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 RESPONSE TO INTERVENING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Intervening Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General (hereinafter "Attorney General"), provides the following response to Intervening Defendant University of Kentucky's (the "University") motion for summary judgment: The General Assembly vested the Attorney General with both the responsibility to adjudicate Open Records appeals as well as the powers necessary to do so. These powers include the ability to confidentially review documents that a public agency claims are exempt under the Open Records Act. Such a review is necessary to prevent a public agency from falsely claiming a document is exempt. This safeguard, coupled with the Act placing the burden of denial squarely on the public agency, is meant to create maximum transparency.

Instead of embracing this transparency, the University attempts to turn the Act into a "trust me" law. It claims that once a public agency suggests a document – in whole or part – is a FERPA document or falls under the attorney-client privilege, the University can avoid any

review by the Attorney General. At one point, the University claimed that every document concerning any sexual assault or harassment on campus was attorney-client privileged. It has also claimed clearly non-exempt documents, such as a set of camera instructions, are student records under FERPA.

This Court must reject the University's arguments. The Act did not create a "trust me" law, and the University has shown it cannot be trusted.

ARGUMENT

The University's Motion is grounded in a fundamental misstatement, misinterpretation and misunderstanding of the Kentucky Open Records Act, and the Attorney General's role in adjudicating open records appeals under KRS 61.880. Specifically, the University contends that the Attorney General does not have the authority to confidentially review, *in camera*, records that the University claims are exempt from disclosure to a public requester, as attorney-client privilege or FERPA-protected, pursuant to KRS 61.880(2)(c). (*See generally*, *University of Kentucky v. The Kernel Press, Inc., d/b/a The Kentucky Kernel*, Case No: 16-CI-3229, University's Memorandum in Support of Motion for Summary Judgment, at pp. 11-13, Feb. 9, 2017)).

The University asserts three claims in support of its argument. It claims:

(1) that the Attorney General is not a judicial officer and/or does not have the judicial authority to review records;

(2) that neither the Attorney General nor the Court may conduct *in camera* review of records claimed to be attorney-client privileged unless the requester proves they are not, and

(3) that the Attorney General has allegedly changed his interpretation of KRS 61.880(2)(c), which lets the University off the hook.

The University is simply incorrect on each claim. The General Assembly validly delegated the Attorney General the authority to review any records a public agency refuses to produce under the Open Records Act. This includes documents allegedly protected by federal privacy laws, KRS 61.878(1)(k), and attorney-client privileged records, KRS 61.878(1)(l). The University's position is further disproven by the fact it would shift the burden from a public agency to the requester to prove that withheld documents – which the requester has not seen – are not open records. Finally, the Attorney General has not changed his interpretation of his discretionary authority to request additional documentation for a confidential, *in camera* review. The Attorney General has more than adequately explained his discretionary right to review records in decisions prior to present case.

I. The Attorney General Adjudicates Open Records Appeals and Issues Open Records Decisions that have the "Force and Effect of Law."

The University argues that the Attorney General acts with executive rather than judicial authority in Open Records Act appeals, and that disclosure of privileged or FERPA-protected materials to the Attorney General would waive privilege and/or violate FERPA. (University's Memo. In Support at pp. 9, 10-11, 12 and 14.) The University "supports" its position with four arguments. The University first claims that the Kentucky Constitution prohibits the Attorney General from exercising judicial authority. (*Id.* at 12.) It next claims, "the General Assembly did not authorize the Attorney General to exercise *judicial* power." (*Id.*) Third, the University asserts that "nothing in the text of the Open Records Act indicates the Attorney General acts as a judicial officer when deciding an Open Records Act appeal." (*Id.*) Finally, the University claims that open records appeals under KRS 61.880 are non-binding arbitrations. (*Id.* at 12-13).

None of the University's contentions have any basis in law. The Kentucky Supreme Court has held "[t]he General Assembly may validly vest legislative or ***judicial authority*** in an

administrative agency if the law delegating that authority provides 'safeguards, procedural and otherwise, which prevent abuse of discretion by the agency.'" *TECO Mechanical Contractor, Inc. v. Commonwealth,* 366 S.W.3d 386, 397-98 (Ky. 2012) (internal citations omitted) (emphasis added). "In the open records context, the Attorney General functions as an administrative agency, authorized to hear and decide open records appeals." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 660-63 (Ky. 2008). Indeed, according to the Kentucky Court of Appeals, "[t]he Kentucky Open Records 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 a decision, which if not appealed to the circuit court, has the 'force and effect of law …'" *Taylor v. Maxson,* 483 S.W.3d 852, 857 (Ky. App. 2016) (*citing* KRS 61.880(5)(b)). *See also* 40 KAR 1:030. Indeed, the very text of the Act also expressly refers to the Attorney General's open records determination process under KRS 61.880 as an "adjudicatory process." KRS 61.880(4).

