COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 8
CASE NO. 16-CI-3229
FILED ELECTRONICALLY

UNIVERSITY OF KENTUCKY, PLAINTIFF/APPELLANT

v.

KENTUCKY KERNEL'S RESPONSE BRIEF

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

* * * * * * * * * * *

Comes the Defendant/Appellee, The Kernel Press, Inc., d/b/a The Kentucky Kernel ("Kentucky Kernel"), by counsel, and for its Response to the University of Kentucky's Brief on Appeal, states as follows:

INTRODUCTION

The University seeks to manipulate its students' privacy interests to cloak its own apparent failure to adequately investigate and properly discipline a professor accused of sexual assault. Before the Attorney General and before this Court, the Kentucky Kernel has made clear that it agrees to the redaction of the name of the student (and student witnesses), along with any personally identifying information about the student. In response, and without offering the documents for review by either the Attorney General or this Court, the University claims that redaction is not possible as to ***any*** part of ***any*** documents in the investigative file. According to the University, then, the ***entire*** file consists of "intimate details" regarding an attack on a student whose identity cannot be concealed by ***any*** amount of redaction - despite the University's apparent conclusion that Harwood did nothing wrong and so should be permitted to resign

without providing notice to his potential new employers. The University is not entitled to cloak itself with its student's right to privacy in such a manner, and it is for the Court – not the University – to determine what redaction is appropriate.

In its Brief, the University generally described the documents that make up the file: "the investigative report, letters by the University to the specific parties concerning the allegations and **final outcome of the investigation**, letters concerning the status of and developments in the case, emails between the investigator and parties and witnesses, the investigator's interview notes, documents supplied by students, documents supplied by the professor, and documents supplied by witnesses . . . ." (Brief, p. 8) (emphasis added). It defies reasonable belief that disclosure of ***every one*** of those documents (in a properly redacted format) would violate the student survivor's privacy interest. Certainly, the University's inquiries to and responses by Harwood do not implicate that right, provided that the student's name and other personally identifying information are redacted. Nor can the University's conclusion as to whether and how Harwood should be disciplined concern the student's right to privacy.

The University's professed concern about protecting its student's privacy rights rings hollow in light of the arguments made by it to the Attorney General. The University justified its refusal to comply with the Open Records Act by asserting that the "public already knows all it needs to know" (Supplemental Response, p. 16) and that, in addition to the survivor, "an individual who is accused of sexual assault may not want the details of the allegations distributed through the media" (Supplemental Response, p. 14). These arguments, together with the University's refusal to even attempt redaction of the requested documents, make clear that its true motivation is to conceal its own behavior and the behavior of its employee, not to protect

students' privacy interests.[1] Regardless of those underlying intentions, however, the Constitutional and statutory provisions cited by the University simply do not create the type of "invisibility cloak" that the University seeks to draw over itself and its employees.

FACTUAL BACKGROUND

On April 6, 2016, the Kernel published an article by reporter Will Wright. The article reported that, "[a]mid a university investigation of alleged sexual harassment by UK associate professor of entomology James Harwood, UK and Harwood came to a resignation agreement that would allow the professor to continue receiving pay and benefits until August 31." (Exhibit 1). That article stated that Mr. Harwood had denied the sexual harassment allegations, and quoted him as stating in an email: "I was found not guilty, **the case is closed** and I will be resigning, effective 31 August 2016, for family medical reasons . . . ." (Emphasis added). Under the terms of the resignation agreement, Mr. Harwood is prohibited from having direct contact with University faculty, staff, or students except for necessary, work-related communications through email.

On April 7, 2016, and as a follow-up to the April 6, 2016, article, Mr. Wright made the following request to the University's Official Records Custodian pursuant to the Kentucky Open Records Act:

> I am requesting an opportunity to obtain copies of all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of James Harwood and any allegations of sexual harassment, sexual assault or any other misconduct by James Harwood.

[1] The Kentucky Kernel and this Court must assume that the real reasons for the University's refusal to produce the requested documents are set forth in the responses to the Attorney General filed by its employee and chief legal counsel rather than those now asserted by hired outside counsel who must attempt to fit the University's arguments into existing law.

