



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

14-ORD-181

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In re: Kristina Goetz/University of Louisville

**Summary:** The University of Louisville procedurally violated the Open Records Act in failing to respond to requests within three business days and in failing to provide sufficient information about a document withheld under an exemption. The University of Louisville did not violate the Open Records Act in withholding a consulting report as a preliminary document until adopted as final agency action. The University of Louisville violated the Open Records Act in not conducting a reasonable search of persons likely to have documents that may have been adopted as the basis for final agency action. The University of Louisville is required to provide all documents that were adopted as the basis for final agency action.

***Open Records Decision***

The questions presented in this appeal are whether the University of Louisville ("U of L") violated the Open Records Act in withholding a report as a preliminary document, and in withholding other documents relating to the report as preliminary documents. We find that U of L procedurally violated the Open Records Act in failing to respond to requests for records within three business days and failing to identify a document withheld under an exemption. U of L did not violate the Open Records Act in withholding a consulting report as a preliminary document until adopted as final agency action, but did violate the Open Records Act in failing to conduct a reasonable search of persons likely to have documents that may have formed the basis for final agency action. U of L



is required to provide all documents that were adopted as the basis for final agency action.

### **Background**

Kristina Goetz ("Goetz") submitted two open records requests to U of L by email on Apr. 21, 2014. The first email requested that "the following documents be made available for inspection: the contract for and all correspondence, including but not limited to, notes, emails, memos and any other documentation regarding the private auditing firm charged with conducting a comprehensive audit of the University of Louisville." The second email requested that "the following documents be made available for inspection: the findings, including any and all drafts, of the recent comprehensive audit of the University of Louisville done by an private auditing firm." Goetz sent a follow-up email on Apr. 28, 2014, stating that "I have not received a formal, written response acknowledging receipt of these requests nor have I received a timetable for when these requests will be filed. Please provide a response promptly as the law requires one within three working days." U of L responded to both requests on Apr. 29, 2014, stating that "the University of Louisville and its affiliated corporations are audited annually. I have not identified any records regarding a specific audit outside the regular audit process." In response, Goetz sent an email clarifying her request on Apr. 30, 2014, requesting:

Any and all documentation, including but not limited to, contracts, emails, memos, notes or other correspondence - electronic or written - regarding the report produced by Strothman & Company PSC, which I understand is scheduled to be presented to the University of Louisville's Board of Trustees next month. I request any and all payment information from the university to Strothman & Company and any and all documents regarding the scope of the work, its intent and results. This includes, but is not limited to, drafts of the report, any and all material that went into its production and any correspondence between U of L and Strothman & Company regarding that work.

Goetz sent a follow-up email on May 5, 2014 "to make sure you received my email last week that clarified my open records request regarding the report

by Strothman & Company PSC." On May 6, 2014, U of L acknowledged receipt of the request, and stated that it had "asked the appropriate university officials to identify all responsive records and send them to me for review. I expect to have a response for you early next week. Goetz sent a follow-up email on May 15, 2014, stating that "you expected to have documents responsive to my request ready for review early this week. It is now Thursday. I am writing to request an update on when those records involving Strothman & Company PSC will be ready for my inspection." U of L responded on May 15, 2014, stating that it was "still working to determine what records exist for this request. I will contact you as soon as I have reviewed the records, I expect early next week."

On May 23, 2014, Goetz sent a follow-up email stating:

This is the third email I have sent regarding my April 30 open records request for access to review all documentation regarding the report produced by Strothman & Company PSC. . . .

I believe there has been sufficient time for the university to find any documentation that is responsive to this request, especially the contract between the University of Louisville and Strothman & Company PSC as well as any payment information. That documentation should be readily available at any time.

I understand that some board of trustee members have reviewed this document. We know it exists.

At this point, I ask that you either produce the documents or deny the request by end of business Tuesday, May 27.

U of L responded on May 27, 2014, apologizing for the continued delay, and stated that it was "still working to determine what records are releasable for the request. I will contact you as soon as I have reviewed the records, I expect later this week."

On May 29, 2014, U of L sent its response:

I have identified the contract and payment information requested. Upon receipt of payment of the attached invoice I will provide you with copies of the records . . . . One additional document responsive to your request was identified but is not

being produced as it is exempt from production under KRS 61.878. Specifically, this document is a draft document that is exempt pursuant to KRS 61.878(1)(i).