This Court must reject the University's argument that the Attorney General is a non-judicial agency in the Open Records context.

A. The General Assembly may delegate judicial authority to an executive branch agency.

The University contends that the Kentucky Constitution prohibits the Attorney General from exercising judicial authority. (*See* University's Memo. In Support, at pp. 11-13.) (University's Answer to the Intervening Complaint, at pp. 12-13 (October 10, 2016).) However, the Kentucky Supreme Court has held that "[t]he General Assembly may validly vest legislative or ***judicial authority*** in an administrative agency if the law delegating that authority provides 'safeguards, procedural and otherwise, which prevent abuse of discretion by the agency.'" *TECO Mechanical Contractor, Inc.*, 366 S.W. at 397-98 (internal citations omitted) (emphasis added).

Although "Kentucky is a strict adherent to the separation of powers doctrine," "given the realities of modern rule-making, [the General Assembly] has neither the time nor the expertise to do it all; it must have help." *Id*. at 397 (internal citations omitted). *See also Holsclaw v. Stephens*, 507 S.W.2d 462, 471 (Ky.1973) (noting that the General Assembly is "not in continuous session and of necessity [it] cannot undertake to determine all facts incident to the administration of the laws which [it] enact[s]"). "As a result of this reality, we have acknowledged that administrative agencies, such as the Cabinet, may exercise legislative or judicial authority if certain protections are in place." *TECO Mechanical Contractor, Inc.*, 366 S.W.3d at 397.

Thus, the General Assembly may validly vest legislative or judicial authority in an administrative agency if the law delegating that authority provides "safeguards, procedural and otherwise, which prevent an abuse of discretion by the agency." *Id*. at 398 (internal citations omitted). Factors to consider in determining whether the law in question provides sufficient safeguards include the experience of the agency to which the authority is delegated, the subject matter of the law, and the availability of judicial review. *Id*. at 398 (internal citation omitted). "When considering a delegation of judicial authority, we also examine whether 'the statute adequately defines the prohibited conduct' so that the agency 'may ascertain the facts and administer the law.'" *Id*. at 398 (internal citation omitted).

B. The General Assembly validly delegated judicial authority to the Attorney General in order to adjudicate open records appeals.

The University claims that "the General Assembly did not authorize the Attorney General to exercise of judicial power," implying that the General Assembly's grant of authority to the Attorney General to adjudicate open records appeals under KRS 61.880, including *in camera* review of records, is an unconstitutional delegation and exercise of judicial authority. (*See*

University's Answer to Intervening Complaint, at pp. 2, 12-13, Sept. 10, 2016; University's Memo. In Support, at pp. 11-13.) The University is wrong.

The General Assembly validly delegated to the Attorney General the duty to adjudicate whether a public agency violated the Open Records Act. KRS 61.880. The legislature determined that these decisions would "have the force and effect of law," and be "enforceable in the circuit court." KRS 61.846(4)(b); KRS 61.880(5)(b); *Taylor v. Maxson*, 483 S.W. 3d at 857. Further, the Kentucky Supreme Court has expressly recognized"[i]n the open records context, the Attorney General functions as an administrative agency, authorized to hear and decide open records appeals." *Chestnut*, 250 S.W.3d at 660-63.

As part of that adjudicatory function, the General Assembly vested the Attorney General with the authority to request documents for a confidential, *in camera* review of documents and information, including the records an agency withheld in an open records request, in order to substantiate the agency's denial of a requester's open records request. *See* KRS 61.880(2)(c). Analogously, under KRS 61.882(3), a Circuit Court reviewing an open records appeal has the authority to, on its own motion or on motion of either party, review the records in controversy *in camera* before reaching a decision. Thus, the "availability of judicial review" factor is satisfied. *TECO Mechanical Contractor, Inc.*, 366 S.W. at, 397-98 (internal citation omitted).

Further, the Attorney General has an enormous body of demonstrable experience in the area of law, generally, and in open records matters, in particular.[1] Since 1993, the Attorney General has issued over 2,500 Open Records Decisions.[2] Further, the General Assembly not only

[1] *Interim Committee on State Gov't, Subcommittee on Open Records, Minutes of Third Meeting of the 1974-76 Biennium*, at *3 (Apr. 29, 1975) ("The status of the Attorney General's response in conflict cases was changed from an 'opinion' to a 'decision,' thus giving the response more impact.").

