COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT,
DIVISION I
CASE NO. 17-CI-00233
Electronically Filed

WESTERN KENTUCKY UNIVERSITY PLAINTIFF

V.

COLLEGE HEIGHTS HERALD, and
THE KERNEL PRESS, INC., d/b/a
THE KENTUCKY KERNEL DEFENDANTS

ORDER FOR PRODUCTION OF DOCUMENTS AND DENYING ATTORNEY'S FEES

This matter is before the Court on motion of Defendants College Heights Herald ("CHH"), and The Kernel Press, Inc., d/b/a The Kentucky Kernel ("Kernel") for Plaintiff Western Kentucky University ("WKU") to produce copies of certain investigations and attorney's fees. Having the benefit of memoranda of law, arguments of counsel, and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that WKU shall produce minimally redacted copies of Cases "G" through "T" constant with redactions made in Cases "A" through "F" as described in this Order. IT IS FURTHER ORDERED that Defendants' motion for attorney's fees is DENIED.

FACTUAL BACKGROUND

On October 18, 2015, the Kernel made an open records request, pursuant to the Kentucky Open Records Act (ORA) KRS 61.870, *et seq.*, to WKU "to obtain all investigative records from all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years." Likewise, on November 1, 2016, the CHH made an open records request to WKU to obtain "all investigative records for all Title IX investigations into all sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation, and/or stalking levied

against Western Kentucky University employees in the last five years." WKU denied the requests, and both the Kernel and CHH asked the Kentucky Attorney General ("AG") to review WKU's denials.

The Office of the Attorney General reviewed WKU's denials, and, on January 26, 2017, it ordered WKU to produce the requested Title IX investigation records in redacted form. Specifically, the AG ordered WKU to allow the Kernel and CHH to inspect "the disputed records with the exception of the names and personal identifies of the complainant and witnesses per KRS 61.878(1)(a) as construed in 99-ORD-39 and 02-ORD-231." On February 24, 2017, WKU appealed the AG's order to this Court, arguing that the Title IX investigation files in question were exempt from disclosure.

During the pendency of this case, the Kentucky Supreme Court granted discretionary review of a similar case from Fayette Circuit Court. Given the substantially similar set of facts presented to the Supreme Court, all actions in this case halted until the Supreme Court issued a ruling. On March 25, 2021, the Supreme Court published its opinion in *University of Kentucky v. Kernel Press, Inc*., 620 S.W.3d 43 (Ky. 2021), providing guidance for the instant case. In light of *Kernel Press, Inc*., the parties began to renegotiate disclosure of the requested investigations.

WKU's twenty Title IX investigation files in question can be sorted into two categories, labeled "Cases A through T" for simplicity. The first category—which includes Cases A through F—involve substantiated allegations of employee misconduct. The second category—which includes Cases G through T—involve allegations of employee misconduct which, after investigation, were deemed to be unsubstantiated. On October 11, 2023, WKU produced Cases A through F in redacted form. In accord with KRS 61.878(1)(a) and *Kernel Press, Inc.*, WKU redacted "student-specific information" from Cases A through F, along with information protected

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by the attorney-client privilege, and WKU did not redact the names of the employees being investigated since the claims were substantiated. CCH and the Kernel was satisfied with the production of Cases A through F and agreed the redacted information was exempt from disclosure.

However, WKU heavily redacted Cases G through T reasoning the unsubstantiated claims warranted greater protection and were exempt from disclosure. Eventually, the parties agreed that WKU would produce Cases G through T with similar redactions to Cases A through F. However, WKU additionally seeks to redact the names of the accused employees who had unsubstantiated allegations against them as well as relevant information that may reveal their identities because such disclosures would be an unwarranted invasion of privacy and, thus, exempt from disclosure. CCH and the Kernel contend that there is no "substantiated" verses "unsubstantiated" distinction from ORA disclosures and WKU should unredacted the names of the accused. The parties argued their positions before the Court on October 19, 2023.

Additionally, CCH and the Kernel seek attorney's fees from WKU because they are alleged to have willfully withheld the files pursuant to a valid ORA request and they have continued to do so during the six years this case was pending.

