

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 21-CI-00798**

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**KENTUCKY STATE UNIVERSITY FOUNDATION, INC.**

**PLAINTIFF**

v.

**OPINION AND ORDER**

**FRANKFORT NEWSMEDIA, LLC d/b/a  
THE STATE JOURNAL**

**DEFENDANT**

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This matter is before the Court on the Motion for Summary Judgment filed by Defendant, Frankfort Newsmedia, LLC d/b/a The State Journal (“Defendant” or “the State Journal”). All parties fully briefed the merits of the case. Being sufficiently advised, the Court hereby **GRANTS** Defendant’s Motion because there is no genuine issue of material fact as to whether Plaintiff Kentucky State University Foundation, Inc. (the “Plaintiff” or the “KSU Foundation”) is a “public agency” for purposes of the Kentucky Open Records Act (the “KORA”) and, as such, subject to the KORA’s record inspection provisions.

**BACKGROUND**

On May 24, 2021, the State Journal submitted a KORA request to the KSU Foundation seeking records related to payments made to a specific individual for a two-year period, as well as “payments made for the purposes of parties celebrating the [specific individual’s] birthday[.]” 21-ORD-179 at 1. The [Defendant] also sought to inspect “any records or documentation reflecting payments of more than \$1,500 made to any entity or individual[.]” *Id.*

Plaintiff denied the KORA request, claiming it “is not a public agency as defined by KRS 61.870(1).” Compl., Exhibit 4. On September 10, 2021, Defendant filed an appeal with the Office of the Attorney General (“OAG”) to which Plaintiff responded on September 17, 2021.

Compl., Exhibit 1. The KSU Foundation argued to the OAG that it is not a public agency because it receives no public funds, it is not controlled by Kentucky State University (the “University”), it has changed its structure since the Kentucky Supreme Court determined it to be a “public agency” under KORA in 1992, and it has total control over deciding whether to grant the University’s disbursement requests. *Id.*

On September 23, 2021, the OAG issued 21-ORD-179, which relied on a 1992 Kentucky Supreme Court decision in which the KSU Foundation denied a KORA request in almost identical circumstances. There, the Kentucky Supreme Court squarely held that the KSU Foundation was a public agency. *Frankfort Publ’g Co. v. Kentucky State Univ. Found., Inc.*, 834 S.W.2d 681 (Ky. 1992). In examining whether subsequent organizational changes to the Foundation made the holding in *Frankfort Publ’g Co.* inapplicable, the OAG noted “[t]he Foundation provides no evidence that clarifies how its Board of Directors is selected.” 21-ORD-179, footnote 1. Ultimately, the OAG was not persuaded that subsequent changes to the structure of the KSU Foundation Board of Directors or the definition of “public agency” under KRS 61.870 affected Plaintiff’s status as a “public agency” under KORA, holding “in the absence of any evidence that explains how the Foundation’s Board of Directors are now selected, the Foundation is still a public agency under KRS 61.870(1)(i).” *Id.* at 4. The Attorney General found that the KSU Foundation was subject to KORA, and it was required to provide responsive records.

### STANDARD OF REVIEW

This Court has subject matter jurisdiction under KRS 61.882(1). A circuit court’s review of an Attorney General Opinion is *de novo*. *Valentine v. Personnel Cabinet*, 322 S.W.3d 505, 507 (Ky. App. 2010) (quoting *Medley v. Board of Educ., Shelby County*, 168 S.W.3d 398, 402

(Ky. App. 2004)) and KRS 61.882(3). As such, questions of law are reviewed without deference to the original decision of the agency. *Medley v. Board of Education of Shelby Co.*, 168 S.W. 3d 398 (Ky. App. 2004). A reviewing court is not bound by the Attorney General's Opinions, but the Court may give "great weight to the reasoning and the opinion expressed" by the Attorney General in an Open Records Case. *York v. Comm.*, 815 S.W.2d 415, 417 (Ky. Ct. App. 1991).

When weighing summary judgment, the proper standard is whether "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 5603. The movant should not succeed unless it has shown "with such clarity that there is no room left for controversy." See *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W.2d 476, 482 (Ky. 1991). In reviewing motions for summary judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor. *Id.* at 480. And summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgement. *Id.*

Summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Jones v. Abner*, 335 S.W.3d 471, 480 (Ky. App. 2011). The question presented here is strictly a legal issue, making summary judgment appropriate.

In applying the Open Records Act, the Court is bound to follow the legislative command that "free and open examination of public records is in the public interest" and that any exceptions to the rule of open examination of public records "shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871.