[2] Open Records Decisions of the Office of the Attorney General from 1993-2017 are publicly available online at the following: http://ag.ky.gov/civil/civil-enviro/orom/Pages/default.aspx.

requires the Attorney General to adjudicate open records appeals, but also requires him to provide a copy of the Open Records Act to the government officials, including the presidents of state universities, along with an explanation of the substantive and procedural requirements of the Act. *See* KRS 15.257(1); *see also*, KRS 164.001(13) and/or (17).[3] The Kentucky Court of Appeals has recognized the Attorney General's expertise in open records cases, holding "[I]n matters relating to open records requests, we are bound to give great weight to the Attorney General's open records decisions." *Cabinet for Health and Family Servs. v. Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008) (internal citation omitted).

Finally, through its delegation of authority to the Attorney General, the General Assembly afforded a requester two (2) routes for appealing the denial of an open records request: the Attorney General or the Circuit Court. *See* KRS 61.880(5); KRS 61.882. Under the University's theory, only one adjudicator in an open records appeal, the Circuit Court, may conduct an *in camera* review when deciding the appeal, despite the plain language of the statute. Interpreting KRS 61.880 and 61.882 as giving more weight to one adjudicator than the other in an open records appeal is illogical, unsupported by the text of either statute, and would create an absurd result.

"When considering a delegation of judicial authority, [the court] also examines whether 'the statute adequately defines the prohibited conduct,' so that the agency 'may ascertain the facts and administer the law.'" *TECO Mechanical Contractor, Inc.*, 366 S.W.3d at 397-98 (*quoting Kentucky Commission on Human Rights v. Fraser*, 625 S.W. 2d 852, 855 (Ky. 1981)). Here, the Open Records Act squarely defines the prohibited conduct under the statute. *See* KRS 61.880; 61.874. The Act explains precisely the categories of records exempt under the law. KRS

[3] Notably, the University of Kentucky School of Journalism and the Scripps Howard First Amendment Center worked with Attorney General Conway's Administration to create a video to assist public officials in understanding their duties under the open records law. https://www.youtube.com/watch?v=mZM3urygkbc&feature=youtu.be.

61.878(1)(a)-(n). However, *in camera* review of disputed records and other information is often necessary to determine if the agency's stated exemption, in fact, applies to the responsive records. *See* 08-ORD-052, 12-ORD-220.

In addition, the Act and its accompanying regulations, provide more safeguards for the adjudication of open records appeals under KRS 61.880. Specifically, KRS 61.880(2)(c) and 40 KAR 1:030(3) provide that any records provided to the Attorney General for *in camera* review are never disclosed to members of the public, even if the Attorney General finds the agency failed to meet its burden of proof and is required to disclose the records to the requester. The Attorney General is required under 40 KAR 1:030(3) to destroy any records provided to him for *in camera* review upon issuing his decision. Notably, even in appeals where the Attorney General finds the agency must turn over the records to a public requester, the agency may still appeal the decision in the Circuit Court. KRS 61.880 and 61.882. In such an appeal, the Circuit Court reviews the matter *de novo* prior to any requirement that the agency turn over the disputed records. *Id.* As the General Assembly provided the Act with safeguards, procedural and otherwise, which prevent abuse of discretion by the agency, the Attorney General may exercise its validly delegated authority under the Act.

C. The plain language of KRS 61.880 authorizes the Attorney General to adjudicate open records appeals.

The University claims that "nothing in the text of the Open Records Act indicates the Attorney General acts a judicial officer when deciding an Open Records Act appeal." (University's Memo. In Support, at p. 12.) However, the Open Records Act expressly refers to the Attorney General's open records appeal process, under KRS 61.880, as an "adjudicatory process." KRS 61.880(4). Moreover, the Kentucky Supreme Court has held "[i]n the open records context, the Attorney General functions as an administrative agency, authorized to hear

and decide open records appeals." *Chestnut*, 250 S.W.3d at 660-63). The Kentucky Court of Appeals has also reasoned that "[t]he Kentucky Open Records 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* 483 S.W.3d at 852, 857(citing KRS 61.880(5)(b); 40 KAR 1:030. Accordingly, the plain language of the statute refers to an Open Records Act appeal as an adjudicatory process, which, as Kentucky courts have recognized, the Attorney General adjudicates.

D. Open Records Decisions are "adjudications."

The University also wrongly claims that open records appeals are "not judicial proceedings." (University's Memo. In Support, at p. 13.) The University claims that open records appeals are non-binding, voluntary arbitrations. (*Id*.) The University could not be more incorrect.

