05-ORD-141

July 7, 2005

In re: *Lexington Snitch*/University of Kentucky

Open Records Decision

The question presented in this appeal is whether the University of Kentucky violated, or otherwise subverted the intent of,[1] the Open Records Act in the disposition of *Lexington Snitch* Publisher Tim Woodburn's May 25 request for a copy of "the fax submitted by Randolph Morris to the UK Athletics Department regarding his decision to make himself available for the NBA draft." For the reasons that follow, we find that the University did not violate the Open Records Act, insofar as it cannot make available for inspection and copying a public record that has been "discarded," but that its failure to implement an adequate program for insuring records preservation constitutes a subversion of the intent of the Act. Because the fax was in the nature of official correspondence terminating a scholarship player's financial relationship with the University, and therefore should have been permanently retained, we find that this appeal raises significant records management issues that are appropriate for review by the Kentucky Department for Libraries and Archives.

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[1] KRS 61.880(4) provides:

> If a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

In a response dated May 31, 2003, University Records Custodian Frank Butler denied Mr. Woodburn's request on the basis of KRS 61.878(1)(k),[2] incorporating 20 U.S.C. § 1232g, the Family Education Rights and Privacy Act, into the Open Records Act. He explained that "[t]he term 'education record' is defined by the regulations and means those 'records' that are 'directly related to the student and maintained by an educational agency.'" It was his position that "if such a record did exist, it would be exempt from disclosure." Shortly thereafter, Mr. Woodburn initiated this appeal asserting that "[a] fax sent by a student, relating to . . . a decision to pursue professional opportunities, has nothing to do with his education or his educational records."

In supplemental correspondence directed to this office following commencement of Mr. Woodburn's appeal, University General Counsel Barbara W. Jones amplified on the University's position. She observed:

> In an effort to resolve the matter the University, while not waiving the basis for the May 31, 2005, denial, advised Mr. Woodburn that the document he had requested had been discarded and was not available to be produced in the event he was successful on the appeal. The University asked Mr. Woodburn if he would be willing to withdraw his appeal knowing that the document was not available. Mr. Woodburn declined to withdraw the appeal.

She reiterated that if the requested record had been retained by the University and still existed, the record would qualify for exclusion from public inspection by operation of KRS 61.878(1)(k) and FERPA, but concluded that "the University cannot produce what it does not have," citing OAG 91-173 and OAG 90-131.

In view of the fact that the requested record no longer exists, that the University denied access on this basis, and that this office has no alternative but to affirm the denial on this basis, we do not address the underlying issue relating to the application of FERPA to communications from a student athlete to the University announcing his decision to leave the University. Instead, we focus on the interrelated issues of proper records management and records access.

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[2] KRS 61.878(1)(k) authorizes nondisclosure of "all public records or information the disclosure of which is prohibited by federal law or regulation."

Pursuant to KRS 61.8715, public agencies are required "to manage and maintain [their] records according to the requirements" of the Open Records Act, KRS 61.870 - 61.880 and the State Archives and Records Act, KRS 171.410 – 171.740, in order "to ensure that efficient administration of government and to provide accountability of government activities. . . ." KRS 61.8715. On this issue, the Attorney General has observed:

> Until July 15, the State Archives and Records Act, codified at KRS 171.410, tracked a parallel path to that of the Open Records Act. Those paths now converge. Under the provisions of the Archives and Records Act, "[t]he head of each state and local agency shall establish and maintain an active continuing program for the economical and efficient management of the records of the agency." KRS 171.680. The agency's program must provide for:
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> > (a) Effective controls over the creation, maintenance, and use of records in the conduct of current business;
> > (b) Cooperation with the department in applying standards, procedures, and techniques designed to improve the management of records;
> > (c) Promotion of the maintenance and security of records deemed appropriate for preservation, and facilitation of the segregation and disposal of records of temporary value;
> > (d) Compliance with the provisions of KRS 171.410 to 171.740 and the rules and regulations of the department [for Library and Archives].
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> Among the duties imposed on the agency head by operation of these provisions, he must "establish such safeguards against removal or loss of records as he shall deem necessary and as may be required by rules and regulations issued under authority of KRS 171.410 to 171.740." KRS 171.710. These safeguards include "making it known to all officials and employees of the agency that no records are to be alienated or destroyed except in accordance