## ANALYSIS

In 1992 the Kentucky Supreme Court held that the KSU Foundation is a “public agency” for purposes of the KORA in a case where, like this one, the State Journal sought certain records from the KSU Foundation (“the 1992 KORA decision”). *Frankfort Pub. Co. v. Kentucky State University Foundation, Inc.*, 834 S.W.2d 681 (Ky. 1992). The Supreme Court’s holding interpreted the language “or agency thereof” in KRS 61.870(1) and also looked to the overall purpose of the KORA. *Id.* at 682 (“An interpretation of KRS 61.870(1), which does not include Foundation as a public agency, is clearly inconsistent with the natural and harmonious reading of KRS 61.870 considering the overall purpose of the Kentucky Open Records law.”).

The KSU Foundation explains that subsequent to the 1992 KORA decision it made organizational changes to its Board of Trustees as well as how operational interactions with the University occurred. Memorandum in Support of the Plaintiff’s Response to the Motion for Summary Judgment (“Plaintiff’s Response”), 1-2. These changes, it argues, result in a structure in which the University and the KSU Foundation operate as two separate entities. *Id.* Plaintiff further contends that amendments made to KRS 61.870(1) subsequent to the 1992 KORA decision make the Supreme Court’s interpretation of the language “of agency thereof” in that case irrelevant when applying the present statute. While the KSU Foundation may be a separate legal entity, it is affiliated with KSU in such significant ways that it is clear that its relationship to KSU is that of agent to principal. It exists to further the mission of KSU, and to implement policies that support KSU, its students and programs. It has no other reason for existence. So long as the KSU Foundation has the primary purpose of supporting KSU, and it holds and distributes its funds for the sole benefit of KSU, it must be “an agency thereof” for purposes of the Open Records Act.

With regard to the statutory modifications to 61.870(1) that occurred after the 1992 KORA decision, the Court of Appeal has explicitly held that “this modification of KRS 61.870 would have no effect on the holding in [the 1992 KORA decision].” *University of Louisville Foundation, Inc. v. Cape Publications, Inc.*, 2003 WL 22748265 at \*7 (Ky. App. 2003). In the *University of Louisville Foundation* case, the Court of Appeals affirmed a trial court ruling that the University’s private foundation was a public agency for purposes of the Open Records Act. The Kentucky Supreme Court denied discretionary review of that decision, and later held that the identity of donors to the U of L Foundation are subject to disclosure under the Open Records Act. *Cape Publications, Inc. v. University of Louisville Foundation, Inc.* 260 S.W.3d 818 (Ky. 2008).

However, even if the amendments to the statute did supersede the holding in that case, the KSU Foundation still falls squarely within the revised definition of “public agency.” Amendments to KRS 61.870(1) made the defined term “public agency” more specific by creating eleven subsections under KRS 61.870(1) (*i.e.*, KRS 61.870(1)(a)-(k)) under which an entity will be considered a “public agency.” As detailed below, two subsections of the “public agency” definition, KRS 61.870(1)(i) and (j), apply to the KSU Foundation irrespective of the organizational and operational changes it implemented in an effort to avoid such characterization.

**I. The KSU Foundation is a “Public Agency” Because it is Established, Created, and Controlled by the University (KRS 61.870(1)(j))**

The Foundation will be treated as a “public agency” under KRS 61.870(1)(j) if it is “established, created, and controlled” by another public agency (*i.e.*, the University). It is undisputed that the members of the University’s Board of Regents, which is without question a “public agency,” acting in its official capacity “established” and “created” the KSU Foundation.

Memorandum in Support of Defendant Frankfort Newsmedia, LLC's Motion for Summary Judgment ("Defendant's Memo"), Exhibit 2 (KSUF's Responses to The State Journal's Requests for Admission). Accordingly, the only issue in dispute as to whether the KSU Foundation is a "public agency" under KRS 61.870(1)(j) is whether it is "controlled" by the University.

The sole purpose of the KSU Foundation is to support and advance the mission of the University. It is bound by its Articles of Incorporation, By-Laws, and tax exempt status with the Internal Revenue Service under Section 501(C)(3), to limit its activities to support of KSU. It has no legal authority to do anything other than provide support to the University. Those facts standing alone establish that KSU has legal control over the KSU Foundation.

In defining "control," we look to how that term has been interpreted in the context of the KORA rather than any meaning assigned to the term under separate statutory frameworks.<sup>1</sup> The Court of Appeals, analyzing a substantially similar university-foundation relationship, has held that a university and its foundation "acting as one and the same" amounts to "control."