A public requester who is unsatisfied with a public agency response may exercise his or her right to appeal to either the Attorney General or the Circuit Court, pursuant to KRS 61.880 or KRS 61.882, respectively. However, the General Assembly does not give the public agency has the choice over whether the Attorney General or the Circuit Court adjudicates the appeal. Moreover, the public agency may not "opt-out" of such an appeal. KRS 61.880(2)(c). However, like the University has done here, an agency may utterly fail to meet its burden of proof by failing to substantiate its claimed exemptions. (*Id*.) To the extent the University mistakenly believes such failure to be "voluntary," the University's contention is clearly contrary to law, public policy, and common sense.

Next, the University claims that open records appeals before the Attorney General are non-binding. (University's Memo. In Support, at p. 13.) Where an agency or public requester does not appeal the decision, the decision shall have the "force and effect of law," and shall be

enforceable in the Circuit Court of the county where the agency has its principal place of business or the county where the public record is maintained. KRS 61.880(5)(b). Like a Circuit Court's ruling in an open records appeal, an Attorney General's Open Records Decision is enforceable if not appealed. (*Id*.)

Finally, the University claims that open records appeals are "arbitrations." (University's Memo. In Support, at p. 13.) This argument is also incorrect. Open records appeals are statutory "adjudications." The General Assembly provided the statutory mechanisms for review in both the Circuit Court under KRS 61.882, and with the Attorney General under KRS 61.880. In both contexts, the reviewing authority has the express statutory authority to review the disputed records and render a decision. *See* KRS 61.880 and 61.882.

Additionally, the University's argument that there is "[no] testimony of witnesses, or subpoena power," is unpersuasive. (University's Memo. In Support, at p. 13.) Open records appeals are a determination of whether the public agency properly complied with KRS 61.870 through KRS 61.884. *See* KRS 61.880 and KRS 61.882. The Circuit Court or the Attorney General issues a decision based on the record presented on appeal, including the request, the initial denial, the agency's response to the appeal, and potentially the disputed records and other documents. The burden of proof is on the public agency. KRS 61.880(2)(c). When a public agency refuses to meet its burden of proof by withholding records from the adjudicator, it violates the Act. KRS 61.880 and 61.882.

Accordingly, the Court should conclude that the General Assembly validly delegated the Attorney General the adjudicative authority to review any records a public agency claims "exempt" under the Open Records Act, including those protected by federal privacy laws, KRS

61.878(1)(k), and attorney-client privileged records, KRS 61.878(1)(1). As such, the Court should deny the University's motion.

II. The Attorney General has the Authority to Review Attorney-Client Privileged Materials Under KRS 61.880(2)(c).

The University contends that, even if the Attorney General has the authority to conduct a confidential, *in camera* review of disputed records, he has no more authority to review the disputed records than the Circuit Court. (Memo. In Support, at pp. 14-16.) Specifically, the University wrongly argues that under *Stidham*, neither the Circuit Court nor the Attorney General may request and review attorney-client privileged records *in camera*, including during an open records appeal under KRS 61.880 or KRS 61.882, unless the requester presents some evidence that the privilege does not apply or that there is an exception to privilege. (*Id.*, at p. 2) (*citing Stidham v.* Clark, 74 S.W.3d 719, 727-28 (Ky. 2012)). As to the Attorney General, the University claims that before an *in camera* review of privileged materials may occur, the "requesting party – not the University – 'must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception [to the attorney-client privilege]'s applicability' before the Attorney General can conduct an *in camera* review." (*Id.*, at p. 16.).[4] Ostensibly, the University argues that *The Kentucky Kernel* was required to present some evidence to the Attorney General or the Court before *in camera* review.[5]

[4] Notably, the University does not argue that the Circuit Court may not review records it contends are exempt FERPA-protected "education records." Rather, the University has expressly agreed that judicial officers have the authority to conduct an *in camera* review of FERPA-protected "education records," stating, "the law recognizes that a judicial officer such as this Court may conduct an *in camera* review of the records in the course of its *de novo* review of the issues currently being briefed between the [public agency] and the [public requester] without violating FERPA." (*See* University's Motion for *In Camera* Review, at p. 3, Nov. 4, 2016.)

[5] The University has changed its position on several occasions during the underlying appeal and throughout this litigation regarding whether "some" or "all" of the responsive records are exempt as "attorney-client privileged." (Attorney General's Memo. In Support of Motion for Summary Judgment, at pp. 8-9, Feb. 9, 2017.) Contrary to the University's argument that *Stidham* requires the public requester to present evidence that the records are not attorney-client privilege or meet an exception to privilege, the University claims that it provided all the disputed records to the Circuit Court. It is unclear whether the University still maintains that some, any, or all of the disputed

The University's arguments are wrong, and would require both the Attorney General and the Circuit Court to simply accept the University's assertions of attorney-client privilege in every case, creating a "silver bullet" for open records requests.

