COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 3
CASE NO. 13-CI-1739

UNIVERSITY OF KENTUCKY — PLAINTIFF/APPELLANT

v.

BRENNA ANGEL — DEFENDANT/APPELLEE

COMPLAINT AND NOTICE OF APPEAL

Comes the plaintiff/appellant, University of Kentucky, and for its complaint and notice of appeal states as follows:

PARTIES AND JURISDICTION

1. This action is brought pursuant to KRS 61.880(5) and KRS 61.882 as an appeal from the Open Records Decision ("the Decision") of the Office of the Kentucky Attorney General, 13-ORD-046. This action is reasonably necessary to prevent an unwarranted invasion of patients' personal privacy and an unlawful disruption of the University's responsibility to self-critically examine and evaluate its provision of health care services.

2. Pursuant to KRS 61.880(3) and 40 KAR 1:030, the Attorney General has not been made a party to this action, nor will he be served with summons as if he were a party to this action. Pursuant to the aforementioned provisions, however, the University of Kentucky is providing the Attorney General with written notice of this action as reflected in the certificate of service below.

3. The plaintiff/appellant, University of Kentucky ("UK"), is a state university and an agency of the Commonwealth of Kentucky that exists and operates pursuant to the applicable provisions of KRS 164.100, *et seq*.

4. The defendant/appellee, Brenna Angel, is a resident of Lexington, Kentucky and a proper party to this action pursuant to KRS 61.880(5) and KRS 61.882.

5. Jurisdiction and venue are proper in this Court pursuant to KRS 23A.010, KRS 61.880(5) and KRS 61.882 because UK has its principal place of business in Fayette County, Kentucky and because the records at issue are maintained, in whole or in part, in Fayette County, Kentucky.

FACTS & PROCEDURAL HISTORY

6. On December 11, 2012, Ms. Angel sent an Open Records Request to UK (copy attached as "Exhibit A") pursuant to the Kentucky Open Records Act, KRS 61.870, *et seq*., seeking access to the following records:

a. the number of surgeries performed by Dr. Mark Plunkett in 2010, 2011 and 2012;

b. the date of the last surgery performed by Dr. Mark Plunkett;

c. payments received for surgeries performed by Dr. Mark Plunkett in 2010 and 2011;

d. the mortality rate of pediatric cardiothoracic surgery cases in 2010, 2011 and 2012; and

e. documentation related to any evaluations/accreditation of the pediatric cardiothoracic surgery program from 2010-2012.

7. Without waiving any exemptions or privileges that may apply, UK states that the "evaluation/accreditation" process at issue in Ms. Angel's request concerns an on-going comprehensive internal review designed to improve patient safety, enhance health care quality and improve health care outcomes at UK. As such, the records Ms. Angel seeks are subject, in whole or in part, to state and federal laws enacted to protect patients from unwarranted invasions of their personal privacy, as well as state and federal laws designed to improve patient safety and health care through deliberate, candid and critical self-analysis and evaluation. In short, Ms. Angel's request calls in part for a disclosure of records that would be contrary to the personal privacy interests of UK patients and UK's responsibility to self-critically examine its provision of health care services to such patients.

8. Accordingly, in response to Ms. Angel's December 11, 2012 request, UK provided Ms. Angel with the number of surgeries provided by Dr. Plunkett for the years in question, as well as the information she sought on payments received for surgeries performed by Dr. Plunkett in 2010 and 2011. However, UK denied the remainder of Ms. Angel's request. In support of its partial denial, UK relied on KRS 61.878(1)(i), (j), (k) and (l), explaining, among other things, that UK was prohibited from disclosing the remaining records at issue pursuant to Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Patient Safety and Quality Improvement Act of 1995 ("PSQIA") codified in 42 USC 299b-21 through 299b-26, the medical peer review privilege codified in KRS 311.377, and/or the attorney client privilege codified in KRE 503; and further because the records were preliminary in nature. In short, UK's partial denial of Ms. Angel's request was based in relevant part on the patient privacy and self-critical analysis interests discussed above. A copy of UK's December 14, 2012 response to Ms. Angel's request is attached as "Exhibit B."

9. On December 21, 2012, an article was published online, written by Ms. Angel, which demonstrated Ms. Angel had been in contact with at least one of Dr. Plunkett's patients and further that she had been in contact with a local support group for children with heart disease, their families and their caregivers, thus giving UK a reasonable basis to believe that Ms. Angel could use the records she sought, alone or in combination, to identify individuals who were the subject of those records and thus violate the personal privacy of such patients. A copy of Ms. Angel's article is attached as "Exhibit C."

10. By letter dated January 9, 2013, Ms. Angel appealed UK's partial denial to the Office of the Attorney General. A copy of that letter is attached as "Exhibit D."

11. UK responded to Ms. Angel's appeal by a letter to the Attorney General dated January 18, 2013. A copy of that letter is attached as "Exhibit E."

12. By letter dated February 7, 2013, the Attorney General sought *in camera* review of the records at issue pursuant to KRS 61.880(2). However, applicable law such as the PSQIA and HIPAA prohibited UK from producing the records *in camera* for the limited purpose of resolving the Open Records dispute before the Attorney General. Therefore, UK was constrained by law to respectfully decline. Copies of the Attorney General's request and UK's response are attached collectively as "Exhibit F."

13. On March 27, 2013, the Attorney General issued the Decision (13-ORD-046), erroneously finding that UK violated the Open Records Act "by withholding records showing date of a physician's last surgery, mortality statistics, and an unspecified program review document under HIPAA, the Patient Safety and Quality Improvement Act of 2005, and KRS 311.377(2)." The Attorney General further erroneously found that UK had failed to meet its burden of proof with respect to the exemptions it had asserted. A copy of the Decision is attached as "Exhibit G."

14. More specifically, the Attorney General erroneously found, in relevant part:

a. "Thus, we have consistently held that HIPAA defers to the state Open Records Act and is therefore no obstacle to the public's access to public records under the Act. Accordingly, even if Ms. Angel's request were seeking 'protected health information'…HIPAA would present no basis for denial of the records." Exhibit G at page 5 (emphasis added).

b. "Due to the University's failure to cooperate with our request to conduct a confidential *in camera* review of the records pursuant to KRS 61.880(2)(c), it is impossible for us to ascertain whether the mortality statistic and/or the unspecified 'review for the pediatric cardiothoracic surgery program' falls inside or outside the PSQIA's protection or that of KRS 311.377, or indeed whether any of the material is 'preliminary' under the exceptions listed in KRS 61.878(1)(i) and (j)…[and thus the] University has failed to meet its burden of proof to sustain its denial of inspection of the public records identified in the requests numbered 4 and 5." *Id.* at pages 7-8.

c. "In light of the PSQIA's similar purposes to those of HIPAA, we are not inclined to find that the PSQIA is any more of an obstruction to a properly made open records request than is HIPAA." *Id.* at page 8 n. 3.

d. "Lastly, as to KRE 503…we likewise find that the University has failed to meet its burden of establishing an exemption in connection with that rule of evidence [and since particular and detailed information of how the exception applies] was not provided, we find that no grounds for an exemption have been established." *Id.* at page 8.

15. The Attorney General's decision in 13-ORD-046 was contrary to the Open Records Act because UK appropriately and lawfully declined the relevant parts of Ms. Angel's request

pursuant to applicable law, including but not necessarily limited to the PSQIA, HIPAA, KRS 311.377, KRE 503, the work-product privilege doctrine, the "preliminary records" exemptions set out in KRS 61.878(1)(i) and (j), and/or the provisions of KRS 61.878(1)(a), which prohibit in relevant part the disclosure of personally identifiable protected health information covered by HIPAA's privacy rule.

16. At all times relevant hereto, UK has acted in good faith regarding compliance with its obligations under the Kentucky Open Records Act.

COUNT I: APPEAL FROM THE ATTORNEY GENERAL'S DECISION IN 13-ORD-046

17. UK incorporates and reasserts the allegations of Paragraphs 1-16 as if fully set out herein.

18. In addition to the Attorney General's overall erroneous holding against UK in the Decision, other issues that form the basis of this appeal and for which UK seeks this Court's *de novo* review are as follows:

a. Whether the Attorney General erred as a matter of law in failing to find that the records in dispute, in whole or in part, are exempt from disclosure under KRS 61.878(1)(i) and (j), which provide for non-disclosure of records that are preliminary in nature.

b. Whether the Attorney General erred as a matter of law in failing to find that the records in dispute, in whole or in part, are exempt from disclosure under KRS 61.878(1)(k), which provides for non-disclosure of records for which disclosure is prohibited by federal law, including, specific to this case, HIPAA and the PSQIA.

c. Whether the Attorney General erred as a matter of law in failing to find that the records in dispute, in whole or in part, are exempt from disclosure under KRS

61.878(1)(l), which provides for non-disclosure of records for which disclosure is prohibited by state law, including, specific to this case, KRS 311.377 and KRE 503.

d. Whether the Attorney General erred as a matter of law in finding that UK's decision not to produce records to the Attorney General for *in camera* review constituted a failure to meet UK's burden of proof as to the exemptions it asserted in support of its partial denial of Ms. Angel's December 11, 2012 request.

e. Whether other exemptions enumerated in or incorporated through KRS 61.878(1), beyond those previously cited, apply to the records at issue, in whole or in part, and/or to information contained therein, at least in part, including but not necessarily limited to KRS 61.878(1)(a) (as applied via HIPAA to the personal privacy of patients at issue in the records sought by Ms. Angel) and the work-product privilege doctrine via KRS 61.878(1)(l).

