.*, 488 S.W. 3d at 4.

The *Todd County Standard, Inc.* case arose from an open records appeal in which the Cabinet for Health and Family Services denied the existence of records relating to a child who was brutally murdered by her adopted brother following an inter-family adoption arranged by the Cabinet and years of abuse at the hands of her adoptive parents. *See generally*, 488 S.W.3d 1. Pursuant to KRS 61.880(2)(c) the Attorney General requested additional documentation, including a description of the search method employed by the Cabinet in attempting to locate the records. *Id.* The Cabinet did not provide any additional documentation. *Id.*

The Court held that where an agency refuses to respond to the Attorney General, pursuant to his request under KRS 61.880(2)(c) and 40 KAR 1:030(3), the Attorney General's ability to render a well-reasoned Open Records decision is frustrated. *Id.* at 8. Further, the Court stated that, "such result would subvert the General Assembly's intent behind providing review by the

Attorney General under KRS 61.880(5)." *Id.* (reasoning that "…the [public agency] cannot benefit from intentionally frustrating the Attorney General's review of an open records request.").[19]

Accordingly, this Court should declare that, as a matter of law, an agency's refusal to provide records to the Attorney General for confidential, *in camera* review, pursuant to KRS 61.880(2)(c), is an unlawful violation of the Open Records Act. If the Court does not determine such behavior unlawful, the University and other public agencies may simply refuse to substantiate their claimed exemptions with any documentary proof, and absurd results will necessarily occur. Specifically, where an agency refuses to provide the records for confidential, *in camera* review, pursuant to KRS 61.880(2)(c), the law will necessarily become a "trust me" law, which bad actors could easily abuse, causing the at least the following two (2) absurd results.

First, the Attorney General would be forced to issue a decision finding, as here, that the agency simply failed to meet its burden of proof under KRS 61.880(2)(c), and directing the agency to potentially release records exempt under the Act. This route would vindicate the Court of Appeals' decision in *Todd County Standard, Inc.*, 488 S.W.3d at 8 (recognizing that such refusals subvert the intent of the statute). It would also recognize that the General Assembly expressly intended the agency to bear the burden of proving its claimed exemptions. Of course, a failure to provide any substantive proof of an exemption is an utter failure to meet the burden of proof. However, the Kentucky Court of Appeals, in an earlier decision, stated that "if [withheld records] are indeed exempt, then [their] disclosure as a sanction against the [agency] is

[19] Further, the Court itself is empowered, to order the production of the records for *in camera* review pursuant to KRS 61.882(3), during open records appeals to substantiate an agency's claimed exceptions. The General Assembly recognized the importance of such review, and provided the Court with the authority to hold a non-complying public agency in contempt of Court for failure to provide the records at-issue for *in camera* review.

inappropriate and impermissible. *Edmondson v. Alig*, 926 S.W.2d 856, 859 (Ky. App. 1996). Therefore, such a result may offend the Court of Appeals' decision in *Edmondson*.

Second, the Attorney General may issue a decision finding that the agency met its burden under KRS 61.880(2)(c), and allow the public agency to potentially withhold non-exempt records from public disclosure. This result would frustrate the purpose and intent of the Open Records Act, which "undoubtedly militates in favor of disclosure." *Hahn*, 80 S.W.3d at 774 (stating "… the public agency that is the subject of the open records request bears the burden of proving that documents sought fit within an exemption to disclosure.") (*citing University of Kentucky v. Courier-Journal, Ky.*, 830 S.W.2d 373 (Ky. 1992))). Further, such a result would subvert the General Assembly's intent behind providing review by the Attorney General under KRS 61.880(5). *See supra*, *Todd*, 488 S.W.3d at 8. This result would clearly offend the Court of Appeals' position in *Todd County Standard, Inc*. Moreover, it would convert the Open Records Act into a "trust me" law, where first the public requester, and then Attorney General would be required to simply take the University at its word. Such a policy would eviscerate Attorney General review under KRS 61.880, and force public requesters to vindicate their rights in Circuit Court, at great cost to the requester, the Court, and the Commonwealth.