(Exhibit 2). In an April 11, 2016, response, the University refused to produce any documents responsive to that request, asserting that the records are exempt from disclosure pursuant to various exceptions to the Act and because they "are considered attorney-client/work product privileged". (Exhibit 3).[2]

Mr. Wright appealed the University's refusal to produce the documents to the Office of Attorney General pursuant to KRS 61.880(2). (Exhibit 4). After receiving the University's response (which repeated the objections set out in the April 11, 2016, letter), the Attorney General's Office asked the University to substantiate its denial of the request by providing written responses to specific inquiries as to the exceptions and privileges cited by the University. (Exhibit 5). For example, the Attorney General inquired as to the basis for the University's characterization of the documents as preliminary in light of Kentucky case law holding that investigative materials lose any "preliminary" exempt status once they are adopted by an agency as part of a final action, and that an employee's resignation constitutes such a final action. The Attorney General also asked the University to explain "any challenges that impede the University's ability to redact the names and personal identifiers of Dr. Harwood's accusers per KRS 61.878(4)" and whether the University was also asserting privacy rights on behalf of Harwood. The letter concluded by asking the University to provide the Office with a copy of all responsive records to which he was denied access, presumably so the Office could conduct an *in camera* review to determine whether the University's reliance on the Act's exceptions, the attorney client privilege, and the work product doctrine was justified.

[2] The University does not argue in its Brief to this Court that its nondisclosure is excused by the attorney-client privilege or the work product doctrine, and so the Herald-Leader assumes that the University has waived its reliance on those exceptions to the Open Records Act. To the extent the University intends to rely on those grounds for nondisclosure in its Reply to this Court, the Herald-leader requests the opportunity to address those issues in a Sur-Reply.

The University then filed a "Supplemental Response," characterizing the Kentucky Kernel as an "eager" student newspaper engaging in "little more than voyeurism," and assuring the Attorney General that "[t]he public already knows all it needs to know" about the matter and that the professor "has already practically experienced the fullest possible consequences" of his actions. (Exhibit 6). In addition to the previously invoked exceptions and privileges, the University made the new argument that it was affirmatively prohibited from producing the requested documents by various federal laws. The University refused to provide any of the documents to the Attorney General for review, and expressed its "willingness to vigorously litigate its claims of privilege". (*Id*., p. 34).

In light of the University's refusal to produce any documents for *in camera* review or to answer the Attorney General's inquiries, the Office concluded that the University's denial of Mr. Wright's request violated the Kentucky Open Records Act. (Exhibit 7). This appeal followed.

ARGUMENT

According to the University, disclosure of the requested documents would violate the student's constitutional and statutory privacy rights, and no amount of redaction would be sufficient to safeguard those rights. Again, the Kentucky Kernel has been and remains willing to review the documents with the personally identifying information regarding the student survivor redacted. The Open Records Act provides: "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." KRS 61.878(4).

I. THE STUDENT'S PRIVACY INTERESTS DO NOT JUSTIFY THE UNIVERSITY'S NON-COMPLIANCE

A. The Student's Constitutional Right to Privacy Is Protected by Production of the Documents In Redacted Form

In the cases cited by the University in support of its claim that its student's constitutional right to privacy prevents it from complying with the Open Records Act, the "intimate details" were protected from disclosure because the survivor/victim's identify was known. In *Block v. Ribar*, 156 F.3d 673 (6th Cir. 1998), a rape victim, Ms. Bloch, publicly criticized a sheriff after no apparent progress was made in the investigation of the crime. In retaliation, the sheriff held a press conference during which he released "highly personal and extremely humiliating details" of the rape suffered by Ms. Bloch. The disclosure obviously violated her privacy rights because the public already knew her identity. In *Sterling v. Borough of Minersville,* 232 F.3d 190, 192 (3d Cir. 2000), a police officer violated a minor arrestee's constitutional rights by threatening to disclose the arrestee's sexual orientation to a family member. In *Powell v. Schriver,* 175 F.3d 107 (2d Cir. 1999), a corrections officer disclosed to other inmates and staff members that a specific inmate was HIV-positive and transsexual. None of these cases involved circumstances in which the identity of the victim was, by agreement of the parties, shielded from disclosure. The University cites no authority for the proposition that "intimate details" of an assault are constitutionally protected from disclosure where the victim's identity and identifying information are redacted.