PRAYER FOR RELIEF

WHEREFORE, pursuant to KRS 61.880(5) and KRS 61.882, the University prays for the following:

A. This Court's review of this matter *de novo*, as provided in KRS 61.882(3), and entry of a briefing schedule to facilitate that review.

B. This Court's *in camera* review of a privilege and/or exemption log regarding the records at issue, consistent with KRS 61.882(3).

C. Reversal of the Attorney General's erroneous decision in 13-ORD-046.

D. Judgment that UK's reliance on the exemptions set out in KRS 61.878(1)(a), (i), (j), (k) and (l), consistent with HIPAA, the PSQIA, KRS 311.377, KRE 503 and other applicable law, and its related denial of Ms. Angel's request, is proper and consistent with applicable law.

E. A determination that UK has at all relevant times acted in good faith regarding compliance with its obligations under the Kentucky Open Records Act.

F. All other relief in law or equity to which the University may be entitled.

Respectfully submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

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COUNSEL FOR UNIVERSITY OF KENTUCKY

CERTIFICATE OF SERVICE

This is to certify that, pursuant to KRS 61.880(3) and 40 KAR 1:030, a copy of the foregoing was served upon the following by certified mail, this 25th day of April 2013:

Hon. John William Conway, Attorney General
Hon. James M. Herrick, Assistant Attorney General
Commonwealth of Kentucky
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

COUNSEL FOR UNIVERSITY OF KENTUCKY

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Brenna Angel
WUKY-FM
340 McVey Hall
University of Kentucky
Lexington, KY 40506

December 11, 2012

Bill Swinford, Official Custodian of Records
University of Kentucky
Main Building Room 301
Lexington, KY 40506

Dear Custodian of Records:

Under the Kentucky Open Records Act § 61.872 et seq., I am requesting an opportunity to inspect or obtain:

1) The number of surgeries performed by Dr. Mark Plunkett in 2010, 2011, and 2012. No patient information is requested.
2) The date of the last surgery performed by Dr. Mark Plunkett. No patient information is requested.
3) Payments received for surgeries performed by Dr. Mark Plunkett in 2010 and 2011.
4) The mortality rate of pediatric cardiothoracic surgery cases in 2010, 2011, and 2012.
5) Documentation related to any evaluations/accreditation of the pediatric cardiothoracic surgery program from 2010-2012.

If there are any fees for searching or copying these records, please inform me if the cost will exceed $10. However, I would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of pediatric heart surgeries performed at the University of Kentucky. I am a reporter for WUKY-FM

EXHIBIT A

and my request is for news gathering purposes. This information is not being sought for commercial purposes.

The Kentucky Open Records Act requires a response time within three business days. If access to the records I am requesting will take longer than that time period, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Brenna Angel

859-257-4483 (office)
502-751-1699 (cell)

UNIVERSITY OF KENTUCKY

Official Records Custodian
301 Main Building
Lexington, KY 40506-0032
859 257-6366
fax 859 323-1062
www.uky.edu

December 14, 2012

VIA EMAIL: brenna.angel@uky.edu
Ms. Brenna Angel
WUKY-FM
340 McVey Hall
University of Kentucky
Lexington, KY 40506

RE: Open Records Request

Dear Ms. Angel:

This letter is in response to your Open Records Request received by this office on December 11, 2012. You requested the following:

"Under the Kentucky Open Records Act § 61.872 et seq., I am requesting an opportunity to inspect or obtain:

1) The number of surgeries performed by Dr. Mark Plunkett in 2010, 2011, and 2012. No patient information is requested.
2) The date of the last surgery performed by Dr. Mark Plunkett. No patient information is requested.
3) Payments received for surgeries performed by Dr. Mark Plunkett in 2010 and 2011.
4) The mortality rate of pediatric cardiothoracic surgery cases in 2010, 2011 and 2012.
5) Documentation related to any evaluations/accreditation of the pediatric cardiothoracic surgery program from 2010-2012."

RESPONSE: Pursuant to your recent Open Records Request, please see the responses to your request below:

1) The number of surgeries performed by Dr. Mark Plunkett in 2010, 2011, and 2012. No patient information is requested.

RESPONSE: As part of his work with the pediatric cardiothoracic surgery team, Dr. Plunkett operated on 110 children in 2010, 81 children in 2011 and 62 children in 2012. In many instances, multiple surgeries were performed.

EXHIBIT B

Brenna Angel
December 14, 2012

2) The date of the last surgery performed by Dr. Mark Plunkett. No patient information is requested.

RESPONSE: We are unable to provide you with the date that Dr. Plunkett performed his last surgery as this is protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA precludes the University's disclosure of medical records except as provided by the Privacy Rule. The University of Kentucky Records Retention Policy reflects current state and federal privacy law: "Confidential Records: While all records created by a public agency, using public funds and public employees, in carrying out its official business are public records, not all of those records are open to inspection. For example, medical records created by the University of Kentucky Medical Center are public records because the Medical Center is a part of the university, which is a public agency; however, medical records are not open to public inspection because of statutory restrictions on access."

3) Payments received for surgeries performed by Dr. Mark Plunkett in 2010 and 2011.

RESPONSE: UKHC has received a total of $288,522.00 in payments for Dr. Plunkett's surgeries in 2010 and $255,380.00 in payments for Dr. Plunkett's surgeries in 2011.

4) The mortality rate of pediatric cardiothoracic surgery cases in 2010, 2011 and 2012.

RESPONSE: We are unable to provide you with the mortality rate of pediatric cardiothoracic surgery cases as this is protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA precludes the University's disclosure of medical records except as provided by the Privacy Rule. Pursuant to the Patient Safety and Quality Improvement Act of 2005, Pub. L. 209-41, 42 U.S.C. 299b-21-b-26, such information is also considered confidential. Further, this specific information is protected pursuant to KRE Rule 503 as this is attorney-client privileged information. Additionally, this request is also denied pursuant to KRS 311.377 which provides that, "At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions and recommendations of a committee, board, commission, medical staff, professional standards review organization, or other entity . . . shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action in any court or in any administrative proceeding before any board, body, or committee, whether federal, state, county, or city.. . ."

We further rely on the Kentucky Supreme Court's decision in Adventist Health Systems/Sunbelt Health Care Corporation v. Trude, 880 S.W.2d 539 (1994) which reaffirmed the confidentiality of medical peer review records under KRS 311.377 (cited above) and prohibited the discovery of the proceedings, records, opinions, conclusion and recommendations of the hospitals' professional's review entities

5) Documentation related to any evaluations/accreditation of the pediatric cardiothoracic surgery program from 2010-2012."

RESPONSE: There is only one review for the pediatric cardiothoracic surgery program and we are unable to provide you with that evaluation/accreditation pursuant to KRS 61.878(1)(i) and (j) as these documents are either preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of a final action of a public agency OR are preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended and are therefore, exempt. Additionally, this information is protected by both the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Patient Safety and Quality Improvement Act of 2005, Pub. L. 209-41, 42 U.S.C. 299b-21-b-26. Further, this specific information is protected pursuant to KRE Rule 503 as this is attorney-client privileged information. Additionally, this request is also denied pursuant to KRS 311.377 which provides that, "At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions and recommendations of a committee, board, commission, medical staff, professional standards review organization, or other entity . . . shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action in any court or in any administrative proceeding before any board, body, or committee, whether federal, state, county, or city.. . ."

We further rely on the Kentucky Supreme Court's decision in Adventist Health Systems/Sunbelt Health Care Corporation v. Trude, 880 S.W.2d 539 (1994) which reaffirmed the confidentiality of medical peer review records under KRS 311.377 (cited above) and prohibited the discovery of the proceedings, records, opinions, conclusion and recommendations of the hospitals' professional's review entities

Brenna Angel
December 14, 2012

If we can be of further assistance, please let us know.