With regard to the remainder of your request, the request is technically deficient due to a failure to identify with some reasonable degree of specificity the documents you wish to review or the individuals whose communications you seek. Thus we are denying the remainder of your request.

Goetz initiated this appeal on June 6, 2014. Goetz stated:

Initially, the university denied the existence of this contract despite the fact that the proposal from Strothman & Co. plainly states on its cover page "special comprehensive financial examination and audit." . . .

The university's partial denial of my request citing KRS 61.878 does not give sufficient information for me to make an appeal. I believe the document being withheld is the report itself, though the university did not give any indication of when it would be considered final. It is also my understanding that this report has been shown to members of the board of trustees and possibly others. . . .

Beyond that, the university approved a \$100,000 increase in payment on March 26 to Strothman & Co. to "cover consultation for implementation of recommendations." Plainly stated, how can a report continue to be a draft when the university is paying the company to help implement its recommendations?

Regarding the emails and other communications, I dispute the university's claim that my request was not specific enough. I asked for all correspondence - emails, memos, notes etc. - regarding this specific contract with this specific company.

On June 11, 2014, Goetz submitted to this office copies of several documents:

- An extension to U of L's personal services contract with Strothman & Co. dated Feb. 10, 2014 and an amendment to the contract dated Mar. 26, 2014;
- The initial personal services contract dated Nov. 15, 2013;

- The Proposal for a Special Comprehensive Financial Examination and Audit submitted by Strothman & Co. to U of L dated October 2013;
- A check from U of L to Strothman and Co. dated Mar. 10, 2014 in the amount of \$107,985.00;
- An invoice from Strothman & Co. to U of L dated Feb. 12, 2014 for the amount of \$107,985 and a check from U of L to Strothman & Co. dated Mar. 10, 2014 for the amount of \$107,985;
- An invoice from Strothman & Co. to U of L dated Mar. 15, 2014 for the amount of \$52,537 and a check from U of L to Strothman & Co. dated Apr. 23, 2014 in the amount of \$52,537;
- A Personal Service Contract Invoice Form from the Legislative Research Commission in the amount of \$52,537, signed by the Contractor on Mar. 15, 2014 and the Contracting Body on Apr. 21, 2014.

U of L responded to this appeal on June 19, 2014. Regarding the contract, U of L stated that "the Complainant recognizes that the University has granted its request to review the contract." Regarding the report, U of L recognized that "final audit reports must be disclosed under the Open Records Act." However, it contended "Rather than a traditional report that merely states facts related to the current financial condition of the audited entity, the report being created by Strothman & Co. is specifically aimed at reviewing, investigating, offering opinions, and making recommendations for potential change." U of L further stated, "The University is continuing to work with Strothman & Co. to finalize the analysis being performed and to develop its response to Strothman & Co.'s findings and recommendations." U of L argued that "investigative reports, including reports prepared by outside consultants, enjoy the protections afforded by KRS 61.878(i)-(j) until they are adopted and made part of a final agency action." U of L further argued that "correspondence related to preliminary drafts . . . are protected from disclosure under KRS 61.878(i)-(j) in the same manner as the drafts themselves." U of L additionally argued that:

Complainant's request for all "correspondence" regarding the auditing firm is overly broad and will create an unreasonable burden on the University in attempting to respond. . . .

The work done by Strothman & Co. covers numerous departments within the University. Of course, the University employs 1,000s of individuals. Yet, the request does not limit itself

to correspondence by any particular employees . . . nor does it even limit itself to correspondence related to the report prepared under the contract requested by Complainant. In its current form, the University would have to undertake to review all employees' files, both hard copy and electronic, to review for any documents "regarding the private auditing firm." Even if the University could locate such documents, its review would further require extensive examination to determine whether portions of the documents were protected . . . . Put simply, such an expansive search would require countless employee hours and extensive technical cost.

On June 27, 2014, under KRS 61.880(2)(c), this office requested additional information from U of L regarding the challenges U of L faced in responding to the request, whether the report was presented to the Board of Trustees or individual trustees, and what action was necessary to finalize the report. U of L responded on July 18, 2014, stating that:

The final consulting report was presented to and accepted by the University's Audit Committee on July 2, 2014. During the July 10, 2014 meeting of the University's Board of Trustees . . . the Board approved the actions of the Audit Committee's July 2, 2014 meeting. This action represented the final agency action necessary to make the consulting report subject to the open records laws.

