COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
4TH DIVISION
CIVIL ACTION NO. 16-CI-3594

UNIVERSITY OF KENTUCKY PLAINTIFF/APPELLANT

V. **UNIVERSITY OF KENTUCKY'S MOTION TO ALTER, AMEND OR VACATE**

LEXINGTON H-L SERVICES, INC. DEFENDANT/APPELLEE
d/b/a LEXINGTON HERALD-LEADER

*** *** ***

Pursuant to CR 59.05, the University respectfully moves the Court to alter, amend, or vacate the Opinion and Order entered on June 27, 2017.[1]

In its June 27, 2017 Opinion and Order, the Court correctly held that the University does not have to produce Mr. Douglass's billing invoices. However, the Court incorrectly held that the University must produce records from the internal "audit" initiated by the University's Chief Compliance Officer in August 2014 (Bates No. UK *in camera* 000001 through 000009).[2] Moreover, and respectfully, the Court's Opinion and Order was silent or otherwise unclear about whether the University must disclose (1) records from the University's pre-acquisition due diligence review, and (2) records from the legal investigation conducted by both internal counsel and outside counsel (David Douglass and others) and related outside consultants specifically engaged for the investigation.[3] (Consistent with the Court's orders and direction, these

[1] The University's motion to alter, amend, or vacate focuses on Open Records aspects of the Court's Opinion and Order, and in particular, the Court's rulings on disclosure of the due diligence, audit, and legal investigation records discussed in further detail below. Of course, there are several other issues that have been presented and addressed throughout the course of this case, some as a matter of Open Records law and others as a matter of Open Meetings statutes and related law. Consistent with CR 59.06, the University reserves its right to raise any issues, arguments, allegations, claims, or defenses that have been addressed in its prior arguments, briefs, and pleadings for appellate review, and nothing about this instant motion should be construed as a waiver to the contrary.

[2] The Court correctly exempted thousands of related patient records from this holding.

[3] This investigation began after the initial "audit" discovered the documentation problems.

records—which compromise several hundred pages—were not provided to the Court *in camera* and, as the Court knows from its review of the billing invoices, the records from outside counsel's legal investigation in particular include things such as legal memoranda, reports, and notes prepared by counsel that are clearly protected by attorney-client and/or work-product privilege and therefore exempt from disclosure.) Accordingly, the University asks the Court to alter, amend, or vacate it Opinion and Order and find that all of these records are exempt from disclosure as a matter of law.

In support of this motion, the University has filed a related memorandum of law.

NOTICE

The foregoing will come before the Court for hearing on July 14, 2017 at 11:30 a.m. or as soon thereafter as counsel may be heard.

Respectfully submitted,
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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
4TH DIVISION
CIVIL ACTION NO. 16-CI-3594

UNIVERSITY OF KENTUCKY PLAINTIFF/APPELLANT

V. **UNIVERSITY OF KENTUCKY'S MEMORANDUM IN SUPPORT OF MOTION TO ALTER, AMEND OR VACATE**

LEXINGTON H-L SERVICES, INC. DEFENDANT/APPELLEE
d/b/a LEXINGTON HERALD-LEADER

*** *** ***

This matter is before the Court upon the University of Kentucky's motion pursuant to CR 59.05 to alter, amend, or vacate the Opinion and Order entered by the Court on June 27, 2017. In support of its motion, the University submits this memorandum of law.[1]

INTRODUCTION

This matter concerns records requested by the Lexington Herald-Leader under the Kentucky Open Records Act in relation to the University's affiliation with a cardiology clinic in Hazard, Kentucky. As explained and otherwise addressed in the University's November 21, 2016 brief on the merits; the oral arguments presented on February 13, 2017; and the Court's subsequent orders for *in camera* review, there are several distinct groups of records at issue in this case:

1. Records from a due diligence review conducted by the University under the direction and oversight of its General Counsel for purposes of identifying potential legal risks relevant to the University's acquisition of the clinic. This due diligence review is described on page 3 of the University's November 21, 2016 brief.

