

FILED ELECTRONICALLY

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

UNIVERSITY OF KENTUCKY

PLAINTIFF/APPELLANT

v.

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

DEFENDANT/APPELLEE

ANSWER TO INTERVENING COMPLAINT

The University of Kentucky (“University”), by and through counsel, submits this Answer to the intervening complaint filed in this matter by the Office of the Attorney General and states as follows:

INTRODUCTION

This case will determine whether and to what extent state and federal law, the Kentucky Constitution, the decisions of United States and Kentucky Supreme Courts, and the United States Constitution grant the Attorney General authority to use *in camera* review to resolve Open Records disputes. This case also will determine whether the Attorney General may order a nearly unfettered release of records containing the intimate details of a sexual assault simply because a public agency like the University advises it is constrained by law from complying with the Attorney General’s request for *in camera* review of such sensitive records.

The University believes the Attorney General’s authority to conduct *in camera* reviews is limited in four ways:

First, consistent with the pronouncements of the United States Department of Education and the Attorney General's explicit position from 2008 to 2016, federal law prohibits the Attorney General from conducting an *in camera* review of records protected by federal privacy statutes that contain no provision to allow for such review without the express written consent of those private citizens whom the records concern. *U.S. Dept. of Educ. Office of Family Policy Compliance Office Letter to Texas Office of Attorney General re: Disclosure of Education Records by School District* (June 25, 2006) (available online at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/txago072506.html>). See also *In re Kentucky Kernel/University of Kentucky*, 12-ORD-220 (2012) (Conway, A.G.); *In re Kentucky Kernel/University of Kentucky*, 08-ORD-052 (2008) (Conway, A.G.) (both recognizing that federal law prohibits the Attorney General from conducting an *in camera* review of records protected by the Family Educational Rights & Privacy Act).

Second, under the Kentucky Constitution, the Attorney General may not exercise judicial power, Ky. Const. § 28, and, as an executive branch official, may not examine the privileged documents of an independent body politic. See *Commonwealth ex rel. Beshear v. Bevin*, ___S.W.3d ___, 2006 WL 5248011 (Ky. 2016) (holding that public universities are "independent bodies politic" and, thus, are not directly subject to the control by the Governor and other executive branch officials).

Third, to the extent the Attorney General exercises judicial power, his authority to conduct an *in camera* review of privileged documents is constrained by the requirements for conducting such a review as established in *United States v. Zolin*, 491 U.S. 554, 571 (1989) and *Stidham v. Clark*, 74 S.W.3d 719, 727-28 (Ky. 2002).

Fourth, because a sexual assault victim has a “fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape . . .,” *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998), the U.S. Constitution prohibits the Attorney General from directing a public agency like the University to release records containing the intimate details of a sexual assault without the express written consent of those victims or the express authorization of an applicable provision of law. *See In re Courier-Journal/Crime Victims Compensation Board*, 03-ORD-153 (2003)(Chandler, A.G.) (relying on *Bloch* and concluding the personal privacy exemption protects the intimate details of a rape from disclosure).

Unfortunately, the Attorney General takes a different view. For reasons that have never been explained, the Attorney General has: (1) reversed his position on review of records protected by federal privacy statutes; (2) redefined his role so that he both interprets the law (judicial power) and enforces it (executive power); (3) resisted the limitations of *Zolin* and *Stidham*; and (4) reversed his position on disclosure of the intimate details of a sexual assault and refused to acknowledge the fundamental right and extent of victims’ privacy.

This Court must determine the exact parameters of the Attorney General’s authority consistent with the law set out above.

FIRST DEFENSE

The intervening complaint fails to state a claim on which relief can be granted and must be dismissed with prejudice.

SECOND DEFENSE

No response is required for the “introduction” section of the Attorney General’s intervening complaint; however, to the extent a response is required, the University admits as much of the introduction as states the Attorney General is obligated to uphold Kentucky’s Constitution and its laws; admits that, when a requester chooses to appeal a denial of an open

records request to the Attorney General rather than proceeding to Circuit Court, the Attorney General has the authority to resolve the dispute subject to the limitations imposed by the U.S. Constitution, state and federal law, the Kentucky Constitution, and judicial decisions limiting *in camera* review; states that the documents, statutes, regulations, and communications referenced in the introduction speak for themselves; and deny the remainder of the introduction's allegations except to the extent they are otherwise expressly admitted in this answer. The University further respectfully states the Attorney General's demand for an order enjoining the University to comply with "any" or "all" future Attorney General requests for *in camera* review is grossly overreaching and inappropriate in light of the principles and law set out in this answer.

THIRD DEFENSE

As to the specific enumerated allegations of the intervening complaint, the University states as follows:

1. As to the allegations of Paragraph 1 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University states the statutes, rules, and laws reference therein speak for themselves and therefore denies the allegations of Paragraph 1.