Respectfully,

Bill Swinford by WE

Bill Swinford
Official Records Custodian

WUKY In Depth 8:11 AM FRI DECEMBER 21, 2012

UK Healthcare Reviewing Pediatric Heart Surgeries, Sending Patients to Other Hospitals

By BRENNA ANGEL (/PEOPLE/BRENNA-ANGEL)

LEXINGTON, Ky. - Kentucky Children's Hospital treats some of the sickest and smallest patients from across central and eastern Kentucky. But for the past several weeks, pediatric heart surgeries have been referred to other hospitals. As Brenna Angel reports, UK Healthcare is reviewing its program, but the reasons why are unclear.

Listen 5:39

Like a lot of kids, Kerrington Johnson is looking forward to Christmas and she made a wish list for Santa.

"Cinderella toys and Dora toys," says Kerrington, who turns four years old in January.

When she was born, doctors diagnosed Kerrington with a heart defect called Tetralogy of Fallot. It was caused by the genetic disorder DiGeorge Syndrome, which is also why she has delayed speech development.

"We try to lead a normal lifestyle but it's not like everybody else's," says Kerrington's mom, Christy Johnson.

Congenital heart disease is the most common type of birth defect, affecting about 40,000 children in the U.S. each year.

"It was pretty rough. She was sick a lot. We couldn't leave the house because she had immune deficiency. Just a lot of respiratory issues."

Kerrington underwent surgery at Kentucky Children's Hospital in 2009, and the Johnson family quickly saw the need for a local support group. They established Kerrington's Heart, Inc. (http://www.kerringtonsheart.org) as a non-profit organization to connect with and assist other parents affected by heart defects. This week Christy has been gathering up clothes and toys to deliver as Christmas presents for Kentucky families who have been receiving care out of state.

"They were not prepared to not be able to give their other children the Christmas that they probably wanted to. So we stepped in and fulfilled that need."

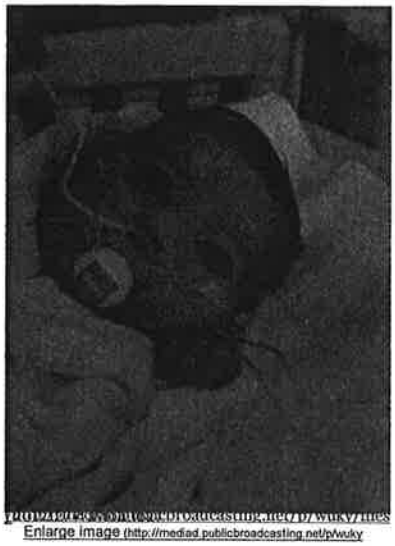
Far From Home

One of those parents in need is Lexington mother Tabitha Rainey. Her son Waylon was born in September with Hypoplastic Left Heart Syndrome.

EXHIBIT C

"A normal heart has four chambers. One of Waylon's did not grow right so he only had three."

University of Kentucky surgeon Dr. Mark Plunkett and his assistant Dr. Deborah Kozik operated on Waylon seven days after he was born. Tabitha was later told that Dr. Plunkett was taking a leave of absence.



Enlarge image (http://mediad.publicbroadcasting.net/p/wuky/files/201212/Waylon.jpg)

Waylon Rainey was born with a congenital heart defect. After receiving treatment at Kentucky Children's Hospital, he was referred to Mott Children's Hospital in Ann Arbor, Michigan. Photo courtesy Rainey family.

"My main question was if the other surgeon felt that she could do the best job that she could, and I was reassured. Then months went past and they lost another patient, who was a dear friend of mine, and it was pretty heavy in the unit at the time. Then soon after I guess they decided to stop doing the surgeries and review the entire program."

With only a few days to pick a new hospital, the Raineys chose Mott Children's Hospital in Ann Arbor, Michigan. Pediatric heart patients are also being sent to other hospitals such as Kosair Children's Hospital in Louisville.

"It's been pretty hush hush. They've not given big answers on it," says Tabitha Rainey.

Program Under Review

UK Healthcare officials have not identified what prompted the review, but they say it is limited to the pediatric cardiothoracic surgery program, not any other pediatric areas or the adult heart program.

"We're looking at what can we do best and how do we best deliver the services and the care that kids need," said Dr. Carmel Wallace, Chair of UK's Department of Pediatrics.

UK's head of surgery, the chief medical officer, and Dr. Michael Karpf, the Executive Vice President for Health Affairs, all would not comment for this story. Dr. Mark Plunkett, the surgeon at the center of the review, also declined to be interviewed.

Hired by UK in 2007, Dr.Plunkett has an impressive background of clinical training and research. The 52-year-old completed fellowships at Duke University and UCLA and has published dozens of articles in peer-reviewed journals.

Enlarge image (http://mediad.publicbroadcasting.net/p/wuky/files/201212/Plunkett.jpg)

Dr. Mark Plunkett, Chief of the Division of Cardiothoracic Surgery at UK.

He was appointed a slew of academic, clinical, and administrative positions, including Associate Professor of Surgery, Chief of Cardiothoracic Surgery, Director of the Pediatric and Congenital Heart Program, and Surgical Director of the Gill Heart Institute. Dr. Plunkett remains on staff at UK with a $700,000 annual salary.

UK denied an open records request for the date of his most recent surgery and his patient mortality rate, citing HIPAA regulations. Records show that the number of children Dr. Plunkett operated on this year is down around 43 percent from two years

ago.

"I was a not aware of that and that was never announced at the Board of Trustees meeting," said Trustee Dr. Charles Sachatello, who sits on the board's healthcare committee.

A surgeon himself, Dr. Sachatello thinks UK should consolidate its pediatric heart program with the University of Louisville because of the high operational costs.

Meanwhile, at the University of Michigan, Tabitha Rainey says her son has improved dramatically and they may get to come home soon. When Waylon needs future surgeries, they will make the trip back to Michigan.

UK Healthcare has lost the trust of the Rainey family, but Christy Johnson wants to see the pediatric cardiothoracic program continue. She thinks Kentucky Children's Hospital can be at the same level as world-renowned facilities.

"I have high hopes. And I believe that with the proper decisions and management that we can accomplish that."

Last week the Johnsons learned that Kerrington will need to undergo another surgery in the spring. Christy says she will be getting feedback from moms in her support group about which hospitals to consider.

TAGS: pediatric cardiothoracic surgery (/term/pediatric-cardiothoracic-surgery) uk healthcare (/term/uk-healthcare) Kentucky Children's Hospital (/term/kentucky-childrens-hospital) Mark Plunkett (/term/mark-plunkett) heart surgery (/term/heart-surgery)

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January 9, 2013

Attorney General
700 Capital Avenue
Capitol Building, Suite 118
Frankfort, KY 40601

Re: Open records appeal

Dear Attorney General,

I am appealing the refusal of the University of Kentucky to allow me to inspect records relating to Dr. Mark Plunkett, a cardiothoracic surgeon at Kentucky Children's Hospital. A copy of my written request and a copy of the university's response are attached.

UK claims that some of the information I requested is protected by the Health Insurance Portability and Accountability Act (HIPAA). My request, however, was for dates and overall statistics, not individual patient information. I was also not permitted to see documentation/correspondence related to a review of UK's pediatric cardiothoracic surgery program.

Sincerely,

Brenna Angel

Brenna Angel

EXHIBIT D

UNIVERSITY OF KENTUCKY

EXHIBIT E

Office of Legal Counsel
301 Main Building
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859 257-2936
859 257-6371
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www.uky.edu

January 18, 2013

VIA FACSIMILE: 502-564-6801

Hon. James Herrick
Attorney General's Office
700 Capitol Avenue
Frankfort, KY 40601

RE: Brenna Angel v. University of Kentucky
Attorney General Log No.: 201300010

Dear Mr. Herrick:

On behalf of the University of Kentucky and pursuant to the Attorney General's Notification of January 14, 2013, I respond to the Open Records Appeal of Ms. Brenna Angel. For the reasons set out below, the Attorney General should affirm the University's decision not to disclose certain records.

The background of this appeal is relatively straightforward. On December 11, 2012, Ms. Angel sent to the University of Kentucky an Open Records Request requesting the following information and/or documentation:

1) The number of surgeries performed by Dr. Mark Plunkett in 2010, 2011, and 2012. No patient information is requested.
2) The date of the last surgery performed by Dr. Mark Plunkett. No patient information is requested.
3) Payments received for surgeries performed by Dr. Mark Plunkett in 2010 and 2011.
4) The mortality rate of pediatric cardiothoracic surgery cases in 2010, 2011 and 2012.
5) Documentation related to any evaluations/accreditation of the pediatric cardiothoracic surgery program from 2010-2012."

On December 14, 2012, the University of Kentucky timely responded to her Open Records Request. Specifically, the University disclosed the number of surgeries performed (Request 1) and the payments received for surgeries (Request 3), but the University declined to disclose the date of the last surgery (Request 2), the mortality rate for pediatric cardiothoracic surgery cases (Request 4), and documents related to the current review of the program (Request 5). The University

explained that federal law and state law prohibited the disclosure of the information sought (Requests 2, 4, and 5) and that the documents related to the current review of the program were preliminary (Request 5).

