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12-ORD-220

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In re: *Kentucky Kernel*/University of Kentucky

Summary: Although its original response was procedurally and substantively deficient, University of Kentucky properly denied request for records relating to student athlete based on federal law prohibiting disclosure of education records as construed in recent case law.

Open Records Decision

The question presented in this appeal is whether the University of Kentucky properly relied on the Family Educational Rights and Privacy Act,[1] incorporated into the Open Records Act by KRS 61.878(1)(k),[2] in denying *Kentucky Kernel* Editor-in-Chief Becca Clemons' August 23, 2012, request for 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." Based on the analysis set forth in *State ex rel. ESPN v. Ohio State University*, 132 Ohio St.3d 212, 970 N.E.2d 939 (Ohio, 2012), we affirm the

[1] 20 U.S.C. 1232g.

[2] KRS 61.878(1)(k) authorizes public agencies to withhold "[a]ll public records or information the disclosure of which is prohibited by federal law or regulation."

University's denial of Ms. Clemons' request. A copy of the opinion is enclosed. In reaching this decision, we emphasize three salient points.

1. The University declined our KRS 61.880(2)(c)[3] request for "a copy of the records involved" notwithstanding our assurances that the records would "not be disclosed."

2. KRS 61.880(2)(c) assigns the burden of proof to the University and past appeals have generally been resolved against public agencies that declined our request for copies of the records involved.[4]

3. Notwithstanding the court's analysis in *ESPN v. Ohio State University*, above, there is a split of authority on the issue of FERPA's application to records involving investigations of student athletes including those conducted by the National Collegiate Athletic Association ("NCAA"). The most recent manifestation of this legal divide is found in Superior Court Judge Howard E. Manning, Jr.'s, August 9, 2012, memorandum in *The News and Observer Publishing Company, et al. v. Richard A. Baddour, Director of Athletics for the University of North Carolina, et al.* 10CVS1941 (Orange County Superior Court) declaring that "[t]his kind of behavior (impermissible benefits - non-academic) does *not relate* to the classroom, test scores, grades, SAT or ACT scores, academic standing or anything else relating to a student's education progress or discipline for violating the

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[3] KRS 61.880(2)(c) provides:

> On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed.

[4] See, e.g., 10-ORD-079 (enclosed) and authorities cited therein.

> educational rules or honor code, all of which are clearly protected by FERPA." (Emphasis in original.)[5]

In the interest of consistent application of FERPA, and in light of 08-ORD-052, we depart from past practice relative to public agency nonproduction of "the records involved," KRS 61.880(2)(c) notwithstanding, but remind the University that, when denied the opportunity to review the records, "the Attorney General's ability to render a reasoned open records decision [is] severely impaired." 96-ORD-106, p. 5, cited in 10-ORD-079, p. 5.

The University initially denied the *Kernel's* request on the basis of KRS 61.878(1)(i),[6] explaining that "this matter is still under review and therefore the University has no documents responsive to [the] request."[7] Following receipt of notification of the *Kernel's* open records appeal, the University invoked FERPA, "prohibit[ing] the University from disclosing such records without the student's prior written consent," and KRS 61.878(1)(k), incorporating the federal law into the Open Records Act. The University addressed a number of anticipated challenges to its position, the most persuasive of which centered on "Noel's role as a player on the basketball court rather than as a student in the classroom." It was the University's position that the two roles are inseparable since "Noel's

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[5] See also "Secrecy 101 – College Athletic Departments Use Vague Law to Keep Public Records From Being Seen," *The Columbus Dispatch*, September 15, 2011 (enclosed). http://www.dispatch.com/content/stories/local2010/10/14/FERPA_MAIN.ART_0_ART_05-31-09AIVFEOG8F.html?sid+101. The sponsor of the law, former U.S. Senator James Buckley, is one of the harshest critics of its overbroad interpretation by colleges and universities. See, e.g., "FERPA Author to Colleges: Stop Violating FERPA." http://thefire.org/article/12954.html. FPCO has also joined in the chorus of detractors. "Right to Remain Silent" http://www.insidehighered.com/news/2009/06/26/Ferpa.