A copy of the final report was attached. U of L further stated, "The draft report was not presented to the Board in May of 2014. . . . A draft of the Consulting Report was presented to the Audit Committee, which includes certain members of the Board, on April 10, 2014." Regarding the correspondence, U of L stated that "none of the drafts or correspondence requested by Complainant were incorporated into the final agency action. Thus, they need not be disclosed." Regarding the burdens placed on U of L, it stated that it "employs approximately 6,000 employees and has approximately 22,000 students enrolled. . . . To attempt to locate any and all communications from those 28,000 plus individuals is simply over-broad and burdensome."

### Analysis

KRS 61.880(1) provides that “each public agency, upon any request for records . . . shall determine within three (3) days . . . after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision.” It is not disputed that U of L did not respond either to Goetz’s initial request within three business days, or to her clarified request within three business days. Accordingly, U of L committed multiple procedural violations of the Open Records Act in failing to respond to requests for records within three business days.

U of L also failed to properly specify the document withheld under an exemption. U of L’s response stated, “One additional document responsive to your request was identified but is not being produced . . . . This document is a draft document that is exempt pursuant to KRS 61.878(1)(i).” KRS 61.880(1) provides, “An agency response denying . . . 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.” “The agency should provide the requesting party . . . with sufficient information about the nature of the withheld record (or the categories of withheld records) . . . to permit the requester to dispute the claim . . . .” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 852 (Ky. 2013). Although U of L did list the exception that applied to the document withheld, it did not provide any information about the document. Accordingly, in failing to provide information sufficient to allow Goetz to dispute the characterization of a document which was withheld as preliminary, U of L violated the Open Records Act.

Regarding the documents submitted to this office by Goetz on June 11, 2014 listed above, 40 KAR 1:030 § 6 provides that “if the requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter.” Since the documents listed above have been provided to Goetz, the request is moot as to those documents.

Regarding the report itself, at issue is whether the report is an audit or a consulting report. KRS 61.878(i) exempts from the Open Records Act "preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency," and KRS 61.878(j) exempts "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." "An audit is a systematic inspection of accounting records and merely reflects income and expenses of operation." OAG 91-72. "Final audit reports are public documents, and must be made available for public inspection . . . ." 93-ORD-125. However, KRS 61.878(j) "authorizes nondisclosure of preliminary recommendations or preliminary memoranda in which opinions are expressed or policies formulated or recommended until they are incorporated into final agency action, notwithstanding the fact that they are prepared for the agency by outside agencies or private consultants." 01-ORD-87. Consulting reports are thus within the preliminary document exception until they are incorporated into final agency action. Although the report prepared by Strothman & Co. contains the label "Special Comprehensive Financial Examination and Audit," the label of "audit" is not determinative. "It is the 'nature and purpose' of those records which determines their status as public records." 05-ORD-065. The report prepared by Strothman & Co. is not a systematic inspection of accounting records, but contains policy recommendations. Therefore, it is a preliminary document until incorporation into final agency action, and U of L did not substantively violate the Open Records Act in withholding the report prior to its adoption as final agency action. Since its adoption as final agency action, the report has been provided to Goetz. Accordingly, Goetz's request for the report is now moot.

Regarding the request for correspondence and other documents, "if these documents were merely *internal* preliminary investigative materials, then they would be exempt . . . . However, once such notes or recommendations are adopted . . . as part of its action, the preliminary characterization is lost, as is the exempt status." *Ky. State Bd. of Med. Licensure v. Courier-Journal and Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. Ct. App. 1983). U of L states that "none of the drafts or correspondence requested by Complainant were incorporated into the final agency action." However, the fact that none of the drafts were expressly incorporated into the final report does not end the inquiry. "Our analysis does not end with a determination that documents are preliminary in character, but



instead also requires a determination of whether such documents, or portions thereof, were ultimately adopted as the basis or a part of the agency's final action." 11-ORD-052. "When the decision mirrors those findings and recommendations . . . it must logically be inferred that they were adopted as the basis of that decision . . . ." 07-ORD-090. "Inasmuch as whatever final actions are taken necessarily stem from them, they must be deemed incorporated as a part of those final determinations." *City of Louisville v. Courier-Journal and Louisville Times Co.*, 637 S.W.2d 658, 659-60 (Ky. Ct. App. 1982). U of L is required to provide not only any preliminary documents that were expressly incorporated into the report, but any documents that formed the basis of the final agency action.