2. The University generally admits as much of the allegations of Paragraph 2 of the intervening complaint as state that a controversy exists regarding the requirements and limitations of law in relation to the Attorney General's authority to conduct an *in camera* review in the course of determining an Open Records dispute. The University states that KRS 418.040 speaks for itself and therefore denies the remainder of the allegations of Paragraph 2.

3. As to the allegations of Paragraph 3 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University states that Civil Rule 65 speaks for itself and therefore denies the allegations of Paragraph 3.

4. The University generally admits as much of the allegations of Paragraph 4 of the intervening complaint as state that a controversy exists regarding the requirements and limitations of law in relation to the Attorney General's authority to conduct an *in camera* review in the course of determining an Open Records dispute. The University states the statutes and communications referenced in Paragraph 4 speak for themselves and denies the remaining allegations of Paragraph 4.

5. As to the allegations of Paragraph 5 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University generally admits as much of the allegations of Paragraph 5 as state that a controversy exists regarding the requirements and limitations of law in relation to the Attorney General's authority to conduct an *in camera* review in the course of determining an Open Records dispute, and denies the remaining allegations of Paragraph 5.

6. As to the allegations of Paragraph 6 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University adopts and incorporates its responses to Paragraphs 1-5 of the intervening complaint.

7. The University generally admits the allegations of Paragraph 7 of the intervening complaint; however, the University states the statutes and constitutional provisions referenced therein speak for themselves and therefore denies the allegations of Paragraph 7 to the extent they are inconsistent with the actual terms of those provisions and other applicable law, and specifically denies the allegations of Paragraph 7 to the extent they are inconsistent with the defenses set out in this answer or otherwise state or suggest the Attorney General has asserted a claim against the University of Kentucky on which relief can be granted or that his authority to conduct or enforce a request for *in camera* review is inconsistent with the University's position as stated in this answer.

8. The University admits the allegations of Paragraph 8 of the intervening complaint.

9. The University admits as much of the allegations of Paragraph 9 of the intervening complaint as state that the Kernel is a newspaper publication operating in Lexington, Kentucky and denies the remaining allegations of Paragraph 9.

10. As to the allegations of Paragraph 10 of the intervening complaint, the University states that no responses is required; however, to the extent a response is required, the University adopts and incorporates its responses to Paragraphs 1-9 of the intervening complaint.

11. As to the allegations of Paragraph 11 of the intervening complaint, the University generally admits a controversy exists regarding the requirements and limitations of law in relation to the Attorney General's authority to conduct an *in camera* review in the course of determining an Open Records dispute. The University further states the statues and rules referenced in Paragraph 11 speak for themselves and therefore denies the remaining allegations of Paragraph 11.

12. The University generally admits the allegations of the first sentence of Paragraph 12 of the intervening complaint concerning the location of the University, the location of the records at issue, venue, and the appropriateness of venue in Fayette County, if anywhere, but denies the remaining allegations of Paragraph 12.

13. The University generally admits the allegations of Paragraph 13 of the intervening complaint but denies those allegations to the extent they are inconsistent with the defenses set out in this answer or otherwise state or suggest the Attorney General has asserted a claim against the University of Kentucky on which relief can be granted or to the extent that his asserted authority to conduct or enforce a request for *in camera* review is inconsistent with the University's position as stated in this answer.

14. As to the allegations of Paragraph 14 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University adopts and incorporates its responses to Paragraphs 1-13 of the intervening complaint.

15. The University admits as much of the allegations of Paragraph 15 of the intervening complaint as state that in the summer of 2015 the University received a complaint from a graduate student alleging sexual harassment by a tenured faculty member. The University states the May 3, 2016 response addressed in Paragraph 15 speaks for itself and therefore denies the remaining allegations of Paragraph 15.

16. The University admits as much of the allegations of Paragraph 16 of the intervening complaint as state that the University's Office of Institutional Equity and Equal Opportunity conducted an investigation into the complaint pursuant to the University's obligations under the U.S. Constitution, Title IX, other applicable laws, and the University's policies and procedures. The University further states that, in formulating legal advice to University officials, the University's legal counsel relied on some of the materials generated by the investigation and some of the materials were prepared in anticipation of litigation. All other allegations contained in Paragraph 16 are denied.

17. As to the allegations of Paragraph 17 of the intervening complaint, the University states the January 18, 2016 communication referenced therein speaks for itself and therefore denies the allegations of Paragraph 17.

18. The University admits as much of the allegations of Paragraph 18 of the intervening complaint as state that in April 2016 the University entered into a separation agreement with the professor. The University further states that this separation agreement constitutes the final agency action of the University. The University states the agreement speaks for itself and therefore denies the remaining allegations of Paragraph 18.