First, the University's argument is directly contrary to the plain and unambiguous language of KRS 61.880 and KRS 61.882. Both KRS 61.880 and KRS 61.882 place the burden on the public agency, requiring the public agency – not the public requester – to prove the records are exempt from disclosure. The Kentucky Supreme Court has reasoned that, "we must interpret statutes as written, without adding any language to the statute, even in open records cases." *Chestnut*, 250 S.W.3d at 661. Simply put, nothing in the Open Records Act places the burden of proving a record is or is not protected by any privilege on the public requester. Rather, the burden of proof is on the public agency. KRS 61.880(2)(c) and KRS 61.882. Here, the University, not *The Kernel*, had the burden of proving that the disputed records were subject to the attorney-client privilege, first to the Attorney General under KRS 61.880(2)(c), and then to the Circuit Court under KRS 61.882.

Second, the University misapplies *Stidham* in arguing that it limits both the Circuit Court and the Attorney General's statutory authority to conduct *in camera* review. The University claims that *Stidham* limits the *in camera* review to those instances where a party opposing privilege makes an evidentiary showing that privileged communications fall into an exception to the attorney-client privilege. (University's Memo. In Support, at p. 16.) The University's argument shifts the burden from the University to the public requester, requiring the public requester to prove a record or records are not exempt under a claimed privilege, as here with

records are exempt as attorney-client privileged, or what, if any, evidence it believes *The Kernel* presented, justifying *in camera* review.

attorney-client privilege. This is directly contrary to the express language of KRS 61.880 and KRS 61.882.

The University's argument also fails to give *Stidham* a full and fair reading. Notably, in *Stidham*, the Kentucky Supreme Court stated, "[t]he party asserting the privilege has the burden to prove the privilege applies." 74 S.W.3d at 725. *See also Scorsone*, 251 S.W.3d at 330 (burden of proof demonstrating that a requested public record falls within the attorney-client privilege falls upon the agency) (*citing* KRS 61.880(3)). This is the same burden a public agency – not a public requester – has in the context of open records appeals to both the Circuit Court and to the Attorney General. *See* KRS 61.880 and KRS 61.882.

To the extent *Stidham* applies in the open records context, there is no reading that supports shifting the burden of proof to public requesters. *See, generally*, *Stidham* 74 S.W.3d 727. In an open records appeal, whether records are exempt from disclosure is dispositive of the appeal. KRS 61.880 and KRS 61.882. As such, the content of the very records themselves is outcome-determinative, often making *in camera* review necessary to resolving the merits of an open records appeal and a vital to the very function of the Open Records Act.

Unlike a litigant in a civil action, in open records appeals a public requester rarely has access to any other documents or information that might allow him or her to challenge privilege, and cannot request discovery. Further, the Kentucky Supreme Court has recognized the distinction between open records and civil litigation, holding, "[a]n open records request should not require the specificity and cunning of a carefully drawn set of discovery requests, so as to outwit narrowing legalistic interpretations by the government; a citizen should be able to submit a brief and simple request for the government to make full disclosure or openly assert its reasons for non-disclosure." *Chestnut*, 250 S.W.3d at 662 (internal citations omitted).

Accordingly, *Stidham* simply does not apply to statutory open records appeals. To the extent it does apply, it does not shift the burden of proving attorney-client privilege to the public requester. The University's interpretation is the anti-thesis of the *Chestnut* holding and the spirit of the Act, making government transparent and accessible to the public.

In the underlying appeal, the University had the statutory burden of proving the disputed records were attorney-client privileged and refused to provide any other documents that might confirm the records were privileged. Rather, the University claimed, as it still does, that the Attorney General must simply accept the University's assertions.

Specifically, the University contends that the Attorney General must simply take the University at its word, expressly stating "[i]f the University advises [the Attorney General] a record represents the communication of legal advice between attorneys and administrators, then attorney client privilege clearly applies." (University's Memo. In Support, at p. 2.) Such a "trust me" stance runs afoul of the intent and language of the Open Records Act and public policy. If successful, each and every public agency will implement the University's self-created and baseless "Trust me law," and decimate the Open Records Act.

III. The Attorney General has Not "Reversed" His Legal Interpretation of KRS 61.880(2)(c) Authority to Review Records Confidentially and *In Camera*.