U of L argues that Goetz's "request for all 'correspondence' regarding the auditing firm is overly broad and will create an unreasonable burden . . . . The university employs 1,000s of individuals. . . ." Regarding U of L's contention that Goetz's request is overly broad, Goetz's request is a request for inspection under KRS 61.872(2), and "nothing in KRS 61.872(2) contains any sort of particularity requirement." *Com. v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008). This office has repeatedly held that "blanket requests for information on a particular subject without specifying certain documents need not be honored." 95-ORD-2. However, Goetz's request is limited to specific documents—documents relating to the report prepared by Strothman & Co. for U of L, a specific time period—the fall of 2013 and 2014, and a specific subject—the report. "To the extent that this request is limited to a special type of document, on a particular subject, for a limited period of time, it cannot be characterized as unduly broad." 95-ORD-27 (finding a request for all purchasing contracts during the tenure of a particular president of the Kentucky Lottery Corporation not to be overly broad). *See also* 93-ORD-116 ("He identifies a particular type of document, to wit, institutional write-ups, for a period of time extending from April, 1981 to the present. His request cannot be characterized as a blanket request for information on a particular subject"). Since Goetz's request identifies particular types of documents on a particular subject for a limited period of time, it is not overly broad.

Regarding U of L's contention that Goetz's request will create an unreasonable burden, KRS 61.872(6) provides, "If the application places an unreasonable burden in producing public records . . . the official custodian may refuse to permit inspection of the public records or mail copies thereof. However,

refusal under this section shall be sustained by clear and convincing evidence." U of L argues that it would have to search through the records of thousands of employees. However, "the obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Chestnut*, 250 S.W.3d at 665. Further:

The Open Records Act does not require an agency to conduct "an exhaustive exhumation of records," . . . or to embark on an unproductive fishing expedition "when the likelihood of finding records that fall within the outermost limits of the zone of relevancy is slight." . . . It is, however, incumbent on an agency "to make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested."

95-ORD-96. An agency is not required to conduct an exhaustive search or a fishing expedition, but is required to make a search that can reasonably be expected to produce responsive records.<sup>1</sup> Although Strothman & Co. did interview many employees in the creation of its report, we find it unlikely that the vast majority of U of L employees contributed documents that were adopted as the basis for final agency action. U of L is required to make a reasonable search of persons who are likely to have responsive documents. This search will likely include the U of L department and supervisor responsible for the solicitation of the report, review, and presentation to the U of L Audit Committee or Board of Trustees, as well as any employees in the chain of command in that office who could reasonably be expected to have been involved.<sup>2</sup> U of L does not claim to have made such a search. Accordingly, in not making a reasonable search of

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<sup>1</sup> See also 14-ORD-153 ("It is incumbent on . . . the party bearing the burden of proof by clear and convincing evidence under KRS 61.872(6), to make a reasonable effort to ascertain the number of responsive records it claims to pose an unreasonable burden within the meaning of that provision").

<sup>2</sup> See generally 06-ORD-207 ("Education Professional Standards Board conducted adequate search for records relating to former employee when search inquiry was directed to former employee's supervisor and 'those individuals in [her] 'chain of command' who could reasonably be expected to produce responsive records'"); 05-ORD-236 n. 4 ("In this case, for example, such a search would extend to the Admissions Office, and all of its organizational units and employees, as well as any individual in the chain of command who is reasonably likely to have corresponded with, or issued memoranda to, the Admissions Office on the issue of the pay rate increase").

persons likely to have documents concerning the report that may have formed the basis for final agency action, U of L violated the Open Records Act.

In summary, U of L procedurally violated the Open Records Act in not responding to requests within three business days, and in failing to provide sufficient information about a document withheld as preliminary. U of L did not violate the Open Records Act in withholding a consulting report as a preliminary document until adopted as final agency action. In not conducting a reasonable search of persons likely to have documents relating to the consulting report that may have been adopted as the basis of final agency action, U of L violated the Open Records Act. U of L is required to provide any documents relating to the report that were adopted as the basis of final agency action.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5)(a). The Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or any subsequent proceedings.

Jack Conway  
Attorney General

*Matt James by JMH*

Matt James  
Assistant Attorney General

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Distributed to:

Kristina Goetz  
Sherri Pawson  
Dana B. Mayton  
Craig C. Dilger