19. As to the allegations of Paragraph 19 of the intervening complaint, the University states the April 11, 2016 letter referenced therein speaks for itself and therefore denies the allegations of Paragraph 19.

20. The University admits the allegations of Paragraph 20 of the intervening complaint, except inasmuch as it is without sufficient information to know the exact date on which the Kernel submitted its appeal and therefore denies the allegations of Paragraph 20 regarding the same.

21. The University admits as much of the allegations of Paragraph 21 of the intervening complaint that state on May 3, 2016, the University responded to the Kernel's appeal pursuant to Section 2 of 40 KAR 1:030. The University states the University's response and the provisions of 40 KAR 1:030 speak for themselves and therefore denies the remaining allegations of Paragraph 21 and further states the Attorney General's power to conduct an *in camera* review of records under KRS 61.880(2) and 40 KAR 1:030 limited by other provisions of law set out in this answer.

22. The University admits as much of the allegations of Paragraph 22 of the intervening complaint as state that the Attorney General requested information and documentation from the University by letter dated May 26, 2016. The University states the Attorney General's May 26, 2016 request speaks for itself and therefore denies the remaining allegations of Paragraph 22.

23. The University admits as much of the allegations of Paragraph 23 of the intervening complaint as state that the University responded to the Attorney General's request for records and information by response dated June 15, 2016. The University states its June 15, 2016 response speaks for itself and therefore denies the remaining allegations of Paragraph 23.

24. The University admits as much of the allegations of Paragraph 24 of the intervening complaint as state that on August 1, 2016, the Attorney General issued its decision in *In re Kentucky Kernel/University of Kentucky*, 16-ORD-161 (2016) (A. Beshear, A.G.). The University states that the Attorney General's August 1, 2016 decision speaks for itself and therefore denies the remaining allegations of Paragraph 24.

25. The University admits the allegations of Paragraph 25 of the intervening complaint.

26. The University admits the allegations of Paragraph 26 of the intervening complaint.

27. As to the allegations of Paragraph 27 of the intervening complaint, the University states no response is required; however, to the extent as response is required, the University adopts and incorporates its responses to Paragraphs 1-26 of the intervening complaint.

28. As to the allegations of Paragraph 28 of the intervening complaint, the University states the provisions of KRS 61.880 speak for themselves and are limited by applicable law as outlined in this answer, and therefore denies the same.

29. As to the allegations of Paragraph 29 of the intervening complaint, the University states the provisions of 40 KAR 1:030 speak for themselves and are limited by applicable law as outlined in this answer, and therefore denies the same.

30. The University denies the allegations of Paragraph 30 of the intervening complaint.

31. As to the allegations of Paragraph 31 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University adopts and incorporates is responses to Paragraphs 1-30 of the intervening complaint.

32. As to the allegations of Paragraph 32 of the intervening complaint, the University states no response is required; however, to the extent a response is required, the University states the provisions of Civil Rule 65.01 speak for themselves, denies the allegations of Paragraph 32, and states the Attorney General's demand for an order enjoining the University to comply with "any" or "all" future Attorney General requests for *in camera* review is grossly overreaching and inappropriate in light of the principles and law set out in this answer.

33. The University states the provisions of Civil Rule 65.05 speak for themselves and therefore denies the allegations of Paragraph 33.

34. The University denies the allegations of Paragraph 34 of the intervening complaint.

35. The University generally admits as much of the allegations of Paragraph 35 of the intervening complaint as state that the Attorney General is the chief law enforcement officer of the Commonwealth; is charged with reviewing denials of Open Records requests pursuant to KRS 61.880 and 40 KAR 1:030; and has certain authority to request an *in camera* review of records under KRS 61.880(2) and 40 KAR 1:030, but states such authority is necessarily limited by the provisions of law addressed in this answer. As to the remaining allegations of Paragraph 35, the University states that 40 KAR 1:030 Section 3 speaks for itself and denies the remaining allegations in Paragraph 35.

36. The University denies the allegations of Paragraph 36 of the intervening complaint.

37. As to the allegations of Paragraph 37 of the intervening complaint, the University states the provisions of Civil Rule 81A speak for themselves and the University is without sufficient information to admit or deny the truth of the Attorney General's allegation about the

actions of every Circuit Judge in the Commonwealth at any given point in time, and therefore denies the allegations of Paragraph 37.

38. The Attorney General's prayer for relief requires no response; however, to the extent a response is required, the University denies the allegations therein, denies that the Attorney General's intervening complaint states a claim on which relief can be granted, and states the Attorney General's demand for an order enjoining the University to comply with "any" or "all" future Attorney General requests for *in camera* review is grossly overreaching and inappropriate in light of the principles and law set out in this answer.