[1] The University's motion to alter, amend, or vacate focuses on Open Records aspects of the Court's Opinion and Order, and in particular, the Court's rulings on disclosure of the due diligence, audit, and legal investigation records discussed in further detail below. Of course, there are several other issues that have been presented and addressed throughout the course of this case, some as a matter of Open Records law and others as a matter of Open Meetings statutes and related law. Consistent with CR 59.06, the University reserves its right to raise any issues, arguments, allegations, claims, or defenses that have been addressed in its prior arguments, briefs, and pleadings for appellate review, and nothing about this instant motion should be construed as a waiver to the contrary.

2. An internal "audit" initiated by the University's Chief Compliance Officer in August 2014 in response to complaints received by the University in Spring and Summer 2014, which discovered possible documentation problems with billing at the Clinic. This "audit" is described on page 4 of the University's November 21, 2016 brief and reflected in records submitted to the Court for *in camera* review as Bates No. UK *in camera* 000001 through 000009.[2]

3. A subsequent legal investigation conducted by both internal counsel and outside counsel (Mr. Douglass and others) and related outside consultants as part of a comprehensive effort to determine (a) what was wrong; (b) the University's potential liability, if any; (c) how to correct the problem; and (d) how to ensure the problem did not happen again. This investigation required counsel and those whom counsel worked with to obtain and analyze facts necessary to determine whether the treatment, medical-record documentation, and billing practices complied with applicable fraud and abuse laws, and in turn assess the University's legal obligations and risks and advise the University accordingly. This investigation is described on page 5 of the University's November 21, 2016 brief as well as the billing invoices submitted to the Court for *in camera* review as Bates No. UK *in camera* 000026 through 000161.[3]

4. The related Power Point presentation presented by attorney David Douglass to the University's Board of Trustees at its May 2, 2016 dinner meeting. *See* the records submitted to the Court for *in camera* review as Bates No. UK *in camera* 000010 through 000025. (The University does not challenge the Court's ruling here.)

5. The billing invoices from Mr. Douglass's firm, which detail the legal assessments and advice of counsel and the communications, interviews, records, and research gathered, conducted, or otherwise prepared in the course of formulating that advice, with description sufficient to demonstrate the privileged nature of the activities and records described therein. *See* the billing invoices submitted to the Court for *in camera* review as Bates No. UK *in camera* 000026 through 000161.

In its June 27, 2017 Opinion and Order, the Court correctly held that the University does not have to produce Mr. Douglass's billing invoices. However, the Court incorrectly held that

[2] As the Court is aware, the "audit" records submitted for *in camera* review did *not* include the thousands of actual patient records reviewed in the course of that audit.

[3] As always, nothing about the University's motions, briefs, and supporting arguments and discussions should be construed as a waiver of the privileges and exemptions that have been asserted by the University with regard to the records and meetings at issue.

the University must produce records from the internal "audit" initiated by the University's Chief Compliance Officer in August 2014 (Bates No. UK *in camera* 000001 through 000009).[4] Moreover, and respectfully, the Court's Opinion and Order was silent or otherwise unclear about whether the University must disclose (1) records from the University's pre-acquisition due diligence review, and (2) records from the legal investigation conducted by both internal counsel and outside counsel (Mr. Douglass and others) and related outside consultants specifically engaged for the investigation.[5] (Consistent with the Court's orders and direction, these records—which compromise several hundred pages—were not provided to the Court *in camera* and, as the Court knows from its review of the billing invoices, the records from outside counsel's legal investigation in particular include things such as legal memoranda, reports, and notes prepared by counsel that are clearly protected by attorney-client and/or work-product privilege and therefore exempt from disclosure.) Accordingly, the University asks the Court to alter, amend, or vacate it Opinion and Order and find that all of these records are exempt from disclosure as a matter of law.

ARGUMENT

I. Standard of Review

Kentucky law provides that a trial court has nearly unlimited power to alter, amend, or vacate its judgments pursuant to CR 59.05. *Hall v. Rowe*, 439 S.W.3d 183, 186 (Ky.App. 2014). The Court's ruling on a motion pursuant to CR 59.05 must not be arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* Thus, a motion pursuant to CR 59.05 should be

[4] The Court correctly exempted thousands of related patient records from this holding.