> with law, and calling attention to the penalties provided by law for the unlawful removal or destruction of records." KRS 171.710.
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> In enacting KRS 61.8715 the General Assembly recognized that the intent of the Open Records Act, to provide full access to public records, was essentially related to, and would be promoted by, efficient records management. This, of course, is the intent and purpose of the State Archives and Records Act. Subversion of the intent of the Archives and Records Act thus constitutes subversion of the intent of the Open Records Act. If a public agency fails to discharge its statutorily mandated duty to establish effective controls over the creation, maintenance, and use of records, and to make known to all of its officials and employees that no records are to be destroyed except in accordance with the law, the agency subverts the intent of the Open Records Act by frustrating full access to public records.

94-ORD-121, p. 8-10.

The disputed record in this appeal clearly constitutes official correspondence of the University of Kentucky and falls squarely within the parameters of Series No. U0100 of the State University Record Retention Schedule insofar as it "documents the major activities, functions and programs of an agency and the important events in its history." It evidences a significant occurrence in the history of the University's athletic program and the termination of a scholarship player's financial relationship with the University, impacting not only the Athletic Department but other departments of the University, including the Office of the Registrar. Should Mr. Morris wish to return to the University in the future, the disputed record would be integral to the resumption of his academic career. Moreover, the record may have significance in evidencing compliance with NCAA rules and regulations.

As official correspondence, the "discarded" fax should have been permanently retained. The disposition instruction for such correspondence, found at Series No. U0100 of the referenced University Records Schedule, directs the permanent retention of official correspondence and transfer to the University Archives after the record's administrative use has ceased. Assuming, *arguendo*,

that the disputed record was not official correspondence, then it must be considered general correspondence of a non-policy making nature, dealing with the operations of a department of the University, as described in Records Series U0101. In this case, the retention period for the disputed record was "indefinite." Regardless of whether Mr. Morris' fax to the Athletic Department was characterized as official correspondence or general correspondence, the University was not free to "discard" it at will.[3]

The Attorney General has long recognized that a public agency cannot afford a requester access to records which do not exist or have been destroyed. See, e.g., OAG 83-111; OAG 87-54; OAG 88-5; OAG 91-112; OAG 91-203. We have also recognized that it is not our duty to investigate in order to locate documents which do not exist or have been destroyed. OAG 86-35. As we observed in OAG 86-35, at page 5, "This office is a reviewer of the course of action taken by a public agency and not a finder of documents . . . for the party seeking to inspect such documents." However, since July 15, 1994, when the amendments to the Open Records Act took effect, we have applied a higher standard of review relative to denials based on the nonexistence, or here the destruction, of the requested records. In order to satisfy its statutory burden of proof, a public agency must, at a minimum, document what efforts were made to locate the missing records, or explain by what authority the records were destroyed. Because the University of Kentucky failed to provide even a minimal explanation for the destruction of the requested record, we are compelled to conclude that the University failed to adequately manage its records. The loss or destruction of a public record creates a presumption of records mismanagement, but this presumption is rebuttable. The University failed to overcome the presumption because it offered no explanation for the destruction of the record.

While we do not find, as a matter of law, that the University of Kentucky violated the Open Records Act by failing to afford Mr. Woodburn access to the requested record, that record having been discarded, or that its reliance on KRS 61.878(1)(k) and FERPA was misplaced,[4] we do find that the University subverted the intent of the Act by failing to establish effective controls over the

[3] It is unclear whether the University complied with KRS 171.720 by notifying the Department for Libraries and Archives of the "actual . . . destruction of records in its custody . . . ."
[4] As noted, we will not engage in a purely academic exercise relative to the issue but will leave the question of the application of FERPA to such a record for another day.

creation, maintenance, and use of the record, thus frustrating any *arguable* right of public access. Ultimately, of course, we cannot afford Mr. Woodburn the relief he seeks, namely access to a copy of the fax submitted by Randolph Morris to the University's Athletics Department regarding his decision to make himself available for the NBA draft. We have, however, referred this matter to the Kentucky Department for Libraries and Archives for additional inquiry as that agency deems warranted. Our review is confined to the issues arising under KRS 61.870 to 61.884, and under those statutes we conclude that the University of Kentucky subverted the intent of the law in the handling of a public record and in its disposition of Mr. Woodburn's request.

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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