In her appeal, Ms. Angel focuses on the date of the last surgery (Request 2) and the mortality statistics (Request 4). She does not address the documents related to the current review of the program (Request 5). Accordingly, the University limits its response to the date of the last surgery (Request 2) and the mortality statistics (Request 4). The University addresses both issues in more detail below.

First, with respect to the date of the last surgery (Request 2), the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its implementing regulations preclude the University from disclosing health information that identifies or may reasonably lead to the identification of the individual. *See* 45 C.F.R. 160.103. *See also* Pietrina Scaraglino, *Complying With HIPAA: A Guide For The University And Its Counsel*, 29 J. COLL. & U.L. 525, 535 (2003). Because Dr. Plunkett performs relatively few surgeries and because all of his surgeries are highly complex surgeries, it is relatively easy to deduce the identity of his patients. Thus, disclosure of the date of his last surgery may reasonably lead to the identification of the patient. Accordingly, federal law precludes the University from disclosing this information.

Of course, there are circumstances where HIPAA would allow the disclosure of the date of the surgery. If a surgeon performed numerous surgeries and if those procedures were relatively routine, then the disclosure of the date might not reasonably lead to the identification of the individual. However, in this instance disclosure of the date may reasonably lead to the identification of the individual.

Second, concerning the request for mortality statistics (Request 4), HIPPA precludes the disclosure of information that may reasonably lead to the identification of individual patients. Very few pediatric cardiothoracic operations are performed at the University and the overwhelming majority of those are done by Dr. Plunkett. If the University were to disclose the number of patients and the number of deaths, it would be relatively easy for someone to deduce the identity of the patients. Therefore, the University may not disclose the mortality statistics for pediatric cardiothoracic surgery cases is precluded from disclosing.

To be sure, there may be circumstances where revealing mortality statistics would not reasonably lead to the identification of the individual patient. For example, mortality statistics for all types of surgery the entire University of Kentucky hospital over an extended period likely would not reasonably lead to the identification of individuals. Yet, when, as here, the request is confined to a small number of surgeries over a relatively short time, the mortality statistics may reasonably lead to the identification of individuals.

Moreover, even if HIPAA did not preclude disclosure, both the federal Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b-21-b-26, and KRS 311.377 prohibit disclosure of the mortality statistics. Those statutes effectively establish a privilege for the University's internal discussions regarding improving patient safety. When a patient dies, it is appropriate for the University's physicians, nurses, and attorneys to have candid discussions as to why the patient died. Such discussions are the only way to improve patient safety. Mortality statistics for a particular program are certainly relevant to those discussions and, thus, are privileged. Therefore, the University cannot disclose the mortality statistics.

In sum, federal and state law prohibits the University from providing the information sought in her appeal. Accordingly, the Attorney General should affirm the decision of the University.

Sincerely,

William E. Thro
General Counsel
University of Kentucky

COLLECTIVE
EXHIBIT F

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

February 7, 2013

William E. Thro, Esq.
Office of Legal Counsel
301 Main Building
University of Kentucky
Lexington, Kentucky 40506-0032

Dear Mr. Thro:

As you know, this office has received an open records appeal from Brenna Angel. At issue is the University of Kentucky's denial of her request to review certain records relating to the date of the last surgery performed by Dr. Mark Plunkett, mortality rates, and evaluation/accreditation of the pediatric cardio-thoracic surgery program.

To facilitate our review, we ask that you provide us with a copy of the withheld documents not later than February 22, 2013. Pursuant to KRS 61.880(2), we acknowledge our obligation not to disclose these documents.

Sincerely,

Jack Conway
Attorney General

James M. Herrick
Assistant Attorney General

#10

cc: Brenna Angel

Received
FEB 12
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UNIVERSITY OF KENTUCKY

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859 257-2936
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February 22, 2012

VIA FACSIMILE: 502-564-6801

Hon. James Herrick
Attorney General's Office
700 Capitol Avenue
Frankfort, KY 40601

RE: Brenna Angel v. University of Kentucky
Attorney General Log No. 201300010.

Dear Mr. Herrick:

On behalf of the University of Kentucky, I respond to the Attorney General's letter of February 7, 2013 requesting to review the documents that the University declined to disclose to Ms. Angel.

The University must decline this request. Federal law generally prohibits the disclosure of the documents and none of the exceptions to the federal statutes allows the Attorney General to review the documents as part of an Open Records Act appeal. Consequently, the University cannot disclose the documents to the Attorney General without violating federal law.

To explain, federal law precludes the disclosure of the documents to Ms. Angel. First, the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its implementing regulations preclude the University from disclosing health information that identifies or may reasonably lead to the identification of the individual. *See* 45 C.F.R. 160.103. *See also* Pietrina Scaraglino, *Complying With HIPAA: A Guide For The University And Its Counsel*, 29 J. COLL. & U.L. 525, 535 (2003). Because Dr. Plunkett performs relatively few surgeries and because all of his surgeries are highly complex surgeries, it is relatively easy to deduce the identity of his patients. Disclosure of the information sought by Ms. Angel may reasonably lead to the identification of the individual patient.

Second, the federal Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b-21-b-26, effectively establishes a privilege for the University's internal discussions regarding improving patient safety. When a patient dies, it is appropriate for the University's physicians, nurses, and attorneys to have candid discussions as to why the patient died. Such discussions are the only way to

improve patient safety. Both the mortality statistics and all documents related to the on-going review fall within the protections of the Patient Safety and Quality Improvement Act. In sum, the University cannot disclose the documents to Ms. Angel. *See* KRS 61.878(1)(a) and (k).

Although the University clearly cannot disclose the documents to Ms. Angel, the Attorney General's request raises a separate and distinct issue of whether the University can disclose the documents to the Attorney General as part of the Attorney General's resolution of Ms. Angel's Open Records Appeal.

Despite the Attorney General's assurances that he will not disclose the documents, federal law prohibits the University from disclosing the documents for the limited purpose of resolving the appeal. While HIPAA's Privacy Rule permits disclosure of medical records without an individual's authorization "to the extent such disclosure is required by law" and the disclosure "complies with and is limited to the relevant requirements of the law." *See* 45 C.F.R 164.512(a), there is no law requiring the University to disclose HIPAA protected information to the Attorney General in this circumstance. Similarly, although the Patient Safety Act permits the University to disclose in limited circumstances, *see* 42 B.SC. 299b-22(c)(1) and (2), none of those circumstances permits an in-camera review by the Attorney General as part of an Open Records Act appeal.

The University is not seeking to be uncooperative. Rather, the University is seeking to avoid a violation of federal law and the resulting civil penalties. *See* 42 U.S.C. 299b-22(f). There are many instances when the University must refuse a Commonwealth official's request to review HIPAA and/or Patient Safety Act material. For example, the University consistently declines requests from the Kentucky Inspector General for materials that constitute patient safety work product under the Patient Safety Act.

In closing, I regret that federal law prohibits the University from disclosing the documents to the Attorney General for purposes of resolving the appeal. For the reasons stated in the initial response and above, the Attorney General should affirm the University's partial denial of Ms. Angel's request.

Sincerely,

William E. Thro

William E. Thro
General Counsel
University of Kentucky

cc: Ms. Brenna Angel

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
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13-ORD-046

March 27, 2013

In re: WUKY-FM/University of Kentucky

Summary: Decision adopting 08-ORD-166; University of Kentucky violated the Open Records Act by withholding records showing date of a physician's last surgery, mortality statistics, and an unspecified program review document under HIPAA, the Patient Safety and Quality Improvement Act of 2005, and KRS 311.377(2); University failed to meet its burden of proof.

Open Records Decision

The question presented in this appeal is whether the University of Kentucky violated the Open Records Act in its disposition of Brenna Angel's December 11, 2012, request to inspect records relating to a surgeon at the Kentucky Children's Hospital. For the reasons that follow, we conclude that the University's response was partially in violation of the Act.

In her December 11 request, Ms. Angel, a news reporter for WUKY-FM, requested to inspect or obtain copies of:

1) The number of surgeries performed by Dr. Mark Plunkett in 2010, 2011, and 2012. No patient information is requested.
2) The date of the last surgery performed by Dr. Mark Plunkett. No patient information is requested.

EXHIBIT G

3) Payments received for surgeries performed by Dr. Mark Plunkett in 2010 and 2011.
4) The mortality rate of pediatric cardiothoracic surgery cases in 2010, 2011, and 2012.
5) Documentation related to any evaluations/accreditation of the pediatric cardiothoracic surgery program from 2010-2012.

On December 14, records custodian Bill Swinford responded on behalf of the University. He provided the information requested by items 1 and 3, but denied requests 2, 4, and 5.

In response to request 2, he stated:[1] "We are unable to provide you with the date that Dr. Plunkett performed his last surgery as this is protected by the Health Insurance Portability and Accountability Act of 1996 ('HIPAA'). HIPAA precludes the University's disclosure of medical records except as provided by the Privacy Rule."