The Kentucky Kernel has the highest regard for the privacy interests of the victim(s) of Dr. Harwood's sexual assault. However, neither the constitutional right of privacy nor the privacy interests protected by KRS 61.878(1)(a) are unlimited; those interests must be balanced against the public's interest in accountability of governmental entities. See, e.g., *Kleinert v. Bureau of Land Management*, 132 F.Supp.3d 79, 95 (D.D.C. 2015) ("If a substantial privacy interest is at stake, then the court must balance the individual's right of privacy against the public interest in disclosure"). Under the University's rationale, no part of any investigation into an

assault committed by an employee on a student can ever be disclosed, even where identifying information is redacted. A governmental agency cannot invoke an individual's right of privacy in order to shield itself from all public scrutiny.[3]

Further, the University's own description of the investigative file makes clear that it consists of far more than the student's identity and the "intimate details" of the assault. The University states that the file includes letters to Harwood, investigative reports, interview notes (presumably, including an interview of Harwood), documents supplied by Harwood, and emails between the investigator and Harwood. Harwood has publicly stated that he was found not guilty, and the University allowed him to resign without consequence. Clearly, then, the file must contain some information beyond the "intimate details" of the assault. As set out below, neither Harwood nor the University have any cognizable privacy interests with regard to the allegations of misconduct. It defies belief that every part of the file is so replete with information that identifies the student that no amount of redaction could adequately protect that student's privacy interests.

The University does not provide any factual support for its speculation that the Kentucky Kernel already knows the identity of the survivor. The University's alleged fear that "skillful Googlers" could ascertain the survivor's identity does not justify non-disclosure. See *Paul P. v. Farmer*, 92 F.Supp.2d 410 (D.N.J. 2000) (refusing to expand the Supreme Court's holding in *Whalen v. Roe*, 429 U.S. 589 (1977) to protect all information which may "lead to" the discovery

[3] Contrary to the University's implication, neither *Whalen v. Roe*, 429 U.S. 589 (1977) nor *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), expressly recognized a constitutional "right" to privacy. See *J.P. v. DeSanti*, 653 F.2d 1080, 1089 (6th Cir. 1981) (declining to "construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure."). In this case, the Court need not decide the existence or scope of a constitutional right to privacy, since the Kentucky Kernel has agreed to redaction of information that would identify the student.

of private information, because to do so would make very little information free from constitutional protection).

The cases cited by the University do not support its conclusory and self-serving claim that redaction will not suffice to protect the survivor's privacy interests. In *Press-Citizen Co., Inc. v. University of Iowa*, 817 N.W.2d 480 (Iowa 2012), documents relating to reports of sexual assaults by two university football players (i.e., students) were protected from disclosure because they were "educational records" as defined by FERPA. Because of the publicity surrounding the assaults, the Court concluded that redaction would not prevent the requestor from knowing the identity of individuals referenced in the records. Here, however, the alleged assault was by a University employee, not by another student. As explained below, records regarding Harwood's misconduct do not qualify for FERPA protection. Moreover, and significantly, the conclusion in *Press-Citizen* that redaction would not be sufficient was made by the Court after an *in camera* review, and then considered on appeal. Here, the University has appointed itself as the exclusive judge of whether the documents may be redacted in a manner that will protect the privacy interests of the student survivor. The Court, not the University, must make that determination.

Likewise, in *Krakauer v. State,* -- P.3d -- , 2016 WL 4978446 (Mont. 2016), the other case on which the University relies, the records at issue concerned a sexual assault committed by a student. They necessarily fell within FERPA's definition of "education records": materials which "contain information *directly related to a student* . . . ." *Id*. at *5 (emphasis added by Court). Records concerning an educational institution's investigation and discipline (or lack thereof) of a teacher were not under consideration. Moreover, and significantly, the *Krakauer* Court remanded the case with instructions to the trial court to "review the requested documents in camera" to determine whether the records fell within exceptions to FERPA's non-disclosure

requirements (including the exception allowing for release of documents pursuant to a court order) and whether redactions would be futile. In other words, neither the Court nor the requesting party was required to take the school at its word that every line of every document in the file implicated the student's privacy interests.

The Kentucky Open Records Act expressly provides for redaction in cases where, as here, the requested material includes some information that may be excepted from disclosure. KRS 61.878(4). The University's attempt to manufacture a conflict between the Act and the United States Constitution consequently fails.

B. The Student's Rights Under the Family Educational Rights and Privacy Act Do Not Excuse the University From Complying with the Open Records Act

While the University has framed the issues on appeal as including the question of "whether the University's obligations under federal privacy law trump the University's obligations under the State Open Records Act" (Complaint, Count I, p. 8), there simply is no conflict between the Act and any of the federal laws cited by the University.