As such, the Court should declare that the Attorney General has the statutory authority to review the records involved in an appeal, fulfilling his statutory obligations under KRS 61.880, and that to withhold records from the Attorney General is a violation of the Act. Such a decision would be consistent with the plain and unambiguous language of the statute. It would recognize the Attorney General's authority to review disputed and undisputed records under KRS 61.880 is consistent with the Court of Appeals' decisions in *Todd County Standard, Inc.* and *Edmondson*. Additionally, the declaration would allow agencies to withhold exempt records from the public,

and also prevent agencies from withholding non-exempt records from the public. This conclusion would further ensure that public business and public records remain available and open to the public. Therefore, this Court should declare that a public agency may not withhold records from Attorney General review pursuant to KRS 61.880.

B. The University Willfully Refused to Provide Any Records or Additional Information for Confidential, *In Camera* Review.

The University not only violated the KRS 61.880(2)(c), but did so willfully. To determine whether a public agency has violated KRS 61.880(2)(c), the Court need only answer (1) whether the Attorney General made a request for records under KRS 61.880(2)(c), and (2) whether the public agency provided the records requested. There is no question – and no genuine issue of material fact – the University flatly refused to provide any records to the Attorney General, pursuant to the Attorney General's, May 26, 2016, request. Not only did the University violate the provision, but also made material misrepresentations to the Attorney General during the underlying appeal, and refused to provide records it acknowledged were non-exempt public records. Accordingly, this Court should determine that the University willfully violated KRS 61.880(2)(c).

The University openly acknowledges that it refused to provide **any** records. (*See* University's Response to Requests for Admission, p. 1-2.) (attached as Exhibit G). The University also either refused to provide certain information or inaccurately provided certain information. As such, the University's refusal violated KRS 61.880(2)(c) of the Open Records Act in the underlying appeal.

First, the University refused to provide a single record to the Attorney General, including records that the University had already provided to the *Kernel*; for example, the University's

policies dealing with sexual assault investigations.[20] The University stated that it provided the *Kernel* with a "wide variety of materials-including the agreement with the accused professor." (*See*, Exhibit A, University Response to the Appeal, p. 2); some 470 pages of records, Bates No.: UK 000001-000470. The University failed to provide these records during the underlying appeal. (Exhibit G, University's Response to Requests for Admission, p. 1-2). The University has a) acknowledged that these records are non-exempt, and b) did not provide them during the underlying appeal. (*Id.*, p. 1-2.). This is a clear violation of KRS 61.880(2)(c).

Further, the University only provided these documents during the discovery-phase of this litigation, and failed to provide the records within the 30 days provided for under the Civil Rules. (*See generally, University of Kentucky v. The Kernel Press, Inc., d/b/a The Kentucky Kernel*, Case No: 16-CI-3229, Intervening Plaintiff's Motion to Compel.) The University now claims that its refusal to provide the 470 pages of records during the underlying appeal was simply a matter of "inadvertence," rather than willful non-compliance with the statute and the May 26, 2016 request letter. (*University of Kentucky v. The Kernel Press, Inc., d/b/a The Kentucky Kernel*, Case No: 16-CI-3229, University's Response to Intervening Plaintiff's Motion to Compel.) Regardless of the accuracy of the University's claim of "inadvertence," the University clearly violated the Act when it did not provide the Attorney General the 470 pages of records that it acknowledges are not and were never exempt from disclosure.

Second, the University made a material misrepresentation to both the Attorney General, during the underlying appeal, and later to the litigants and the Court in this matter. Specifically, the University claimed, "in the summer of 2015, a graduate student filed a complaint against a

[20] The University claims its policies are available online, however, the University must provide hard copies to the Attorney General. Further, the University failed to mention, at any point, that it modified A.R. §6.2 on June 10, 2016, between its initial Response and Supplemental Response. *See* A.R. § 6.2 http://www.uky.edu/regs/files/ar/AR%206-2.pdf (Effective June 10, 2016) (last visited Jan. 30, 2017).

tenured professor alleging the tenured professor had sexually harassed her." (*See* Exhibit A, University Response to the Appeal, p. 1.). In its Supplemental Response, the University then claimed "[t]his Open Records Act appeal involves…the University's investigation of a graduate student's allegations of sexual assault against a tenured professor. (*See* Exhibit B, University Supplemental Response, p. 2.). The University also stated: "[a]lthough Mr. Wright focused his request on the actual current investigation, his request also encompassed the existence of allegations outside of the current investigation. The University's search was for all allegations, not just those that were subject of the current investigations. There were no other allegations." (*Id*., at n.1.).