In response to request 4, he stated:

> We are unable to provide you with the mortality rate of pediatric cardiothoracic surgery cases as this is protected by [HIPAA]. Pursuant to the Patient Safety and Quality Improvement Act of 2005, Pub. L. 209-41, 42 U.S.C. 299b-21-b-26, such information is also considered confidential. Further, this specific knowledge is protected pursuant to KRS Rule 502 as this is attorney-client privileged information. Additionally, this request is also denied pursuant to KRS 311.377 which provides that, "At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions and recommendations of a committee, board, commission, medical staff, professional standards review organization, or other entity ... shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence in any civil action in any

[1] Although it was unclear from the University's initial response whether records existed that contained the information requested in items 2 and 4, subsequent correspondence from the University during the course of this appeal has clarified that such records do exist.

> court or in any administrative proceeding before any board, body, or committee, whether federal, state, county, or city...."[2]
>
> We further rely on the Kentucky Supreme Court's decision in *Adventist Health Systems/Sunbelt Health Care Corporation v. Trude*, 880, S.W.2d 539 ([Ky.] 1994) which reaffirmed the confidentiality of medical peer review records under KRS 311.377 ... and prohibited the discovery of the proceedings, records, opinions, conclusion and recommendations of the hospitals' professional's [*sic*] review entities[.]

Responding to request 5, Mr. Swinford stated:

> There is only one review for the pediatric cardiothoracic surgery program and we are unable to provide you with that evaluation/accreditation pursuant to KRS 61.878(1)(i) and (j) as these documents are either preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of a final action of a public agency OR are preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended and are therefore, exempt.

He additionally cited HIPAA, the Patient Safety and Quality Improvement Act of 2005, KRE 503, and KRS 311.377.

Ms. Angel initiated this appeal on January 9, 2013. She emphasized that her request "was for dates and overall statistics, not individual patient information," and that she "was also not permitted to see documentation/correspondence related to a review of UK's pediatric cardiothoracic surgery program."

On January 18, 2013, University of Kentucky General Counsel William E. Thro responded to the appeal. Concerning the request for the date of Dr. Plunkett's last surgery (request number 2), he states:

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[2] This material is quoted from Subsection (2) of KRS 311.377.

> [HIPAA] and its implementing regulations preclude the University from disclosing health information that identifies or may reasonably lead to the identification of the individual. *See* 45 C.F.R. 160.103. ... Because Dr. Plunkett performs relatively few surgeries and because all of his surgeries are highly complex surgeries, it is relatively easy to deduce the identity of his patients. Thus, disclosure of the date of his last surgery may reasonably lead to the identification of the patient. Accordingly, federal law precludes the University from disclosing this information.

This office has repeatedly ruled that HIPAA does not preempt the Kentucky Open Records Act. In 2008, we cited cases from Ohio and Texas for the conclusion that "protected health information" under HIPAA can be disclosed to comply with the Open Records Act under what is known as the "required by law" exception to the HIPAA privacy rule. 08-ORD-166 (copy attached and reasoning adopted as the basis for our decision herein).

45 C.F.R. § 164.512(a)(1) contains this exception, which is formulated as follows:

> A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

The Texas case we cited in 08-ORD-166, *Abbott v. Texas Dept. of Mental Health and Mental Retardation,* 212 S.W.3d 648 (Tex. App. 2006), refers to the HHS commentary to 45 C.F.R. § 164.512, which states in pertinent part:

> These rules permit covered entities to make disclosures that are required by state Freedom of Information Act (FOIA) laws under 164.512(a). Thus, if a state FOIA law designates death records and autopsy reports as public information that must be disclosed, a covered entity may disclose it without an authorization under the rule. To the extent that such information is required to be disclosed by FOIA or other law, such disclosures are permitted under the

> final rule. In addition, to the extent that death records and autopsy reports are obtainable from non-covered entities, such as state legal authorities, access to this information is not impeded by this rule.

Thus, we have consistently held that HIPAA defers to the state Open Records Act and is therefore no obstacle to the public's access to public records under the Act. *See* 08-ORD-188; 09-ORD-166; 10-ORD-161; 11-ORD-096; 12-ORD-039. Accordingly, even if Ms. Angel's request were seeking "protected health information," an assertion which is questionable at best, HIPAA would present no basis for denial of the records. Thus, the University has not sustained its burden to justify withholding records showing the date of Dr. Plunkett's last surgery pursuant to request number 2.

As to Ms. Angel's request for mortality statistics (request number 4), Mr. Thro states:

> [HIPAA] precludes the disclosure of information that may reasonably lead to the identification of individual patients. Very few pediatric cardiothoracic operations are performed at the University and the overwhelming majority of those are done by Dr. Plunkett. If the University were to disclose the number of patients and the number of deaths, it would be relatively easy for someone to deduce the identity of the patients. Therefore, the University may not disclose the mortality statistics for pediatric cardiothoracic surgery cases is precluded from disclosing [*sic*].
>
> To be sure, there may be circumstances where revealing mortality statistics would not reasonably lead to the identification of the individual patient. For example, mortality statistics for all types of surgery the [sic] entire University of Kentucky hospital over an extended period likely would not reasonably lead to the identification of individuals. Yet, when, as here, the request is confined to a small number of surgeries over a relatively short time, the mortality statistics may reasonably lead to the identification of individuals.

> Moreover, even if HIPAA did not preclude disclosure, both the federal Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b-21-b-26 [*sic*], and KRS 311.377 prohibit disclosure of the mortality statistics. Those statutes effectively establish a privilege for the University's internal discussions regarding improving patient safety. When a patient dies, it is appropriate for the University's physicians, nurses, and attorneys to have candid discussions as to why the patient died. Such discussions are the only way to improve patient safety. Mortality statistics for a particular program are certainly relevant to those discussions and, thus, are privileged. Therefore, the University cannot disclose the mortality statistics.

Mr. Thro does not address the denial of the evaluation/accreditation records (request number 5), but we assume the University stands by the arguments articulated by Mr. Swinford, including the provisions of KRS 311.377. The record is unclear as to the exact nature of the documents withheld from inspection on the basis of this statute. Nowhere does the University identify or describe the "review for the pediatric cardiothoracic surgery program" or "evaluation/accreditation" to which it refers. With so little information, we are unable to determine that the University properly invoked KRS 311.377 as incorporated into the Open Records Act by KRS 61.878(1)(l).

Furthermore, the University has completely refused to comply with this office's request to provide a copy of the records for confidential review pursuant to KRS 61.880(2)(c). In so refusing, the University relies primarily upon HIPAA, and secondarily upon the Patient Safety and Quality Improvement Act of 2005 ("PSQIA"), 42 U.S.C. § 299b-21 *et seq.*

We have previously determined that HIPAA does not impede the Open Records Act, and we note the PSQIA's similarity to HIPAA in its protection of "individually identifiable health information," which it explicitly defines by reference to HIPAA confidentiality regulations. 42 U.S.C. § 299b-21(2)(C). Without going into exhaustive detail, we observe that "identifiable patient safety work product," which is the subject of the PSQIA's confidentiality provisions, also includes data and records which allow the identification of a provider or a reporting individual and which:

> (I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or
> (II) are developed by a patient safety organization for the conduct of patient safety activities;
> and which could result in improved patient safety, health care quality, or health care outcomes; or
> ...which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

42 U.S.C. § 299b-21(7)(a). "Nonidentifiable patient safety work product," which does not allow identification of a provider, patient, or reporting individual, is not confidential. 42 U.S.C. § 299b-22(2)(B). Furthermore, "patient safety work product" as a whole "does not include information that is collected, maintained, or developed separately, *or exists separately,* from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product." 42 U.S.C. § 299b-21(7)(B) (emphasis added). Given the complexities of these definitions, it is crucial for us to know the form in which the subject records are maintained, whether the mortality statistic in question "exists separately ... from a patient safety evaluation system," and myriad other details that can only be afforded by an *in camera* review of the withheld records.

"'It 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.'" 12-ORD-220 (quoting 08-ORD-052). When a public agency refuses to comply with our request to examine the disputed records, we are "severely handicapped in conducting our review." 96-ORD-206. As a rule, we find that an agency making such a refusal has failed to meet its burden of proof, and this case is no exception. (*See* 10-ORD-079, copy attached, and authorities cited therein.)