In relying on the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, et seq., the University ignores the purpose of that statute, the definitions identifying what is and is not an "education record" subject to its protection, and federal case law making clear that an educational institution cannot abuse FERPA in the manner urged by the University.

As an initial matter, FERPA is a *funding* statute. It does not prohibit (or compel) the disclosure of anything at all. Instead, it imposes conditions on the availability of federal funds, making those funds unavailable to an educational institution which has a "policy or practice" of improperly releasing "personally identifiable information in education records":

> (2) No funds shall be made available under any applicable program to any educational agency or institution which has **a policy or practice of releasing, or providing access to, any personally identifiable information in education**

> **records** other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or
>
> (B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required.

20 U.S.C. § 1232g(a)(2) (emphasis added). FERPA, then, comes into play only with regard to the University's eligibility to receive federal funds, and the receipt of those funds is imperiled only insofar as the University "has a **policy or practice** of release, or providing access to, any personally identifiable information in education records . . . ." (Emphasis added).

Even if FERPA affirmatively prohibited the disclosure of education records, the documents sought by the Kentucky Kernel simply do not fall within that statute's definition:

> For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), **those records, files, documents, and other materials which—**
>
> **(i) contain information *directly related* to a student**; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.
>
> (B) **The term "education records" does not include**—
>
> . . .
>
> **(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person**

> **in that person's capacity as an employee and are not available for use for any other purpose . . . .**

20 U.S.C. 1232g(a)(4) (all emphasis added).

The University cites a single case, decided by the Florida state Court of Appeals, in support of its reliance on FERPA to avoid its obligations under the Kentucky Open Records Act. In that case, *Rhea v. Distr. Bd of Trs. Of Santa Fe. College*, 109 So.3d 851, 858 (Fla. App. 2013), however, the target of the University's investigation – a professor accused of misconduct – sought an *unredacted* copy of a student's email complaining about his inappropriate behavior. The professor had already received a redacted version of the email. Neither *Rhea* nor FERPA provide a basis for the University's refusal to redact personally identifying information regarding the student-complainants from the records requested by the Kentucky Kernel. Further, the *Rhea* Court acknowledged that its characterization of the email as an "education record" departed from a line of federal cases, notably including two cases decided by United States District Courts within the Sixth Circuit Court of Appeals, *Ellis v. Cleveland Municipal School Dist*., 309 F.Supp.2d 1019 (N.D. Ohio 2004), and *Wallace v. Cranbrook Educational Community*, 2006 WL 2796135 (E.D. Mich. 2006).[4]

Ellis was a lawsuit brought by a student against a school district regarding alleged abuse by substitute teachers. In discovery, the student sought related incident reports, student and employee witness statements, and information regarding discipline of the substitute teachers. The Court rejected the school's FERPA-based objection on numerous bases. "First, FERPA applies to the disclosure of student records, not teacher records." *Id*. at 1022. Because the function of

[4] While this Court is obviously not bound by the federal courts' interpretations of Kentucky law, the Kernel submits that some deference is owed to the federal courts' interpretations of *federal* law. See, e.g., *Jackson v. JB Hunt Transp., Inc.*, 384 S.W.3d 177, 182 (Ky. App. 2012) (finding "no reason to disagree" with the analysis or conclusions of federal courts interpreting a federal regulation). At the least, *Ellis* and *Wallace* are more deserving of weight than a Florida appellate court decision.

FERPA is to protect educationally related information, the statute does not prevent the disclosure of records related to an alleged incident of harassment by a teacher. *Id*. Information about assaults made by a substitute teacher do not implicate FERPA because they do not contain information "directly related to a student," within the meaning of 20 U.S.C. 1232g(a)(4). "**While these records clearly involve students as alleged victims and witnesses, the records themselves are directly related to the activities and behaviors of the teachers themselves and are therefore not governed by FERPA**." *Id*. at 1023 (emphasis added). That conclusion "is not only consistent with the language of the statute itself but also operates to protect the safety of students in the schools." *Id*. The Court explained:

> As in *Rios* [*v. Reed*, 73 F.R.D. 589, 600 (E.D.N.Y. 1977)], where the trial court concluded that FERPA should not be used as a cloak for alleged discriminatory practices, **FERPA should not operate to protect allegations of abuse by substitute teachers from discovery in private actions designed to combat such abuse**. While this Court reaches no conclusions as to the merits of plaintiff's claim in this case, **the individual and social importance of the issues raised by its claims is undeniable** . . . .