The University contends that the Attorney General has "reversed" his position on whether the Attorney General may conduct a confidential *in camera* review of records protected by Federal privacy statutes; specifically, FERPA-protected "education records." (*See* University's Answer to Intervening Complaint, at pp. 2-3; University's Memo. In Support, at pp. 16-18.) The University is incorrect. Rather, as the University is readily aware, the Attorney General has maintained, under KRS 61.880(2)(c), that he has the discretionary authority to, on a case-by-case basis, request additional documentation and information – including documents an agency has

claimed are exempt from public disclosure, such as under federal law – for confidential, *in camera* review when adjudicating open records appeals.

Specifically, the University claims the Attorney General held the explicit position from 2008-2016 [6] that "federal law prohibits the Attorney General from conducting *in camera* review of records protected by federal privacy statutes ...," and has now "reversed" that position. (University's Answer to Intervening Complaint, at p. 2 (*citing* 12-ORD-220 and 08-ORD-052.)) The University also claims that the Attorney General has also reversed his position on the "supremacy of federal privacy laws." (University's Memo. In Supp., at pp. 16-18.) In addition, the University claims that the Attorney General is required to explain, has not explained, and must now explain, what the University perceives to be a "reversal" of legal interpretation. (*Id.*, at pp. 18-19.)

Contrary to the University's contention, the Attorney General has not changed, much less "reversed," his position regarding his authority under KRS 61.880(2)(c). Rather, he has maintained his position that under KRS 61.880(2)(c) he may request additional documentation for *in camera* review when adjudicating open records appeals. Moreover, the Attorney General has consistently stated that when a public agency refuses to provide records to him pursuant to KRS 61.880(2)(c), it severely impairs the Attorney General's ability to adjudicate open records appeals. 12-ORD-220, at p. 3. The Attorney General's authority to request additional documentation for *in camera* review includes disputed records in an open records appeal that an agency asserts are protected by federal privacy's laws. 13-ORD-046.

Further, the Attorney General has maintained that "[a]s a rule, we find that an agency making such a refusal has failed to meet its burden of proof, and this case is no exception." 13-

[6] The University's time-span covers the administrations of both Attorney General Beshear and his predecessor, Attorney General Jack Conway.

ORD-046, at p. 7 (emphasis added.) Clearly, the Attorney General did not "reverse" this interpretation in 16-ORD-161. Indeed, the University and its counsel were well-aware of the Attorney General's consistent interpretation that appeared in previous decisions involving the University. The University's counsel was counsel of record in the underlying appeal and in 13-ORD-046. The University's outside counsel in this action was also counsel of record for the University in 12-ORD-220 and 08-ORD-052. The University's argument is without merit.

Based on the respective records presented on appeal in both 08-ORD-052 and 12-ORD-220, the Attorney General reached a decision on the merits without conducting *in camera* review. Notably, neither decision adopts the University's interpretation that FERPA prohibits *in camera* review under KRS 61.880(2)(c). Rather, in 08-ORD-052 and 12-ORD-220 the Attorney General noted that he conducts KRS 61.880(2)(c) *in camera* review, on a case-by-case basis. 08-ORD-052, at p. 7. *See also* 12-ORD-220, at p. 4 (discussing 08-0RD-052). In both decisions, the Attorney General found the University met its burden in proving the records were FERPA-protected "education records," based on the language and content of the request, and through a substantive analysis of FERPA as it might apply to the records that would be responsive to such a request. *See* 08-ORD-052, at p. 7; 12-ORD-220, at p. 4. Specifically, in both decisions, the open records requests expressly implicated the records of students. 08-ORD-052 (Student Government Listserv Emails), 12-ORD-220 (Requesting records of student-athlete Nerlens Noel). Thus, 16-ORD-161 does not depart from these decisions under the facts of each, but rather demonstrates an appeal in which the Attorney General exercised his discretionary authority to request additional documentation for a confidential, *in camera* review.

In the instant case, the University refused to provide **any** records – disputed and undisputed – to the Attorney General for *in camera* review pursuant to the Attorney General's

lawful request under KRS 61.880(2)(c). *See* 16-ORD-161. Because of the University's refusal, the Attorney General was unable to determine whether the withheld records were indeed exempt, and thus found the University failed to meet its burden under KRS 61.880(2). *See* 16-ORD-161, at p. 4, n. 6 (recognizing that unlike 08-ORD-052[7] and 12-ORD-220,[8] this open records appeal dealt with records containing allegations of misconduct against a professor – not a student). The Attorney General opined that:

> 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.) The University's refusal to honor the Attorney General's requests suggests that it views these requests as either adversarial or a form of "advoca[cy] for the requester," or both. The juxtaposition of the assignment of the burden of proof to the agency and the Attorney General's authority to request additional documentation "for substantiation" establishes the contrary. **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. **Accordingly, we find that the University of Kentucky failed to meet its burden of proof** … ."