Due to the University's failure to cooperate with our request to conduct a confidential *in camera* review of the records pursuant to KRS 61.880(2)(c), it is impossible for us to ascertain whether the mortality statistic and/or the

unspecified "review for the pediatric cardiothoracic surgery program" falls inside or outside the PSQIA's protection or that of KRS 311.377, or indeed whether any of the material is "preliminary" under the exceptions listed in KRS 61.878(1)(i) and (j). All "exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed," KRS 61.871, and "[t]he burden of proof in sustaining the action shall rest with the agency." KRS 61.880(2)(c). The University has failed to meet its burden of proof to sustain its denial of inspection of the public records identified in the requests numbered 4 and 5.[3]

Lastly, as to KRE 503, which the University throws in without citing a specific subsection or explaining its applicability, we likewise find that the University has failed to meet its burden of establishing an exemption in connection with that rule of evidence. "An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880(1). This statutory language requires "particular and detailed information in response to a request for documents." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). Since this was not provided, we find that no grounds for an exemption have been established. We therefore must conclude that the University's disposition of Ms. Angel's request failed to comply with the Open Records Act insofar as it denied access to the requested records.

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 proceedings.

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[3] The University cites no law interpreting the PSQIA as superseding a state Open Records Act. In light of the PSQIA's similar purposes to those of HIPAA, we are not inclined to find that the PSQIA is any more of an obstruction to a properly made open records request than is HIPAA. Due to the agency's failure to meet its burden of proof, we need not decide that legal issue at this time.

Jack Conway
Attorney General

James M. Herrick
Assistant Attorney General

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Distributed to:

Ms. Brenna Angel
Bill Swinford, Esq.
William E. Thro, Esq.

08-ORD-166

August 13, 2008

In re: John Wilson/Cabinet for Health and Family Services – Office of Inspector General

Summary: Cabinet for Health and Family Services' Office of Inspector General violated both the procedural and substantive requirements of the Open Records Act in partially denying request for all 2008 completed investigations of Bluegrass/Oakwood Communities on the basis of KRS 61.878(1)(a) and HIPAA.

Open Records Decision

The question presented in this appeal is whether the Cabinet for Health and Family Services' Office of Inspector General violated the Open Records Act in partially denying John Wilson's June 9, 2008, request for copies of "all completed investigations of Bluegrass/Oakwood Communities . . . for the year of 2008." For the reasons that follow, we find that the OIG's partial denial of Mr. Wilson's request constituted both a procedural and substantive violation of the Act.

In a response dated June 24, 2008, and post-marked June 27, 2008, Inspector General Sadiqa N. Reynolds notified Mr. Wilson that the records he requested "ha[d] been gathered and the copy and postage fee . . . determined." She advised him that "[u]pon receipt of payment, the information will be reviewed to comply with the confidentiality requirements of KRS 61.870 *et seq.*," noting that "[a]dditional time may be required for this process as well." On July

2, 2008,[1] the OIG mailed the requested records to Mr. Wilson, but explained that "[c]onfidential information ha[d] been redacted in compliance with KRS 61.878(1)(a), which provides that 'Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy' be withheld."[2]

Shortly thereafter, Mr. Wilson initiated this appeal asserting that the records disclosed to him "were so heavily redacted that they are useless." He provided this office with copies of records released to him in response to an earlier open records request, and the *same* records released to him after the request that gave rise to this appeal. Mr. Wilson explained that the instant appeal was prompted by:

> the requested information not being provided due to the redacting of information that was not consistent with earlier redactions and not required by law.

He acknowledged the OIG's duty to redact "the name of the victim, social security number, date of birth, or other clearly personal identifying information about the victim," but requested that "the proper information . . . be provided without the improper redacting."

In supplemental correspondence directed to this office following commencement of Mr. Wilson's appeal, Assistant Counsel Anne E. Burnham expanded on the bases for the OIG's partial denial of his request, advising that "there were additional grounds for the redaction of information from the records in question." She observed:

> Specifically, the records were redacted in accordance with the Health Insurance Portability and Accountability Act codified at 45 C.F.R. Part 164. Under the so called "HIPAA Privacy Rule, absent a

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[1] The OIG's July 2 response was post-marked July 7.

[2] The OIG violated KRS 61.880(1) by failing to respond to Mr. Wilson's request within three business days. Although the OIG cited KRS 61.878(1)(a) as the "statement of the exception authorizing the withholding" of portions of the records, the OIG did not provide "a brief explanation of how the exception applies" to those portions of the records withheld. Additionally, we note that nearly one month elapsed between the date of his request and the date on which the redacted records were mailed to him.

> valid authorization or a HIPAA compliant subpoena or court order, information relative to a patient's diagnosis, medical treatment, etc. cannot be disclosed. Furthermore, the Cabinet is bound by KRS 194A.060 to keep confidential any records that "directly or indirectly identify a client or patient or former client or patient of the cabinet". The information that was redacted from the records provided to Mr. Wilson included individual patient's diagnoses, medical treatment information, and was redacted to protect the privacy of the individual patient therein.

Continuing, Ms. Burnham described a May 19, 2008, OIG policy change relating to disclosure of OIG investigation records:

> [A]fter careful review of the records in question, generally speaking, and a review of the statutes applicable to the Cabinet, it was decided that the Cabinet was not fulfilling its duty to its clients by not redacting medical information from these records.

Noting that this change in policy accounted for the heavier redactions in the records released to Mr. Wilson in July 2008, than the same records released to him in May 2008, she concluded that "medical information relative to patients identified in complaint investigations [would thenceforward] be redacted unless a valid HIPAA compliant release or subpoena was provided . . . ." It was the OIG's position that a review of the complaint investigation records provided to Mr. Wilson after the policy change confirmed that "the essence and nature of the complaint was not redacted . . . ." Respectfully, we disagree.

Although Kentucky's courts have not yet addressed the issue of the intersection between HIPAA and the state's open records law, at least two jurisdictions have. We find their analysis highly persuasive and adopt it as our own. In *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 844 N.E.2d 1181 (Ohio 2006), the Ohio Supreme Court declared that lead risk assessment reports maintained by a city health department, and lead citation notices issued to property owners, did not contain "protected health information" (PHI) as defined in HIPAA at 42 U.S.C.A. § 1320d *et seq.* and 45 CFR § 164.502(a), and that even if they did contain PHI, and the health department operated as a "covered entity" for HIPAA purposes, those assessment reports and citation notices would

be subject to disclosure under the "required by law" exception to the HIPAA Privacy Rule. Because Ohio's Public Records Law required disclosure of the reports and notices, and HIPAA did not supercede state disclosure requirements, the court concluded that the health department had "a clear legal duty to make the [records] available . . . ." to the requester. *Id.* at 2188.

At pages 1186 and 1187 of *Daniels*, the Ohio Supreme Court pointedly observed:

> A review of HIPAA reveals a "required by law" exception to the prohibition against disclosure of protected health information. With respect to this position, Section 164.512(a)(1), Title 45, C.F.R. provides, "A covered entity may * * * disclose protected health information to the extent that such * * * disclosure is *required by law* * * *" (Emphasis added.) And the Ohio Public Records Act requires disclosure of records unless the disclosure or release is prohibited by federal law. R.C. 149.43(a)(1)(v).
>
> Hence, we are confronted here with a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law. (Footnote reciting 45 C.F.R. § 164.512(a) omitted).

Continuing, the court explained the legislative context out of which the Privacy Rule arose:

> [A]t the time of implementing these regulations, the Department of Health and Human Services, Office of the Secretary, promulgated Standards for Privacy of Individually Identifiable Health Information (000), 65 F.R. 82462, 82667-82668, stating, "[W]e intend [160.512(a)] to preserve access to information considered important enough by state or federal authorities to require its disclosure by law"; "we do not believe that Congress intended to preempt each such law"; and "[t]he rule's approach is simply intended to avoid any obstruction to the health plan or covered health care provider's ability to comply with its existing legal obligations."

> Similarly, in reviewing federal Freedom of Information Act ("FOIA") requests, the secretary explains that federal FOIA requests "come within § 164.512(a) of the privacy regulation that *permits uses or disclosures required by law if the uses or disclosures meet the relevant requirements of the law.*" (Emphasis added.) 65 F.R. 82462, 82482.

Daniels at 1187. The court analogized an Ohio Public Records Act request submitted to a public agency like the Cincinnati Health Department to a FOIA request and concluded that the public agency "need determine only whether the requested disclosure is required by Ohio law to avoid violating HIPAA's Privacy Rule." *Id.*, citing, Tex. Atty. Gen. Op. 681 (2004) 7, "which reached the same conclusion under Texas law."