Id. at 1024 (emphasis added).[5] Had it not been for the Kentucky Kernel's dogged determination and investigation, the University's efforts to protect its employee and hide his misconduct from subsequent employers and students would have succeeded. Instead, his abuse has been "discovered," which is of great "social importance". Of equal social importance is discovery of the University's response to the serious accusations made against Harwood.

Similarly, in *Wallace*, a teacher accused of inappropriate sexual behavior toward students sought discovery in a wrongful termination action against the school. The teacher asked for

[5] Even if the records could qualify as "education records" as defined by FERPA, however, the *Ellis* Court noted that "FERPA is not a law which absolutely prohibits the disclosure of educational records; rather it is a provision which imposes a financial penalty for the unauthorized disclosure of educational records." *Id*. at 1023. Moreover, "the language of the statute, on its face, appears to limit its prohibition to those situations where an educational agency 'has a policy or practice of permitting the release of education records.'" *Id*. (Citing 20 U.S.C. 1232(g)(b)(1) and (2)).

production of the investigatory notes and student statements gathered during the investigation, and the school argued that disclosure would violate FERPA. Citing *Ellis* and other case law, the Court held that the documents could not constitute education records because they did not "directly relate[ ]" to students, and for the additional reason that they fell within one of the exceptions to the definition: "Under FERPA, education records do not include, 'in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose." *Id*. at *4. See also *Matter of Hampton Bays Union Free School Dist. v. Public Employment Relations Board*, 62 A.D.3d 1066 (N.Y. App. 2009) ("In our view, *teacher* disciplinary records and/or records pertaining to allegations of teacher misconduct cannot be equated with *student* disciplinary records . . . and do not contain 'information directly related to a student'") (emphasis in original); *Brouillet v. Cowles Pub. Co.*, 791 P.2d 526 (Wash. 1990) (rejecting defendant's FERPA objection to plaintiff's request for records specifying reasons for teacher certification revocations for use in preparing investigative news article regarding teacher sexual misconduct with students, the Court held that "[t]his law protects student records, not teacher records").

Judge Bertelsman recently rejected a university's attempt to use FERPA to justify its refusal to provide information about sexual assaults where no student-identifying information was sought. In *Jane Doe Plaintiff v. Northern Kentucky University*, 2016 WL 6237510 (E.D. Ky. 2016), a plaintiff brought a claim that Northern Kentucky University was deliberately indifferent to her allegations of sexual assault. Her counsel deposed NKU's athletic director and asked whether he was aware of allegations of rape against basketball players, whether he had asked the

players if the allegations were true, whether those students had been disciplined, and what the outcome of the investigation was. None of the questions asked for the names of the students or other identifying information, yet NKU's attorney (the same counsel who is now representing the University of Kentucky) instructed the witness not to answer based upon FERPA. Not only did the Court reject such a broad interpretation of FERPA, but it awarded sanctions to the plaintiff's counsel, ordering the defendant to pay her costs and attorney fees incurred in litigating the motion to compel and appearing at the depositions.

FERPA is intended to protect the privacy interests of students – not educators who have harrassed students, and not educational institutions that would prefer such scandals remain behind closed doors. It does not apply to records that are not "education records," and even as to education records, it is triggered only by the release of personally identifiable information. The University's reliance on FERPA to justify its violation of the Open Records Act thwarts both the purpose and plain language of that federal law.[6]

In addition to FERPA, the University appears to justify its violation of the Act by citing (with little explanation) privacy obligations imposed upon it by the Clery Act and the Violence Against Women Act ("VAWA"). Neither statute has any conceivable application to this dispute. The Clery Act generally mandates that all college and universities that accept federal funding

[6] The University's argument that compliance with the Open Records Act will result in a catastrophic loss of funding (Brief, footnote 12) is simply incorrect. While Congress may condition receipt of federal funds on accepting reasonable conditions under its Spending Clause authority, the financial penalty for noncompliance cannot be "so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal quotes and citations omitted). In *NFIB v. Sebelius*, 132 S.Ct. 2566, 2604 (2012), the Supreme Court explained that, where federally imposed conditions "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." The *Sebelius* Court concluded that pressure had become compulsion where states were threatened with ineligibility for hundreds of millions of dollars in federal health funding if they rejected the Affordable Care Act's mandate to expand Medicaid eligibility. If honoring a request for public records will put a university in violation of FERPA, and if the result of being found in violation of FERPA is the "institutional death penalty" of disqualification from federal funding, then FERPA fails the compulsion standard of *Sebelius*.