[5] This investigation began after the initial "audit" discovered the documentation problems.

granted when, as here, doing so is necessary to either (a) correct manifest errors of law upon which the Court's decision was based, or (b) prevent manifest injustice. *See id.*[6]

II. The Court Correctly Held that Attorney David Douglass's Billing Invoices are Privileged and Not Subject to Disclosure under the Open Records Act

In its underlying Open Records request, the Herald-Leader sought unredacted copies of attorney David Douglass's billing invoices. On grounds of attorney-client and work-product privilege, the University declined, but it did provide the Herald-Leader with information on the total amount paid to Mr. Douglass and the reason why Mr. Douglass was hired. In turn, this Court correctly held that "[t]he Herald-Leader's demand for more than it already has received is plainly unnecessary *and contrary to all the privilege is mean to preserve*." June 27, 2017 Opinion and Order at 10 (emphasis added). As discussed in Section IV, below, the Court should likewise preserve privilege for the legal investigation by internal and outside counsel as well as outside consultants engaged for purposes of the investigation detailed in those invoices.

III. The Court Should Vacate its Holding on the "Audit" Initiated by the University's Chief Compliance Officer

For reasons the University has already argued, *all* of the records at issue in the Herald-Leader's request are exempt from disclosure as a matter of law—not just the billing invoices of outside counsel. To hold otherwise constitutes a manifest error of law that must be corrected by vacating the Court's holdings to the contrary.

At the very least, the Court should vacate its holding on the internal "audit" initiated by the University's Chief Compliance Officer in August 2014. As the Court is aware from its review of the "audit" described on page 4 of the University's November 21, 2016 brief and the corresponding records submitted for *in camera* review (Bates No. UK *in camera* 000001 through

[6] This memorandum does not address other possible grounds for CR 59.05 relief outlined in *Hall* that do not apply here.

000009), the "audit" initiated by the University's Chief Compliance Officer in August 2014 may be accurately described as a "spot check" of patient records conducted in response to a handful of complaints raised earlier that year.

As a matter of law, and for reasons already presented at length in the University's brief on the merits, these "audit" records were "preliminary" records exempt from disclosure under KRS 61.878(1)(i) and/or (j). Further, these "audit" records did not lose their preliminary status when the University began sending repayment checks to the federal government in September 2015.

Because the University performs literally thousands of such "audits" or "spot checks" every year, as a practical matter, the University cannot function if every such "audit" or "spot check" becomes subject to disclosure. Public agencies have a clear need for candid preliminary communications without constant fear of undue disruption from pervasive requests for records that are not concerned with nor reasonably calculated to ascertain whether a state agency like the University is properly carrying out its statutory functions. As the Court of Appeals explained over 20 years ago:

> From the [Open Records Act's] exclusions [for preliminary records] we must conclude that with respect to certain records, the General Assembly has determined that the public's right to know is subservient to…the need for governmental confidentiality.

See Courier-Journal v. Jones, 895 S.W.2d 6, 8 (Ky.App. 1995). Accordingly, "[n]ot every paper in the office of a public agency is a public record subject to public inspection. Many papers are simply work papers which are exempted because they are preliminary drafts and notes." *Id.* Indeed, "[i]f the law required disclosure" of every record and event short of final agency action, such important preliminary activity "might never occur." *See id.* Compelled disclosure "could thus devalue or eliminate altogether" the gathering and provision of information needed to assess

and address problems. *See id*. In short, key preliminary work "might be inhibited" if it is "regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press." *See id*.[7] In order to avoid such a chilling result, and pursuant to applicable law, the Court should vacate its order to disclose records from the "audit" that is described on page 4 of the University's November 21, 2016 brief and reflected in records submitted to the Court for *in camera* review as Bates No. UK *in camera* 000001 through 000009.