Five months after the Ohio court determined that public agencies must look to their state's open records laws to assess the propriety of disclosure of public records in their custody, regardless of whether the agencies are "covered entities" and the requested records contain "protected health information," the Texas Court of Appeals reached the same conclusion. In *Abbott v. Texas Department of Mental Health and Mental Retardation*, 212 S.W.3d 648 (Tex. App. 2006), the Texas Court of Appeals held that if a public agency receives a request for records containing potentially protected health information under the state's Public Information Act, the agency must determine whether the state act compels disclosure, or authorizes nondisclosure, under the exception to HIPAA's Privacy Rule allowing disclosure of PHI to the extent "required by law." In *Abbott*, the Texas court analyzed the propriety of the Department of Mental Health and Mental Retardation's denial of a request for statistics relating to allegations of patient abuse and neglect. Like the Ohio court in *Daniels*, above, the Texas court rejected the "circular logic" advanced by the Department that agencies "contemplating disclosure under the Public Information Act are required to refer back to HIPAA, . . . HIPAA . . . prohibit[s] disclosure of [PHI], health information is considered confidential by law and, therefore, [PHI is] not subject to disclosure under the Act." *Abbott* at 662. In rejecting the argument, the court reasoned that the Department's:

> interpretation would send us back to the start of the analysis and would prevent the disclosure of all protected health information despite the Public Information Act's default favoring disclosure of information.

Id.

> The Texas court concluded that its construction of these laws:
>
> properly balances the need for privacy under HIPAA . . . and the need for disclosure under the Public Information Act . . . correctly reconciles these two statutes. . . . [and is supported by] the Commentary to the Privacy Rule. . . .
>
> . . .
>
> Our construction comports with the policy of this state to disclose information regarding abuse and neglect at facilities caring for the mentally ill or mentally retarded [citations omitted]. It also is consistent with the public's interest in having access to information about the operation of these facilities.

Id. at 663 (citing *State ex rel. Cincinnati Enquirer v. Daniels*, above). As noted, we find the Ohio and Texas courts' analysis highly persuasive.

Kentucky's Open Records Law, which in this context parallels Ohio's Public Records Law and Texas' Public Information Act, and is determinative of the issue of access under the "required by law" exception to HIPAA's privacy rule, declares that "[a]ll public records shall be open for inspection by any person,"[3] and "exhibits a general bias favoring disclosure."[4] In light of the legislative recognition "that free and open examination of public records is in the public interest[,] . . . the exceptions provided for by KRS 61.878 or otherwise provided by law [must] be strictly construed, even though such examination

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[3] KRS 61.872(1).

[4] *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992)

may cause inconvenience or embarrassment to public officials or others."[5] Resolution of the access issue in this appeal turns on the propriety of the OIG's current interpretation of KRS 194.060(1) and whether it is consonant with the policy of strict construction of "the exceptions provided for by KRS 61.878 or *otherwise provided by law*," id., (emphasis added), and thus "exhibits a general bias favoring disclosure." *Board of Examiners* at 327. Our analysis of the OIG's original invocation of KRS 61.878(1)(a) mirrors our analysis of its invocation of KRS 194.060(1) inasmuch as both exceptions are aimed at protecting "the individual's right to privacy."

KRS 194.060(1) provides:

> (1) The secretary shall develop and promulgate administrative regulations that protect the confidential nature of all records and reports of the cabinet that directly or indirectly identify a client or patient or former client or patient of the cabinet and that insure that these records are not disclosed to or by any person except as, and insofar as:
>
> (a) The person identified or the guardian if any, shall give consent; or
> (b) Disclosure may be permitted under state or federal law.

Although the OIG cites no regulations supporting its policy change or, indeed, any state regulations promulgated under this statute, it asserts the necessity of now redacting its investigative records more heavily to fulfill its duty to its clients.

We have examined the OIG investigative records, both pre- and post-policy change, proffered by Mr. Wilson to support his position that the redactions are too heavy, rendering those records meaningless, and we agree with him. Extracting a single paragraph from those records, we find the following:

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[5] KRS 61.871.

Before

The facility failed to protect resident(s) from neglect; i.e., On February 12, 2008 at 2:05 p.m., classroom staff Kelly Russell reported that when classroom staff I brought resident to the resident was lying over in her wheelchair with her head on her lap and her hands handing down the sides of the wheelchair. The resident had blood on her left arm. Medical was notified and noted that the nails were off of the resident's right ring finger and right middle finger. The top of the resident's ring finger was cut and 2-3 lacerations were noted to the ring finger between the 1st and 2nd knuckle. The resident was transferred to the local hospital where x-rays were negative for fractures. Upon review of the video cameras, it was discovered that staff member was transporting the resident in a reckless manner that may have contributed to the resident's injuries.

After

The facility failed to protect resident(s) from neglect; i.e., On February 12, 2008 at 2:05 p.m., classroom staff reported that when classroom staff brought resident the resident was The resident Medical was notified and noted that resident's The he resident was . Upon review of the video cameras, it was discovered that staff member was transporting the resident in a reckless manner that may have contributed to the resident's

We concur with Mr. Wilson in the view that the information redacted from the post-policy change investigative report neither "directly [n]or indirectly identif[ies] a client or patient or former client or patient of the cabinet." KRS 194.060(1). While it describes the condition of an Oakwood resident that gave

rise to an investigation, that resident is not identified by name, age, birth date, social security number, photograph, or any other personal identifier. There is no reasonable basis to believe that the redacted information can be used to identify that individual. We therefore conclude that the information was improperly redacted under KRS 194A.160(1), and that its disclosure would not have constituted a clearly unwarranted invasion of personal privacy under KRS 61.878(1)(a).

Pursuant to KRS 194A.030(1)(c), the Office of the Inspector General is responsible for:

> The conduct of audits and investigations for detecting the perpetration of fraud or abuse of any program by any client, or by any vendor of services with whom the cabinet has contracted; and the conduct of special investigations requested by the secretary, commissioners, or office heads of the cabinet into matters related to the cabinet or its programs[.]

We find that the OIG's new policy requiring heavy redaction of its investigative records does not strike the proper balance between the individual's right of privacy and the public's right to know that the OIG discharged its statutory duty. As noted, the Open Records Act recognizes the public's interest in free and open examination of public records and is:

> premised upon the public's right to expect its agencies properly to execute their statutory functions. In 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.

Board of Examiners at 328. Under the policy adopted by the OIG on May 19, 2008, the public is effectively foreclosed from monitoring the agency's conduct in discharging its statutory duty to investigate abuse and neglect at this state owned and operated facility for individuals with developmental disabilities. The policy therefore violates the Open Records Act, incorporating KRS 194.060(1), as the controlling law in the resolution of this dispute under the "required by law" exception to the HIPAA Privacy Rule.

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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#343

Distributed to:

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10-ORD-079

April 19, 2010

In re: *The State Journal*/City of Frankfort

Summary: City of Frankfort failed to meet its burden of proof in denying request for records relating to ethics complaints filed against city officials and electrical inspection records for identified properties. Based on established legal authority, City may withhold the complaints themselves until they are finally resolved by final action or a decision to take no action.

Open Records Decision

The question presented in this appeal is whether the City of Frankfort violated the Open Records Act in denying *Frankfort State Journal* reporter Kevin Wheatley's requests for copies of all ethical complaints filed against City Manager Tony Massey, City Commissioner Kathy Carter, and City Clerk Ramona Newman, all documents related to these complaints, and all City of Frankfort electrical inspections for 708 and 710 Hoge Avenue within the six months prior to the requests. We find that the City failed to meet its burden of proof in denying Mr. Wheatley's requests for documents relating to complaints and electrical inspections, but may withhold the complaints themselves until the allegations contained therein are finally resolved or a decision is made to take no action.

The City premised its denial of Mr. Wheatley's request for ethical complaints on KRS 61.878(1)(i) and (j), reciting the language of these statutory exceptions. Additionally, the City relied on Frankfort Code of Ordinances

39.17(C)[1] and KRS 61.878(1)(h), arguing that "any records that may be available are confidential until such time as a preliminary inquiry determines otherwise . . . ." The City did not address Mr. Wheatley's request for documentation related to the ethical complaints or electrical inspection reports. Consequently, Mr. Wheatley initiated this appeal.

In supplemental correspondence directed to this office, the City explained:

> The requested records relate to complaints filed alleging that certain City of Frankfort officials and/or employees have violated the provisions of the City's Code of Ethics. As a result of these complaints, an administrative adjudication of these complaints is currently underway. Accordingly, the requested records are exempt from release pursuant to KRS 61.870(1)(h) because the City is currently involved in an administrative adjudication concerning the allegations and the requested records were obtained as a result of the investigation of the alleged violations. The premature release of this information would harm the process of adjudicating these complaints because it would identify the complainants who could then be subject to retaliation, pressure or ostracism by individuals that did not agree with their actions in making the complaints. Such retaliation, pressure or ostracism would be prejudicial to the determination of the complaints and could result in the withdrawal of the complaints or discourage the filing of such complaints in the future.

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[1] With reference to this ordinance, we remind the City:

> In enacting the Open Records Law, KRS 61.870 - 61.884, the General Assembly has preempted the field of inspection of public records. A city cannot by ordinance make records confidential or exempt from public inspection unless the particular records come under one of the exemptions from mandatory public inspection provided by KRS 61.878.

OAG 82-435, p. 2; see also 92-ORD-1136; 94-ORD-64; 00-ORD-117; 01-ORD-63; OAG 82-518, at p. 1 ("The Mayor does not have the authority to countermand the requirements of the Open Records Law").