"must notify the constituent campus communities – students, faculty, employees, and the like – when certain crimes are brought to their attention." *Havlik v. Johnson & Wales*, 509 F.3d 25, 30 (1st Cir. 2007). The University specifically cites 20 U.S.C. 1092(f)(8)(B)(v) of the Clery Act, but that provision merely states that an institution of higher education receiving federal funding must "develop and distribute" a statement of policy regarding "how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law."[7] Notably, it was the Kentucky Kernel – not the University – who ensured that "constituent campus communities" learned of Harwood's criminal acts. The University clearly cannot be trusted to be its own censor,[8] and this is precisely why compliance with the Open Records Act is critical in ensuring that all students are aware of potential campus dangers.

The VAWA creates a federal civil rights cause of action for victims of violent crimes that are motivated by gender. Recipients of grants made under the VAWA must agree not to disclose "any personally identifying information or individual information" collected through the grantees' VAWA-related programs. 42 U.S.C. 13925(b)(2)(B)(i). Like FERPA, the VAWA defines "personally identifying information" as including first and last name, address, contact information, social security number, or other information "that would serve to identify any individual." The VAWA does not prohibit the disclosure of records related to a grantees' investigation of sexual harassment where that information is redacted and, moreover, the Act

[7] The University also cites a regulation promulgated under the Clery Act, 34 CFR 668.46(b)(1), which requires the institution to prepare an "annual security report" that includes information about how the institution will protect the confidentiality of victims. The University did not provide the Attorney General or this Court with an explanation as to how this regulation interferes with its obligations under the Open Records Act.

[8] See front page article in the October 29, 2016, *Wall Street Journal* (attached as Exhibit 8), detailing the failures of the Baylor University president and football coach to properly act upon and disclose assaults on women by football players/students. It was only after the press uncovered and publicized the assaults that disclosures were made and actions were taken to protect students.

acknowledges that release of the information may be compelled by statutory or court mandate. 42 U.S.C. 13925(b)(2)(C). The University cites no case in which the VAWA has been applied to shield a public educational institution from compliance with state or federal transparency laws, particularly where a requestor specifically seeks redacted versions of the records.

C. The Records Do Not Fall Within the Personal Privacy Exemption of KRS 61.878(1)(a)

The University's reliance on the "personal privacy" exception to the Open Record is misplaced. Again, the Kernel has made clear that it is willing to accept the requested documents with the students' identifying information redacted. The University's assertion that disclosure "of the details may deter other survivors from coming forward" is not a factor to be considered under the Open Records Act. Even if relevant, however, the Kentucky Kernel submits that the real danger of deterrence stems not from compliance with the Open Records Act, but from the University's apparent insistence that its investigation of Mr. Harwood's misconduct (and, apparently, the investigation of any assault by any University employee on any student) remain secret.

In light of the Kernel's request for redaction, the University's invocation of the personal privacy exception appears to be predominantly motivated by its interest in protecting Harwood, not the survivors of his assaults. This is evidenced by the University's contention before the Attorney General that "an individual who is accused of sexual assault may not want the details of the allegations distributed through the media" (Supplemental Response, p. 14). Like the balancing test that applies in determining the extent of an individual's constitutional "right" to privacy, KRS 61.878(1)(a) requires the Court to consider not only the personal nature of the information, but also the public's interest in knowing whether a public employee has engaged in misconduct in the course and scope of his or her public duties and whether the agency has

appropriately responded. That public interest must be weighed against the alleged privacy interest.

Kentucky law is clear that Harwood's alleged privacy interest must yield to the public's interest in ensuring that the University has appropriately responded to the serious allegations made against him. In *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001), a newspaper asked to inspect a city's documents regarding investigations and disciplinary actions related to police department employees. Some of the involved police officers filed a petition asking the Court to declare that the documents were not subject to disclosure under the Open Records Act. The Court explained:

> The first step in our analysis under KRS 61.878(1)(a) must begin with a determination as to whether the information in question is of a "personal nature." If we find that it is, then we must determine whether public disclosure "would constitute a clearly unwarranted invasion of personal privacy." This latter determination entails the comparative balancing of interests.