[7]In 08-ORD-052, *The Kernel* requested emails sent through student government's executive branch listserv that included communications between students, and students and professors. Specifically, *The Kernel* requested "access to or copies of all emails sent through ***Student Government's executive branch listserv*** since April 25, 2007 [through February 5, 2008]." (Emphasis added). This office contacted the Family Policy Compliance Office [FPCO] of the United States Department of Education, which stated that because the SGA officers' positions are conditioned upon their status as full-time students, the postings they generate on the SGA/EB listserv should be considered "education records" for purposes of FERPA analysis. Thus, the Attorney General was able to reach the conclusion that the records responsive to the *Kernel*'s request were directly-related to students, and were thus FERPA protected "education records," exempt from disclosure, without requiring further review of the disputed records.

[8]In 12-ORD-220, *The Kernel* requested records related to a former University of Kentucky basketball player, Nerlens Noel, his recruitment by the University, and his eligibility. In particular, *The Kernel* requested copies "of any correspondence with UK and UK Athletics about Nerlens Noel, including memoranda, paperwork, and any other correspondence in the past two years … [as well as] any correspondence with the NCAA about Nerlens Noel." The University again refused to provide the Attorney General with the records at issue. However, as in 08-ORD-052, the Attorney General was able to reach a decision, notwithstanding the University's failure, relying on the Court's analysis of *State ex rel. ESPN v. Ohio State University*, 970 N.E.2d 939 (Ohio 2002), as applied to *The Kernel*'s request. Specifically, the court in *ESPN*, relying on the Sixth Circuit's interpretation of "education records" in *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), rejected the claim that records relating to an NCAA investigation of student athletes were not "education records." 970 N.E.2d 939, 946-47 (Ohio 2002).

16-ORD-161 (emphasis added).

A plain reading of 16-ORD-161 reveals no reversal of the position as to the Attorney General's authority under KRS 61.880(2)(c) to request additional documentation in adjudicating open records appeals. In fact, continuity has existed across administrations, including the administration preceding Attorney General Conway.[9] Moreover, this Attorney General has held, in a prior decision, that the University of Kentucky violated the Open Records Act, by failing to meet its statutory burden of proof, when it refused to provide the Attorney General with additional information he requested pursuant to KRS 61.880(2)(c), consistent with the interpretations of 13-ORD-046, 12-ORD-220, and 08-ORD-052. *See* 16-ORD-101.

It is apparent from both the University's words and actions that the University does not respect the Open Records Act, and simply chooses not to comply with the Attorney General's properly delegated right to review under KRS 61.880(2)(c). In fact, the University's utter disregard for the General Assembly's delegation of authority to the Attorney General in open records appeals is well-established. *See, e.g.*, 16-ORD-161; 16-ORD-101; 13-ORD-046; 12-ORD-220; 08-ORD-052. The University's desire that the Open Record Act, and KRS 61.880(2)(c) become a "trust me" law is palpable: "if the University advises that a record directly relates to a student and is maintained by the University, then FERPA clearly applies." (University's Memo. In Supp., at p 2.) Instead of acknowledging the Attorney General's clear interpretation of KRS 61.880(2)(c), the University has consistently and irreverently flouted the

[9] *See e.g*, 03-ORD-201 (Kentucky State University ("KSU") denied records to the public requester on grounds that they were FERPA-protected "education records." KSU provided the records to the Attorney General, pursuant to the Attorney General's KRS 61.880(2)(c) request. Upon review, the Attorney General determined that the records were FERPA-protected, un-redactable, and that KSU properly denied the public requester's Open Records request.). *See also*, 06-ORD-094 (University of Louisville denied records to public requester on basis that they were FERPA-protected education records. The University provided records to the Attorney General. Upon review of the records, the Attorney General upheld University's denial of the records to the public requester).

law. For example, in the underlying appeal the University refused to provide the Attorney General with even the **undisputed** records that it had already disclosed to *The Kernel* – about 470 pages of non-exempt public records.

The Attorney General has not "reversed" his interpretation of his authority under KRS 61.880(2)(c) to request additional documentation for confidential, *in camera* review on a case-by-case basis. The Attorney General has maintained a consistent, well-articulated interpretation of KRS 61.880(2)(c) in adjudicating open records appeals, including in 16-ORD-161. The University and University counsel were aware of those interpretations, in both the context of records protected by federal privacy laws and other exceptions to disclosure under the Open Records Act. Accordingly, the University's argument fails.