The City also argued that the complaints and inspection reports "contain . . . preliminary drafts, notes, and correspondence with private individuals," "are preliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended," "contain information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of privacy . . . [and] cause considerable harm to officials and/or City employees . . .," and are protected from disclosure by KRS 61.878(1)(i), (j), and (a), respectively. Finally, the City asserted that Section 39.17(C) of the City of Frankfort Code of Ordinances mandates confidentiality as to "all proceedings and records relating to a preliminary inquiry being conducted by the Board of Ethics . . . until a final determination is made by the Board."

To facilitate our review of the issues before us, on April 1, 2010, this office exercised its authority under KRS 61.880(2)(c) by requesting additional information from the City, including copies of the disputed records for purposes of *in camera* inspection. We asked that the City respond to our inquiry on or before April 9, 2010, and agreed to extend the deadline for the City's response to April 13, 2010. The City did not avail itself of the opportunity to substantiate its position or otherwise honor our KRS 61.880(2)(c) request. Given the paucity of information in the record on appeal, we find that the City failed to meet its burden of proof in denying Mr. Wheatley access to documentation relating to the complaints against Mr. Massey, Commissioner Carter, and Ms. Newman, and in denying him access to electrical inspections conducted at 708 and 710 Hoge Avenue that were generated in the six months prior to his request. Based on well-established legal authority, we affirm the City's reliance on KRS 61.878(1)(i) and (j) to support nondisclosure of the complaints themselves.

Kentucky's courts have accorded protection to documentation exchanged by public officials that consists of "preliminary discussions involving what course of action should be taken in regard to a controversy . . . [and therefore] preliminary recommendations and preliminary memoranda in which opinions are expressed or policies formulated or recommended. *Baker v. Jones,* 199 S.W.3d 749, 552 (Ky. App. 2006). Such records, whether electronically stored or in hard copy, "enjoy the same protection . . . under a line of open records decisions [issued by the Attorney General dating] back to 2000." 07-ORD-161, p. 6. With few exceptions, it has been our practice to conduct an *in camera* inspection of

documentation for which protection is claimed under KRS 61.878(1)(i) or (j) to determine if they constitute preliminary "drafts, notes, correspondence with private individuals other than correspondences which is intended to give notice of final action of a public agency" or "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." KRS 61.878(1)(i) and (j). This has also been our practice in assessing the propriety of agency invocation of KRS 61.878(1)(h). Here, the City has frustrated our efforts by failing to provide us with copies of the disputed records and respond to our inquiries by explaining, for example, how the Ethics Commission discharges its duties under City ordinance and what its role is in relation to the City Commission.

To facilitate our review of open records appeals, KRS 61.880(2)(c) and 40 KAR 1:030(3) vest this office with the authority to inspect the records in dispute. KRS 61.880(2)(c) thus provides in relevant part:

> 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.

Similarly, 40 KAR 1:030(3) provides:

> KRS 61.880(2) authorizes the Attorney General to request additional documentation from the agency against which a complaint is made. If documents thus obtained are copies of documents claimed by the agency to be exempt from the Open Records Law, the Attorney General shall not disclose them and shall destroy the copies at the time the decision is rendered.

In 96-ORD-206, this office acknowledged that we were "severely handicapped in conducting our review" by virtue of an agency's refusal to honor our request for copies of the disputed records or respond to our written inquires. Quoting from an earlier decision, we observed:

> Although there is no clear standard of proof under the Kentucky Open Records Act, with one narrow exception, [footnote omitted] it is clear that the burden of proof in sustaining public agency action in the event of an appeal to the Attorney General, or to the circuit court, is on the agency. KRS 61.880(2)(c); KRS 61.882(3). It is also clear that a bare assertion relative to the basis for denial does not satisfy the burden of proof imposed on the agency. We have received no supporting documentation to confirm the assertion, nor have we been afforded access to . . . [the disputed record] which we specifically requested.

95-ORD-61, p. 5, cited in 96-ORD-206. Relying on KRS 61.880(2)(c) and 40 KAR 1:030(3), we noted:

> [T]he General Assembly has twice vested the Attorney General with the authority to require production of public records, for which a claim of exemption has been made, for *in camera* review. Without this authority, the Attorney General's ability to render a reasoned open records decision would be severely impaired. The Attorney General recognizes that he is bound to observe the confidentiality of the records, and does not share [the agency's] apparent view that disclosure to this office pursuant to KRS 61.880(2)(c) constitutes waiver as to any legitimate privilege [or exemption] asserted. Because he does not have authority to compel disclosure of the disputed records, his only recourse is to find against the public agency in the hope that the agency will more conscientiously discharge its duties under the Open Records Act in the future.

96-ORD-106, p. 5. In both 95-ORD-61 and 96-ORD-206, the Attorney General concluded that the agencies whose denials were challenged had not met their burden of proof in sustaining those denials under KRS 61.880(2)(c).[2] We are

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[2] See also 04-ORD-031 (Kenton County Fiscal Court failed to meet statutory burden of proof in denying access to records relating to dismissal of director of animal control by failing to produce disputed records and respond to inquiries lawfully requested under KRS 61.880(2)(c)); 05-ORD-169 (Attorney General cannot affirm City of Mayfield's denial of request for investigative records

constrained to reach the same conclusion in the appeal now before us. Accord 05-ORD-185.

KRS 61.880(2)(c) provides that an agency resisting disclosure has the burden of proof to sustain its action. In light of the statement of legislative policy set forth at KRS 61.871, declaring that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others," we are not prepared to accept, without independent confirmation, that all of the responsive documents are shielded from public inspection by KRS 61.878(1)(h), (i), (j), or any other exception or local ordinance. Bearing in mind that the City is assigned the burden of proof, that the Open Records Act "exhibits a general bias favoring disclosure," *Board of Examiners of Psychologists v. Courier-Journal*, 826 S.W.2d 324, 327 (Ky. 1992), and that "free and open examination of public records is in the public interest . . . even though such examination may cause inconvenience or embarrassment to public officials or others," KRS 61.871, we find that the City of Frankfort has not met its burden of proof in denying *The State Journal's* request for documentation relating to the complaints filed against Mr. Massey, Commissioner Carter, and Ms. Newman. Nor has it met its burden in the denial of Mr. Wheatley's request for documentation relating to electrical inspections conducted in the six months prior to submission of the request, including, of course, the inspection reports themselves.[3] Accordingly, the City must produce all responsive records for his review and provide him with copies upon request.

We can infer from the City's response that complaints are pending against the named individuals. KRS 61.878(1)(i) and (j) have long been interpreted to authorize nondisclosure of the complaint or other initiating document in which allegations are made until final action is taken on those charges or a decision to

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on the basis of records' nonexistence where city elected not to respond to written inquiries lawfully submitted under authority of KRS 61.880(2)(c)).

[3] See 08-ORD-063, 96-ORD-32, OAG 80-596, OAG 77-585 (affirming public's right of access to restaurant inspections conducted by health department and recognizing that "the reports of inspections of enterprises regulated by law are public because of the need for public supervision of the actions of regulatory agencies and the public's right to be alerted to unsafe conditions" OAG 80-596, p. 3).

take no action is made. *Palmer v. Driggers*, 60 SW 3d 591 (Ky. App. 2001). Thus, in *City of Louisville v. Courier-Journal and Louisville Times Co.*, 637 S.W.2d 658, 659 (Ky. App. 1982), the Kentucky Court of Appeals recognized:

> [S]ubsections [(i) and (j)] protect the Internal Affairs reports from being made public. Internal Affairs, as was stipulated, has no independent authority to issue a binding decision and serves merely as a fact-finder for the convenience of the Chief and the Deputy Chief of Police.
>
> Its information is submitted for review to the Chief who alone determines what final action is to be taken. Perforce although at that point the work of Internal Affairs is final as to its own role, it remains preliminary to the Chief's final decision. Of course, if the Chief adopts its notes or recommendations as part of his final action, clearly the preliminary characterization is lost to that extent.
>
> This holding, however, is limited to Internal Affairs' involvement. We do not find that the complaints *per se* are exempt from inspection once final action is taken. Inasmuch as whatever final actions are taken necessarily stem from them, they must be deemed incorporated as a part of those final determinations.

While the complaint process is proceeding, the City may properly withhold the complaints/initiating documents concerning these individuals, but must disclose them, along with any record reflecting final action on them, or a decision to take no action, at their conclusion. Under the same line of reasoning, the City must disclose any prior complaints leveled against the individuals that have been resolved by final action, or a decision to take no action, along with any related documentation adopted as the basis for that resolution. As we noted in 10-ORD-070 and 10-ORD-076, "no statutory basis exists for denying" requests for records reflecting final action or the decision to take no action and the complaints from which the final action or decision to take no action "necessarily stem."

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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