The issues for this Court to decide are whether WKU may be permitted to redact the names of the accused in the cases where the claims were unsubstantiated, and whether CHH and the Kernel are entitled to attorney's fees.

LAW AND ANALYSIS

The primary issue presently before the Court is whether, pursuant to KRS 61.678(1)(a), WKU may redact from Cases G through T the names and identifying-information of certain employees who had unsubstantiated investigations of misconduct brought against them. KRS 61.678(1)(a) provides that "[p]ublic records containing information of a personal nature where the

public disclosure thereof would constitute a clearly *unwarranted* invasion of personal privacy" are exempt from production under the ORA. In *Kernel Press,* the Kentucky Supreme Court reasoned that, in the context of the disclosure of Title IX investigation files, determining whether a record may be withheld under the privacy exemption requires the court to balance the privacy interest in question "against the strong public interest in knowing how" the investigation was handled. *Kernel Press, Inc.*, 620 S.W.3d at 60. To invoke that exemption, a public agency is required to comparatively weigh the antagonistic interests at stake; that is, the public's right "to be informed about what their government is up to" against the individual's right to privacy. *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 85 (Ky. 2013). The ORA generally favors disclosure. *See Ky. Bd. of Exam'rs of Psychologists v. Courier–Journal*, 826 S.W.2d 324 (Ky. 1992).

WKU contends that the employees who were wrongly accused misconduct have a stronger privacy interest because disclosure of their identifies would likely subject them to embarrassment and stigma, and that this interest outweighs the public's interest because the allegations made against them were ultimately unsubstantiated, as compared to substantiated claims. In support of this distinction, WKU cites to a Kentucky Attorney General Opinion that held wrongly accused police officers who were not ultimately charged with wrongdoing (i.e., unsubstantiated claims) had a greater privacy interest that outweighed the public interest in disclosure when there was no evidence to suggest favoritism or bias during the course of the investigation. *Ky. Op. Att'y Gen*. 20-ORD-026 (2020) (distinguishing *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001)).

In other sexual harassment complaints, the AG has held "[t]he fact that [an agency] may have ultimately concluded that there is no basis for action against an individual employee has no bearing on whether these records must be released. 'It is only through full disclosure of complaints, both substantiated and unsubstantiated, that the public can effectively monitor public agency

action, and ensure that the agency is promptly, responsibly, and thoroughly investigating and acting upon allegations of employee misconduct.' Moreover, 'an individual who is impelled to file a complaint against a public agency employee is more likely to act responsibly [, and less likely to make false accusations]…, if the entire process is exposed to the light of public scrutiny.'" *Ky. Op. Atty. Gen*. 02-ORD-231 (2002) (citing *Ky. Op. Atty. Gen*. 94-ORD-76 and 97-ORD-121). There appears to be inconstancy in AG opinions, as to be expected, but they do not foreclose disclosure in unsubstantial complaints. Although highly persuasive, AG opinions are not binding.

In *Doe v. Conway*, 357 S.W.3d 505 (Ky. App. 2010), the Court of Appeals ordered disclosure of an investigation into alleged sexual harassment and other misconduct of a Transportation Cabinet official over the official's arguments that the records contained only rumor and speculation and would constitute an unwarranted invasion of his privacy. The court held that "[t]o imply that the public should not be given the opportunity to weigh this information for itself would defeat the purpose of the Act." *Id*. at 508. "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*. Decisions of the AG are consistent with this finding. *See* 98–ORD–45 ("The fact that the Cabinet may have ultimately concluded that there is no basis for action against an individual employee has no bearing on whether these records must be released."). *Id*. Indeed, the AG has determined that both substantiated and unsubstantiated complaints of sexual harassment against cabinet employees are subject to scrutiny. *Id*.; *see also* 02–ORD–231 (finding that the public has a great interest in disclosure of alleged sexual misconduct by government employees during the scope of their employment regardless of whether the claims are substantiated).