IV. An Injunction Prohibiting the University from Refusing a Request for, KRS 61.880(2)(c), *In Camera* Review is Both Appropriate and Reasonable.

The University claims that the Attorney General's requested relief is "both overbroad and vague," stating "blanket injunctions enjoining public agencies from violating the Open Records Act 'are repugnant to the American Spirit …'" *Fiscal Court of Jefferson Co. v. Courier-Journal*, 554 S.W.2d 72, 73-74 (Ky. 1977).[10] Under the Open Records Act, KRS 61.882(1) grants the Circuit Court "jurisdiction to enforce the provisions of [the Act] by injunction or other appropriate order on application of any person." The Kentucky Rules of Civil Procedure require that restraining orders and injunctions be specific in their terms and describe in reasonable detail the act to be restrained. CR 65.02(1). The Kentucky Court of Appeals recently upheld injunctive relief against a public agency, like the University, "resisting its most basic obligations under the

[10] *Fiscal Court of Jefferson Co.* involved a public requester seeking an injunction against a public agency in an Open Meetings Act appeal, not an Open Records Act appeal, as the University contends. 554 S.W.2d 72.

Open Records Act." *Cabinet for Health and Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 386 (2016).

Unlike the relief requested here, the injunction granted by the trial court in *Fiscal Court of Jefferson Co.*, did nothing more than "direct the members of the Fiscal Court to obey the Kentucky Open Meetings Law." *Id*. However, the Court in *Fiscal Court*, looked favorably to a "narrowly drawn" injunctive relief granted in *Jefferson County Bd. of Education v. Courier-Journal*, 551 S.W.2d 25 (Ky. App. 1977). *Id.* at 73-74. Specifically, the Court in *Jefferson County Bd. of Educ.* upheld the trial court's grant of injunctive relief against the public agency in an open meetings appeal. The Court stated the following:

> We can see no reason to greatly disturb the remedy the trial court fashioned. The court enjoined the appellants from violations of the law based on its findings. Therefore, in light of that court's findings, **the injunction prohibits the Board and its members from conducting or participating in a closed session to discuss the purchase of the Omar Carmichael School property by the University of Louisville without complying with KRS 61.815**, disposition of Channel 15 with the exception of pending litigation in the case of Stephens v. Adams House and any other matter which relies on the October 28th Resolution to provide the correct notice. **The court remained within the authority supplied it by KRS 61.845 in granting this type of relief**. So long as the Board and its members make a good faith effort to obey, they need not fear contempt

Jefferson County Bd. of Education, 551 S.W.2d at 29 (emphasis added).

In the instant case, the Attorney General seeks an injunction prohibiting the University from refusing to comply with the Attorney General's lawful requests for a confidential, *in camera* review under KRS 61.880(2)(c). The relief is narrowly drawn because it would not broadly prohibit the University from "committing some new violation unlike" the violation here. The injunction would prohibit the University from refusing a KRS 61.880(2)(c) request for substantiating records, as such refusals "severely impair" the Attorney General's ability to carry out his statutory duty to issue open records decision. The General Assembly did not exclude any

record from Attorney General review under KRS 61.880(2)(c). As such, any University refusal[11] is substantially the same violation as the University's violation in the instant case. Accordingly, the requested relief is narrowly drawn.

CONCLUSION

The Court should deny the University of Kentucky's Motion. The General Assembly validly delegated the Attorney General the authority to conduct confidential *in camera* review of records, pursuant to his statutory duty to adjudicate open records appeals and it did not exempt any of the invoved records from his review. Like the Circuit Court, the Attorney General has discretionary authority to request and review records *in camera* to substantiate the University's claimed exemptions.

The burden of proof is on the University – not the public requester – in open records appeals. When the University refuses the Attorney General's request for additional documentation to review *in camera*, the University fails to meet its burden of proof, and violates the Act. The General Assembly intended the Attorney General's statutory review as a low-cost mechanism for ensuring maximum transparency in government. The University would have the Court eviscerate that review, and turn the open records appeals into either a "trust-me" law, where extensive litigation would be needed for the public to access open records. Accordingly, the Court should deny the University's Motion for Summary Judgment.

[11] The University has on numerous occasions refused to comply with KRS 61.880(2)(c). *See e.g.*, 16-ORD-161, 16-ORD-101.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response to Plaintiff/Appellant's Motion for Summary Judgment via the Court's electronic filing system on March 13, 2017, and that I also sent a true and accurate copy of the same via electronic mail to the following individuals on March 13, 2017:

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