[6] Although the University recited the language of both KRS 61.878(1)(i) *and (j)*, it cited KRS 61.878(1)(i) only. Given the University's refusal to honor our request for copies of "the records involved," we cannot assess the propriety of its invocation of these exceptions.

[7] The fact that a record is protected from disclosure by one or more of the exceptions to the Open Records Act does not render it a nonresponsive record. The University's initial response was therefore inaccurate. Records responsive to Ms. Clemons' request did, in fact, exist, but arguably enjoyed protection under an exception to the Act.

place on the team is inherently dependent on - not exclusive of - his place as a student at the University, and thus the records Ms. Clemons seeks are 'education records' protected by FERPA even though they may not have anything to do with Noel's actual classroom activities." In support of its position that "FERPA precludes the University" from producing copies of the "records involved" for *in camera* inspection by this office, pursuant to KRS 61.880(2)(c), the University cited a July 25, 2006, U.S. Department of Education Family Policy Compliance Office ("FCPO") letter to the Texas Attorney General relating to disclosure of education records by a school district to the Attorney General for purposes of records access analysis and review.[8]

In 08-ORD-052 this office affirmed the University of Kentucky's denial of a request submitted by the *Kernel* for "access to or copies of all emails sent through Student Government's executive branch listserv" for a stated period, notwithstanding the University's refusal to honor our KRS 61.880(2)(c) request to conduct an *in camera* inspection of the records. A copy of that open records decision is enclosed. We deferred to the University in its characterization of the email as an "education record" based on FPCO's concurrence in this view and the recognition that "because the [Student Government Association] officers' positions are conditioned on their status as full-time students, the postings they generate on the SGA/EB listserv must be considered 'education records' for purposes of FERPA analysis." 08-ORD-052, p. 6. At page 7 of that decision, we reminded the University that "[i]t has been, and remains, our practice," pursuant to KRS 61.880(2)(c), to conduct "an *in camera* inspection of the ["records involved"] to determine if the agency against which the appeal was brought properly denied access to those records."

We defer to the University's characterization of the record identified in Ms. Clemons' request as "education records" based on 08-ORD-052 and the analysis in *State ex rel. ESPN, Inc. v. Ohio State University*, above, the single reported opinion on this issue we have located. Relying on the Sixth Circuit Court of Appeals expansive definition of the term "education records" in *United*

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[8] http://www!.ed.gov/policy/gen/gid/fpco/ferpa/library. Prompted by the problems encountered in issuing 08-ORD-052, on April 23, 2008, this office requested that FPCO "provide formal guidance to the Kentucky Attorney General on the application [of the July 25] letter" to Kentucky educational agencies and institutions in light of KRS 61.880(2)(c). A copy of that letter is enclosed. To date, we have received no response to our request for guidance.

States v. Miami University 294 F.3d 797 (6th Cir. 2002), the court rejected the claim that records relating to an NCAA investigation of student athletes were not "education records," emphasizing that "the plain language of the statute does not restrict the term 'education records' to 'academic performance, financial aid, or scholastic performance'" and that "[e]ducation records need only 'contain information directly related to a student' and be 'maintained by an educational agency or institution' or a person acting for the institution." *ESPN* at 946, 947. "'Notably,'" the court opined, "'Congress made no content-based judgments with regard to its 'education records' definition.'" *ESPN* at 946 quoting *Miami University* at 812.

It is on this basis 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.[9]

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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#364

[9] Ohio State provided ESPN with more than 700 documents responsive to its request. The University of Kentucky apparently provided the *Kernel* with none. This manifest disparity may be attributable to the fact that ESPN's request involved multiple student athletes and the *Kernel's* involved only one making the redaction of personally identifiable information impracticable.

Distributed to:

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