39. The University denies any allegation in the intervening complaint not specifically admitted in this answer.

FOURTH DEFENSE

The intervening complaint is barred as a matter of law in whole or in part by sovereign immunity, governmental immunity, and/or other immunities afforded to the University as an agency and independent body politic of the Commonwealth of Kentucky. In particular, sovereign immunity prohibits an injunctive relief action: (1) where there is no on-going violation of state or federal law; or (2) where state and federal law do not require the University to behave in a particular way.

FIFTH DEFENSE

The intervening complaint is barred as a matter of law in whole or in part for lack of standing and/or subject matter jurisdiction.

SIXTH DEFENSE

The intervening complaint is barred in whole or in part on the basis of waiver and/or estoppel. Specifically, waiver and/or estoppel apply in two respects. First, the Attorney General has reversed his previous position on the limits of *in camera* review, without notice or

explanation, from the position previously reflected in *In re Kentucky Kernel/University of Kentucky*, 12-ORD-220 (2012) (Conway, A.G.) and *In re Kentucky Kernel/University of Kentucky*, 08-ORD-052 (2008) (Conway, A.G.). Second, the Attorney General has reversed his previous position on the disclosure of the intimate details of a sexual assault, without notice or explanation from the position previously reflected in *See In re Courier-Journal/Crime Victims Compensation Board*, 03-ORD-153 (2003)(Chandler, A.G.) (relying on *Bloch* and concluding the personal privacy exemption protects the intimate details of a rape from disclosure).

SEVENTH DEFENSE

Federal privacy laws, including but not necessarily limited to FERPA, prohibit or otherwise limit the Attorney General from conducting an *in camera* review of certain records as part of his resolution of an Open Records dispute without the express written consent of those persons whom the records concern or the express authorization of an applicable provision of law. *See, e.g., U.S. Dept. of Educ. Office of Family Policy Compliance Office Letter to Texas Office of Attorney General re: Disclosure of Education Records by School District* (June 25, 2006).

EIGHTH DEFENSE

The Kentucky Constitution prohibits or otherwise limits the Attorney General from conducting an *in camera* review of privileged records from an independent body politic. The Kentucky Constitution limits the Attorney General in two ways. First, the Kentucky Constitution prohibits the Attorney General from exercising judicial power. Consequently, the University cannot disclose privileged documents without waiving the privilege. The Attorney General may not force the University to choose between waiving a privilege and losing an Open Records Act appeal. Second, because the Attorney General is a constitutional officer of the executive branch, the separation of powers provisions preclude him from interfering in the internal affairs of another constitutional officer or independent body politic. This limitation on

interference in the internal affairs of another constitutional officer or independent body politic includes examination of the privileged communications of the constitutional officer or independent body politic. Just as the Attorney General may not view the Governor's privileged documents, he may not view the University's privileged documents.

NINTH DEFENSE

If this Court concludes that the General Assembly has authorized the Attorney General to exercise judicial power, then the Attorney General's *in camera* review of privileged documents is necessarily limited by and subject to the threshold requirements announced in *United States v. Zolin*, 491 U.S. 554, 571 (1989) and *Stidham v. Clark*, 74 S.W.3d 719, 727-28 (Ky. 2002). If he is acting as a judicial officer, the Attorney General's authority to conduct an *in camera* review of privileged documents is no greater than that of a Circuit Court.

TENTH DEFENSE

In deciding an Open Records Act matter, the Attorney General may not direct a public entity to violate a sexual assault victim's "fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape . . .," *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998). Moreover, any order to do so may subject public officials to personal liability under 42 U.S.C. § 1983. *See Bloch*, 156 F.3d at 687.

ELEVENTH DEFENSE

The Attorney General's statutory authority to decide Open Records Act appeals requires him to determine whether records are exempt on the merits. It does not authorize him to order the release of documents simply because a public entity is unable to disclose documents protected by federal privacy law or applicable privilege. In resolving the underlying Open Records dispute in this case, the Attorney General failed to make a determination on the merits.

TWELFTH DEFENSE

The University reserves the right to raise additional defenses as may become appropriate through the course of discovery in this case.

WHEREFORE, the University prays for the following:

- A. Judgment in its favor regarding the Attorney General's intervening complaint and the University's compliance with KRS 61.880(2)(c) and 40 KAR 1:030.
- B. A determination that the University has at all relevant times acted in good faith regarding compliance with its obligations under the Kentucky Open Records Act.
- C. All other relief in law or equity to which the University may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2016, the foregoing document was electronically filed with the Clerk of this Court using the KY eCourts eFiling system, which will send notification of such filing to all parties registered to receive electronic filings and that I emailed/mailed this document U.S. mail, first class, postage prepaid, to the following:

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