Following the Attorney General's Open Records Decision, 16-ORD-161, the Attorney General became aware that these statements were not accurate. (*See* Marjorie Kirk, *Kernel* obtains withheld records; victims say UK trying to protect professor in sexual assault case, http://www.kykernel.com/news/kernel-obtains-withheld-records-victims-say-uk-trying-to-protect/article_1434f31e-6175-11e6-8148-2f5a5ecb7147.html (last visited Jan. 30, 2017)).[21] The University impliedly confirmed that there were additional victims at a Board Meeting on September 9, 2016, wherein the Administration read the letters of **two** victims, and disclosed the name of one of the victims when it failed to properly redact copies of the letters, which were then distributed to the media. *Id*. As this Court is aware, the University also claimed that in the "Fall of 2015, a University received a complaint from a female doctoral student…" (*See University of*

[21] The *Kernel*'s August 13, 2016 article stated that the University's Office of Institutional Equity and Equal Opportunity investigative findings/reports detailed, "…there were **two complainants** and **five total victims**, who reported instances of sexual assault or sexual harassment to the University The victims included **men and women** who worked for Harwood's Department. The incidents spanned about 3 years, between 2012 and 2015…" (*See Id.*, http://www.kykernel.com/news/kernel-obtains-withheld-records-victims-say-uk-trying-to-protect/article_1434f31e-6175-11e6-8148-2f5a5ecb7147.html (last visited Jan. 30, 2017)).

Kentucky v. The Kernel Press, Inc., d/b/a The Kentucky Kernel, Case No: 16-CI-3229, University Brief on Appeal, p. 4.)

The Attorney General requested the records in dispute, the records provided to the *Kernel*, and other information and documentation. The University refused to provide any records or additional documentation, and inaccurately provided certain information. Accordingly, the University clearly violated the Open Records Act when it failed to provide this information upon the Attorney General's KRS 61.880(2)(c) request. Moreover, the University's refusal was not a solitary violation of the Act. Rather, the University has recently adopted a strategy of refusing to produce records to the Attorney General for confidential, *in camera*, review under KRS 61.880. The University's pervasive, errant behavior in open records appeals demonstrates, as in the instant case, willful violations of KRS 61.880.

CONCLUSION

The University of Kentucky's refusal to provide any records to the Attorney General for review under KRS 61.880(2)(c), on their face, violate KRS 61.880. KRS 61.880(2)(c) plainly and unambiguously provides the Attorney General with the discretionary authority to confidentially review records that a public agency claims are exempt under the Act. Here, the University claimed the records fell under certain exemptions of the Act, but refused to provide **any** records to the Attorney General. The University even refused to provide records to which it claimed no exemption. Further, despite the University's claims, neither FERPA nor the attorney-client privilege preclude the Attorney General from reviewing records under KRS 61.880.

However, the University has asserted that not only should the Attorney General simply accept the University's claimed exemptions, but that the Attorney General has no choice but take the University at its word. The University's assertion is contrary to law, public policy, and good

sense. Just as a litigant cannot also be judge, a public agency in an open records appeal cannot also be impartial adjudicator. Such a "silver-bullet" precedent would allow bad actors to turn the Act into a "trust me" law, eviscerating open records review by the Attorney General, flooding the courts with open records litigation, and placing the costly burden of expensive litigation upon those seeking access to public records.

The General Assembly intended the Attorney General's statutory review as a low-cost mechanism for ensuring transparency in government. While we may generally trust our public institutions to comply with the law, the law also requires us to verify that compliance. The Attorney General's authority to confidentially review records pursuant to KRS 61.880(2)(c) provides the mechanism for verifying the University's compliance with the Act. The University unlawfully refused to submit itself to that law on this occasion and others.

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

Respectfully Submitted

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