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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

**RESPONSE TO THE ATTORNEY GENERAL'S
MOTION TO INTERVENE**

The plaintiff/appellant, University of Kentucky (“University”), by and through counsel, responds to the Attorney General’s Motion to Intervene as follows:

If the Court feels the proper jurisdictional prerequisites have been met, the University does not object to the Attorney General’s Motion to Intervene and to file an Intervening Complaint. The University takes this position for two reasons.

First, there is a clear controversy between the Attorney General and the University over the University’s inability to allow the Attorney General to conduct an *in camera* review of records that are protected by federal privacy laws. This first controversy is the direct result of the Attorney General’s sudden reversal—without prior notice or explanation—of his long-standing position that federal law indeed prohibits the University from providing such records for *in camera* review. Second, there is a clear controversy between the parties over the University’s ability to produce records that are protected by the attorney-client privilege. This controversy is a direct result of the Attorney General’s refusal to acknowledge the real risk of

waiving privilege that the University runs with disclosure of such records to a non-judicial officer such as the Attorney General.

For the benefit of the Court, the University provides the following background for how the parties ended up in this particular dispute about the *in camera* review of records protected by federal privacy laws.

In 2006, the United States Department of Education's Family Policy and Compliance Office specifically addressed whether an educational institution could provide the Texas Attorney General with copies of records protected by the Family Education Rights & Privacy Act ("FERPA"), 20 U.S.C. § 1232g, for the purposes of conducting an *in camera* review of those records in the course of deciding a dispute between the institution and a media outlet that had requested the records under the Texas Public Information Act. The federal government concluded FERPA did not authorize the educational institution to provide the Texas Attorney General with copies of the records for review. In other words, the federal government declared that turning over student records to the Attorney General for purposes of reviewing those records to decide an Open Records dispute would in fact violate FERPA. *See* July 25, 2006 *FPCO letter to Texas Office of Attorney General re: Disclosure of Education Records by School District*, available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/txago072506.html>.

Relying on the 2006 pronouncement from the federal government, in 2008 the University respectfully declined to produce FERPA-protected documents to the Attorney General for an *in camera* review related to a dispute with the Kentucky Kernel over its request for student records under the Open Records Act. Upon reviewing the federal government's 2006 pronouncement cited above, the Attorney General agreed with the University's assertion that FERPA "precludes the University from tendering the requested SGA/EB listserv postings to the Attorney General for any *in-camera* inspection in this case." *In re Kentucky Kernel/University of Kentucky*, 08-

ORD-052 (2008) (Conway, A.G.). Accordingly, the Attorney General did not penalize the University for declining to provide records for *in camera* review and, based upon what information the University could provide, found that the records at issue were in fact exempt from production under the Open Records Act pursuant to federal law.

Similarly, four years later, in 2012, the University again was unable provide the Attorney General with copies of student records sought by Kernel for purposes of an *in camera* review. The Attorney General reaffirmed the principles he first articulated four years earlier. In ruling for the University, the Attorney General declared:

It is on this basis [FERPA] that we affirm the University of Kentucky's denial of the *Kentucky Kernel's* open records request. Since we were unable to review the relevant documents *in camera*, we rely on the University's interpretation and application of the federal law, and its professed appreciation for the value of transparency, to ensure that public records are not improperly withheld in the name of student privacy.

In re Kentucky Kernel/University of Kentucky, 12-ORD-220 (2012) (Conway, A.G.).

Now, without any intervening change in the law or any explanation from the Attorney General, the Attorney General insists the law has changed. Regrettably, the Attorney General has now accused the University of acting “lawlessly” for having followed both the Attorney General’s long-established precedent and the requirements of federal law. Under the compelling circumstances, the University must defend the privacy interests of the student survivors and victims of sexual assault in this case, and those in the University community who invariably will be affected in the future. This case provides a perfect example of the additional damage caused to victims of sexual assault that will occur when a detailed description of that abuse is published without their consent. Simply redacting the victims’ names while publishing the sexual assault details did not protect the victims’ identity here, and will not do so in the future. Certainly a ruling in favor of the Kernel and/or the Attorney General will have a chilling effect on the

University's ability to protect the victims and survivors of sexual assault and discourage them from coming forward to report this reprehensible conduct.

In conclusion, this Court must decide whether the federal privacy laws at issue prohibit the University from producing records to the Attorney General for *in camera* review. Additionally, this Court must determine whether production of the University's privileged documents to the Attorney General waives the aforementioned privilege such that the University would be constrained not to produce such records.

Wherefore, the University of Kentucky prays that the Court grant the Attorney General's Motion to Intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 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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