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As the Supreme Court held in *Board of Examiners*, "[i]n general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." *Ky. Bd. of Examiners of Psychologists*, 826 S.W.2d at 328. WKU "would likewise serve the public interest by preserving the credentials of a qualified [employees] wrongfully accused of unprofessional conduct." *Id*. WKU employees who were wrongfully accused could be vindicated by the disclosure of a thorough investigation revealing the reason for lack of disciplinary action. As CHH correctly notes, WKU may be investigating senior employees presenting an even greater public interest in identifying potential misconduct, bias, or political favoritism. If unsubstantiated claims warranted greater protection in some cases, perverse incentives exist for public agencies to unsubstantiate claims to avoid public scrutiny. Disclosure of the identities of those wrongfully accused in unsubstantiated claims does not constitute an unwarranted invasion of privacy because "Kentucky citizens have a strong interest in ensuring that public institutions […] respond appropriately to accusations of sexual harassment by a public employee." *Kernel Press, Inc.*, 620 S.W.3d at 60.

However, disclosure of personally identifiable information (PII) of wrongfully accused it not limitless. The Court is "hesitant to denigrate the sanctity of the home, that place in which an individual's privacy has long been steadfastly recognized by our laws and customs." *Zink v. Comm., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994). The names and job titles of those accused in unsubstantiated claims are a warranted invasion of privacy subject to disclosure. However, other PII – such as contact information, addresses, phone numbers, birth dates, Social Security Numbers, and other private personal information, etc. – have no bearing on the allegations or the fruitfulness of WKU's investigation and, therefore, are not subject to disclosure as this would result in an unwarranted invasion of privacy.

Additionally, CHH and the Kernel seek attorney's fees alleging that WKU willfully withheld production of the requested documents in violation of the ORA. KRS 61.882. In this context, "willful connotes that the agency withheld requested records without plausible justification and with conscious disregard of the requester's rights." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). However, "[a] public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined to be incorrect, is insufficient to establish a willful violation of the Act.... In other words, a technical violation of the Act is not enough; the existence of bad faith is required." *Id*. (citing *Bowling v. Lexington–Fayette Urban County Gov't.*, 172 S.W.3d 333, 343 (Ky. 2005)).

WKU filed the instant case on February 24, 3017, appealing the AG's decision ordering production of the subject investigations. In support of its position, WKU relied on an opinion issued by the Fayette Circuit Court on January 23, 2017, in a very similar case, holding that Title IX investigation files were "education records" under FERPA and exempt from disclosure. The Kentucky Supreme Court granted discretionary review and all progress in this case was, essentially, stayed. The Court issued the *Kernel Press, Inc.*, opinion on March 25, 2021, and the parties began renegotiating production of the requested investigation in accord with the *Kernel Press, Inc.*, opinion. On October 11, 2023, WKU produced Cases A through F to CHH's and the Kernel's satisfaction, but redacted Cases G through T then relying on *Ky. Op. Att'y Gen*. 20-ORD-026 (2020) (supporting redactions for unsubstantiated claims). WKU had a legally sound, plausible justification for doing so based on its cited authority.

Furthermore, there were large periods of inaction by all parties and WKU produced some records that it knew there was no legal justification to withhold or redact. For the remaining unsubstantiated claims, WKU was placed in a precarious position that disclosing identities in

unsubstantiated claims could subject wrongfully accused employees to scorn, embarrassment, or harassment. The Court acknowledges WKU's duty to its employees to protect their privacy while balancing public interests. WKU had a plausible, good-faith justification for the records it redacted and has worked with CHH and the Kernel to produce documents in a manner that satisfies all parties Although WKU's reliance was misplaced in this case, there is scant evidence to suggest that its non-disclosure was egregious, done so in bad faith, or willful in violation of the ORA. Accordingly,

IT IS HERBY ORDERED that WKU shall produce to CHH and the Kernel Cases G though T with redactions consistent with those made in Cases A through F, which shall include the names and titles of those whom allegations were made against although said claims were unsubstantiated.

IT IS FURTHER ORDERED that CHH's and the Kernel's motion for attorney's fees and costs are DENIED.

This is a final and appealable order with no just cause for delay.

So ORDERED this 13th day of August, 2024.

/s/ HON. CHRISTOPHER T. COHRON
electronically signed
8/13/2024 10:00:45 AM CT

Hon. Christopher T. Cohron, Judge
Warren Circuit Court, Division I

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