Id. at 598. The Court readily agreed that the allegations of misconduct by the police officer were of "a personal nature", but disclosure was nevertheless required because the public had a unique and legitimate interest in knowing the underlying basis for the disciplinary charge. "The complaint charged specific acts of misconduct by Palmer while he was on duty." *Id*. at 599. Therefore, and "[w]hile the allegations of misconduct by Palmer are of a personal nature, we hold that the public disclosure of the complaint would not constitute a clearly unwarranted invasion of Palmer's personal privacy." *Id*.

In *Doe v. Conway*, 357 S.W.3d 505 (Ky. App. 2010), a Cabinet official and lobbyist sought to prevent the disclosure of information derived from an investigation into their misconduct, which included improper use of Cabinet resources to engage in sex acts and take drugs. The Court noted that the personal privacy exception, like all exceptions to the Act, must be construed in light of the Act's general bias favoring disclosure. The exception does not apply

simply because the information at issue is "salacious" or "inflammatory". As to the Cabinet official, "[w]hile some of the conduct may indeed be of a personal nature, the conduct allegedly occurred on government time, while on government sponsored trips, and among government employees. Thus, to the extent this information is of a private nature, it must be weighed against the public's interest in knowing what its government is doing." *Id*. at 508. The Court explained:

> While the appellant claims that the information in the file is hearsay, rumors, and speculation, it is nonetheless subject to disclosure under the Act because of the importance of the public interest involved. **To imply that the public should not be given the opportunity to weigh this information for itself would defeat the purpose of the Act which is to ensure accountability**. This is true even if an investigation does not lead to criminal charges. Indeed, in some instances the failure to bring criminal charges may be the basis of public scrutiny.

Id. at 508 (emphasis added).

Palmer and *Doe* are consistent with a long line of Attorney General Opinions refusing to allow the personal privacy exemption to be misused as a shield for public employees who have engaged in embarrassing conduct. *In re WHAT-TV/Hardin County School District*, 13-ORD-121 (school district must provide records relating to investigation of principal that was concluded by resignation; because he occupied a position of trust, the allegations against him were "a matter of unique public interest" even though he would doubtless prefer they remain confidential) (emphasis added); *In re: J. Robert Cowan/Cabinet for Families and Children*, 98-ORD-45 (personal privacy exemption did not apply to request for documents pertaining to sexual harassment complaints involving Cabinet employees; "we have generally held that the privacy interest of public employees who have been disciplined for, or exonerated of charges of, misconduct in the course of their employment is outweighed by the public interest in monitoring agency action" and while sexual harassment complaints are of a uniquely sensitive nature, "**conduct giving rise to such complaints can only be characterized as misconduct of the most egregious character, and a matter in which the public has at least as great, if not a**

greater, interest than other forms of misconduct") (emphasis added); *In re WHAT-11/Justice Cabinet*, 02-ORD-231 ("In general, we believe that where the allegations concern a public employee, and arise in the context of performance of his or her employment, the public interest in regulation outweighs the employee's privacy interest" even where the allegations of sexual harassment are of a very personal nature); *In re: The Crittenden Press/Crittenden County Board of Education*, 05-ORD-046 (in request for copies of records relating to removal of school superintendent, "we find that the public's interest in reviewing the documents that formed the basis for the Board's decision to remove her is superior to her desire for confidentiality"); *In re: Randy Skaggs/Carter County Board of Education*, 07-ORD-241 (2007) ("this Office has generally held that the privacy interests of public employees against whom complaints or grievances have been leveled or allegations made, and the final action relative to those complaints, grievances, or allegations, including the decision to take no action, are outweighed by the public interest in monitoring agency action"); *In re: WHAS-11/Seven Counties Services, Inc*., 02-ORD-222 (in response to request for disciplinary records related to a physician, sensitive information about the complainants may be redacted, but the privacy interests of those clients does not extend to the physician).

Harwood's misconduct, as reported to the University, occurred during two separate work-related conferences. His laboratory at the University was characterized as "inappropriately sexually charged." (August 13, 2016, Kentucky Kernel article (Exhibit 9)). His actions took place within the scope of his position as a public employee, and any expectation of privacy he may have had is therefore heavily outweighed by the public's interest in ensuring that the University responded appropriately to the charges.

