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16-ORD-057

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In re: Lachin Hatemi/Kentucky Medical Services Foundation, Inc.

Summary: Decision adopting 15-ORD-205; Kentucky Medical Services Foundation, Inc., is a public agency subject to the Open Records Act, but failed to establish that it was subject to FERPA or to explain privacy interest implicated by disclosing names of Dean's Fund Scholarship recipients under KRS 61.878(1)(a); nor was there clear and convincing evidence of unreasonable burden or an intent to disrupt essential functions under KRS 61.872(6).

Open Records Decision

The question presented in this appeal is whether Kentucky Medical Services Foundation, Inc. ("KMSF"), violated the Open Records Act in the disposition of Dr. Lachin Hatemi's November 29, 2015, request for a "[I]ist of all recipients of Dean's Fund Scholarship in 2009, 2010, 2011, 2012, 2013, 2014 and 2015."¹ For the reasons stated below, we find that the records were improperly denied.

KMSF's response to the request, issued on December 1, 2015, stated: "The records that you requested ... are student protected [sic] by FERPA, 20 USC 1232g and exempt from disclosure under the Open Records Act, KRS 68.878(1)(k) [sic] and KRS 61.878(1)(a). Accordingly, we are not providing them to you." Dr. Hatemi appealed to this office the following day, arguing: "When individuals

¹ Other items included in the request do not appear to be at issue in this appeal.



apply for scholarships which are funded by public funds, they forfeit their right to privacy about their scholarship status. Since public funds had been disbursed as scholarships to unknown individuals based on an unknown criteria [sic], general public should have a right to know the identity of recipients of these scholarships."

On December 11, 2015, attorney Harry L. Dadds responded to the appeal on behalf of KMSF, making three arguments:

- First, KMSF argues that it is not subject to the Open Records Act. That argument was rejected by our recent ruling in 15-ORD-205, which we find controlling on that issue.
- Second, KMSF argues that the information sought is "student names protected by the Family Educational Rights and Privacy Act" and by KRS 61.878(1)(a).
- Third, KMSF argues that Dr. Hatemi "is attempting to disrupt KMSF operation in an attempt to harass and intimidate KMSF employees and officers," within the meaning of KRS 61.872(6), based on the fact that he has previously made a "massive" request for records as documented in 15-ORD-205.

Since 15-ORD-205 is controlling as to KMSF's first argument, we attach a copy of that decision and adopt its reasoning in this appeal to the effect that KMSF is a public agency established, created, and controlled by the University of Kentucky and its College of Medicine. We therefore begin by analyzing KMSF's second argument.

The Family Educational and Privacy Rights Act ("FERPA"), 20 U.S.C. § 1232g, provides at subsection (b)(1):

No funds shall be made available under any applicable program to any *educational agency or institution* which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein *other than directory information, as defined in paragraph (5) of subsection (a) of this section*) of students without the written consent of their parents to any

individual, agency, or organization, other than [certain limited exceptions.]

(Emphasis added.) Subsection (a)(5)(A) of the same statute defines “‘directory information’ relating to a student” as including:

the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(Emphasis added.) A threshold question is whether KMSF is an “educational agency or institution” within the meaning of 20 U.S.C. § 1232g(b)(1).

The term “educational agency or institution” does not appear to be defined for purposes of the chapter containing FERPA.² In KMSF’s arguments presented in 15-ORD-205, which it incorporates into its response to the present appeal, KMSF represents that it was established as “a not for profit corporation that would bill and collect for services of medical faculty members, manage their practices and arrange for improved salaries and benefits.” There is no indication of any educational mission, or any receipt of federal funds under an education program, that would qualify KMSF as an “educational agency or institution” subject to FERPA. Therefore, we conclude that KMSF has not made an adequate showing of the applicability of FERPA to records in its possession.³

We next address KMSF’s argument that the names of Dean’s Fund Scholarship recipients are subject to KRS 61.878(1)(a), which exempts from disclosure “records containing information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of personal privacy.”

² In Kentucky’s equivalent of FERPA, however, KRS 160.700(2) does contain a definition of “educational institution” as “any public school providing an elementary and secondary education, including vocational.”

³ Furthermore, even if FERPA applied, the names of students and “awards received” would constitute “directory information” under the definition quoted above.

The language of the exemption "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," while the Open Records Act as a whole "exhibits a general bias favoring disclosure" and places the burden of establishing an exemption on the public agency. *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This necessitates a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327-28.

The public interest in open records has been analyzed as follows by the Kentucky Court of Appeals: "At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994). On the other hand, the specific privacy interest in this case has not been in any way articulated by KMSF,⁴ which has merely added a perfunctory reference to KRS 61.878(1)(a) with its citation of FERPA.

KRS 61.880(1) requires that "[a]n agency response denying ... inspection of any record shall include ... a brief explanation of how the exception applies to the record withheld." This explanation must not be "perfunctory," but must "provide particular and detailed information." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996). With no detailed explanation of the privacy interest at issue, we must find that KMSF has not met its burden of proof under KRS 61.880(2)(c) to sustain its invocation of KRS 61.878(1)(a), and therefore the exemption cannot be relied upon.

Lastly, KMSF argues under KRS 61.872(6) that "the application places an unreasonable burden in producing public records or of the custodian has reason to believe that repeated requests are intended to disrupt other essential functions

⁴ KMSF has not stated whether Dean's Fund Scholarships are based on merit, financial need, or other factors. Indeed, part of Dr. Hatemi's complaint is that the scholarship is based upon "unknown criteria."

of the public agency." The statute provides that "refusal under this section shall be sustained by clear and convincing evidence." The present application, for a list of names of scholarship recipients over seven years, is certainly not burdensome in itself. Furthermore, in 15-ORD-205, we found that Dr. Hatemi's previous request for records from KMSF, though broad in scope, was not unreasonably burdensome. The addition of the negligible burden posed by the present application does not change that result; nor does it present clear and convincing evidence of an intent to disrupt essential functions of KMSF. Therefore, we find that KMSF has not sustained its refusal under KRS 61.872.

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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#455

Distributed to:

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