IV. The Court Should Clarify its Opinion Regarding the University's Due Diligence Records and the Legal Investigation Conducted by Outside Counsel and Protect those Records from Disclosure

At the very least, the Court should clarify its opinion regarding records from (a) the University's due diligence review conducted before the cardiology clinic's acquisition (see page 3 of the University's November 21, 2016 brief); and (b) the investigation of outside counsel, clearly privileged, and his team conducted for purposes of assessing and advising the University on legal risks associated with billing issues discovered at the clinic (see page 5 of the University's November 21, 2016 brief and information from the legal invoices marked as Bates No. UK *in camera* 000026 through 000161).

As noted during discussion at oral argument on February 13, 2017; the *in camera* order entered February 20, 2017; and the Court's conference call with counsel for the parties on March 9, 2017, the Court has sought to review only a handful of records *in camera*—namely, the Chief Compliance Officer's initial "audit" in August 2014, David Douglass's Power Point in May 2016, and the billing invoices of David Douglass's firm from April 2015 through May 2016. The Court did not request *in camera* review of the University's due diligence records (described on page 3 of the University's November 21, 2016 brief) nor records from counsel's legal

[7] This same reasoning extends to other preliminary records at issue in this case, regardless of privilege, including the due diligence records and the investigation of outside counsel conducted for the purposes of assessing legal risks and advising the University about the same.

investigation (summarized on page 5 of the University's November 21, 2016 brief). Indeed, at oral argument on February 13, 2017, the Herald-Leader expressly stated it was *not* requesting *in camera* review of the legal investigation conducted by Mr. Douglass and others after documentation problems were discovered. Of course, the limited scope of *in camera* review was reasonable in light of the substantial amount of information and extensive level of detail about the remaining records (in particular, the legal investigation of outside counsel) already provided in the University's briefs and the billing invoices from Mr. Douglass's firm. *See City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013) (recognizing that *in camera* review in Open Records cases should be the exception rather than the rule); *Stidham v. Clark*, 74 S.W.3d 719, 727-28 (Ky. 2002) (circuit courts should not conduct an *in camera* review of privileged records except in limited circumstances).

Unfortunately, the Court's Opinion and Order is silent or otherwise unclear about its holding on (a) the University's due diligence records, and (b) by both internal counsel and outside counsel (Mr. Douglass and others) and related outside consultants specifically engaged for the investigation.. The lack of clarity stems primarily from the fact that, respectfully, the Court's Opinion and Order erroneously appears to interchangeably discuss the due diligence records, the internal "audit" records, and the records from outside counsel's legal investigation. As noted above, however, these three groups of records are separate and distinct from each other and, as such, warrant separate and distinct direction from the Court, and a definitive ruling that these records are exempt from disclosure.

For the reasons argued at length in the University's November 21, 2016 brief; its December 16, 2016 reply; and the oral arguments presented on February 13, 2017, both the due diligence records that predated the University's acquisition of the cardiology clinic and, most

certainly, the legal investigation of outside counsel that followed the internal "audit" initiated by the University's Chief Compliance Officer in 2014 are exempt from disclosure under the Open Records Act. Indeed, the Court has already recognized that even the *description* of legal counsel's investigation contained Mr. Douglass's billing invoices was, in and of itself, privileged and therefore exempt from disclosure. It necessarily follows that the actual investigation of counsel and the records described within Mr. Douglass's billing records are likewise privileged.

CONCLUSION

The University understands the Court's June 27, 2017 Opinion and Order to hold that the records from its internal "audit" (described on page 4 of the University's November 21, 2016 brief and reflected in the records marked as Bates No. UK *in camera* 000001 through 000009) are not exempt under the Open Records Act and therefore must be disclosed. For the reasons above and those argued before, the Court should vacate that holding. As to the due diligence records described on page 3 of the University's November 21, 2016 brief and the legal investigation described on page 5 of that brief, the Court should clarify its Opinion and, like the billing invoices from Mr. Douglass's firm, find that those records are exempt from disclosure as a matter of law.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served by email and first class mail on this 6th day of July 2017 upon the following:

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