The cases cited by the University in reliance on this exception are readily distinguishable. In *Cape Publications, Inc. v. Univ. of Louisville Found., Inc*., 260 S.W.3d 818, 823 (Ky. 2008), the Supreme Court held that donors to a charitable public agency who had not requested to remain anonymous had only minimal privacy interests, so their names must be disclosed pursuant to an Open Records request despite the foundation's invocation of the personal privacy exception. The Court found the exception did apply as to donors who had requested anonymity. In this case, however, the Kernel has already agreed that all personally identifiable information about the victims should be redacted. In *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76 (Ky. 2013), a newspaper sought to learn whether the police department responded inconsistently to criminal complaints, so requested from the city clerk copies of arrest citations and incident reports for 2009 that involved stalking, harassment, or terroristic threatening. The clerk provided the documents, but withheld records involving juveniles and open cases, and redacted certain personal data, including names, social security numbers, and home addresses. Again, the Kernel has no objection to – and, in fact, requests – the redaction of any information that personally identifies Mr. Harwood's victims.

Finally, in *Kentucky Board of Examiners v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992), a public agency was found to have properly refused a newspaper's request to inspect a "complaints file" concerning patients' accusations of sexual improprieties against a psychotherapist. Unlike in this case, the Attorney General was permitted to review the documents *in camera,* and his Office provided an affidavit describing the contents in general terms. That and other uncontroverted evidence established "that the materials are rife with details of clients' marital and familial relationships and psychological symptoms, as well as [the therapist's] clinical impressions and course of therapy." *Id*. at 328. The Court did not suggest,

much less hold, that all accusations of a sexual nature necessarily fall within the personal privacy exemption, or address the scenario presented here, where the requesting party has already agreed to redaction of information that might identify private, innocent citizens.

II. THE RECORDS DO NOT FALL WITHIN THE "PRELIMINARY" DOCUMENTS EXCEPTIONS SET OUT IN KRS 61.878(1)(I) OR (J)

The University's attempt to fit the requested records into the Act's exceptions for "[p]reliminary drafts, notes, correspondence with private individuals" and for "[p]reliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended" is nothing short of a request that this Court overrule the Kentucky's Supreme Court's nearly twenty-five-year-old holding that "investigative materials that were only preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." *University of Kentucky v. Courier-Journal & Louisville Times Co*., 830 S.W.2d 373 (Ky. 1992). While the University has characterized that holding as a "judicially created exception", the Supreme Court's decision was based on the plain language of the statute and, in any event, is binding on this Court. SCR 1.030(8)(a).

The exception is inapplicable regardless of the University's conclusory assertion that the Settlement Agreement did not "adopt" the investigative material. In *Palmer*, 60 S.W.3d 591, the police officer argued that the documents related to the investigation of his misconduct were exempt as preliminary. Citing *University of Kentucky*, *supra*, the Court held that the complaints could no longer be deemed exempt once final action is taken and, **"[i]nasmuch as whatever final actions are taken necessarily stem from them, they must be deemed incorporated as part of those final determinations** . . . ." *Id*. at 595 (emphasis added). The police officer's resignation, like Harwood's resignation, constitutes a final action, and *Palmer* characterized any

argument to the contrary as defying "common sense". There and here, the effect of the resignation was to end the investigation and disciplinary proceedings.

Two of the three Attorney General Opinions cited by the University before the Attorney General in its reliance on the "preliminary" drafts and recommendations exception (Atty. Gen. Op. 78-738 and 94-ORD-108) predate *Palmer*. The remaining Opinion, *In re Bill Strauss/Kentucky High School Athletic Association*, 00-ORD-29, concerned records in which high school coaches had ranked "preferred" and "preferred to scratch" game officials. The Attorney General concluded that, because no final action had been taken as to the records, they remained preliminary performance evaluations. Here, in contrast, the subject of the investigation, Harwood, has resigned. That resignation was made pursuant to a provision in the University's administrative regulations titled "Informal **Resolution** Option." (See August 13, 2016, Kentucky Kernel article) (emphasis added). Harwood has stated that the case is closed. (Exhibit 9). There is nothing remotely preliminary about the documents at this point.

CONCLUSION

For the reasons set forth above, the Kernel respectfully asks that the University be required to immediately produce the documents requested in the April 7, 2016, Open Records request, with personal information identifying the victims redacted, and that the Court set a discovery and briefing schedule with regard to the willfulness of the University's violation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that an accurate copy of the foregoing was served via US Mail, postage prepaid, and e-mail, upon the following counsel of record on this 31st day of October, 2016.

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