*University of Louisville Foundation, Inc.*, 2003 WL 22748265 at \*7. In addition, the Kentucky Supreme Court has provided guidance on the issue of "control" in a similar factual context, recognizing that a university's "exercise [of] extensive ongoing 'control' of [its] [f]oundation" through contractual agreements governing the affairs of such foundation "supports the conclusion that the [f]oundation is a public agency for open records purposes pursuant to KRS 61.870(1)(j)." *Kearney v. Univ. of Ky.*, 638 S.W.3d 385, 395 n.11 (Ky. 2022) (quoting *Lachim Hatemi/Kentucky Medical Services Foundation, Inc.*, 15-ORD-205). As a matter of law, all

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<sup>1</sup> Plaintiff's reliance on the definition of "control" set forth in KRS 271B.12-200(7) ("[T]he power to direct or cause the direction of the management and policies of a person.") is not controlling for purposes of the KORA. Plaintiff's Response at 8. However, even if this definition were to be applied, there is uncontroverted evidence in the record establishing that the management and policies of the KSU Foundation must, under the MOU, align with the University's priorities, which satisfies KRS 271B.12-200(7)'s definition of "control."

funds of the Foundation are held in trust for the benefit of the University, and accordingly, such funds must be subject to the same scrutiny under KORA as funds held directly by the University itself. The University cannot circumvent public scrutiny and accountability under KORA by routing money held in trust for the University through a charitable entity established by the University. KORA does not allow a public agency to do indirectly what the law forbids it do directly.

**A. The University Exercises Control Through Contractual Requirements**

The KSU Foundation publicly holds itself out as acting “for the benefit of Kentucky State University or for any student, faculty or staff members, or any line of work, teaching or investigation of Kentucky State University.” Defendant’s Memo, Exhibit 4 (“Our Mission,” Introduction to the Foundation’s Triennial Report); *see also* Defendant’s Memo at fn 50 (The purpose of the KSU Foundation is “to raise and secure funding from any and all sources to support the educational and research efforts of Kentucky State University.”).

This mission is solidified through a number of provisions in a Memorandum of Understanding (“MOU”) entered into between the University and the KSU Foundation on March 11, 2019. Defendant’s Memo, Exhibit 5 (Memorandum of Understanding Between Commonwealth of Kentucky, Kentucky State University and Kentucky State University Foundation, Inc.). The first paragraph of the MOU identifies the purpose for the parties entering into the agreement: “to advance the mission of Kentucky State University.” Subsequent introductory paragraphs describe the KSU Foundation’s business purpose as one that is inextricably linked to the mission and priorities of the University.<sup>2</sup> The longest section of the

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<sup>2</sup> For example: “The Foundation was organized . . . for the purpose of stimulating voluntary private support . . . for the benefit of the University”; “The Foundation exists to raise and manage private resources supporting the mission and priorities of the University . . .”; and, “The Foundation is dedicated to assisting the University . . . in addressing, through financial support, the long-term academic and other priorities of the University.”

MOU, comprising nearly two of the MOU's five full-text pages, is entitled "Foundation's Responsibilities" and includes five subsections that set forth specific duties of the KSU Foundation, including:

- **Fund Raising and Stewardship**

- "The Foundation shall create an environment conducive to increasing levels of private support for the mission and priorities of the University."
- "The Foundation shall support the University with the planning and executing comprehensive fund-raising and donor-acquisition programs in support of the University's mission.
- "The Foundation will establish, adhere to, and periodically assess gift-management and acceptance policies. It will promptly acknowledge and issue receipts for all gifts on behalf of the Foundation and University . . . ."
- The Foundation recognizes and defers to the University [on fundraising] . . . ."
- "The Foundation will collaborate with designated University official(s) to identify and cultivate prospects for private gifts . . . ."

- **Asset Management**

- "The Foundation will engage an independent accounting firm annually to conduct an audit of the Foundation's financial and operational records and will provide the University with a copy of the audited financial statements including management letters."

- **Institutional Flexibility**



- “The Foundation will explore current opportunities, including acquisition and management of real estate on behalf of the University for future allocation, transfer, or use.”
- **Transfer of Funds**
  - “The Foundation is the primary depository of private gifts and will transfer funds to the designated entity within the institution in compliance with . . . University policies . . . .”
- **Foundation Funding and Administration**
  - “The Foundation will maintain its tax-exempt status . . . and carry on its work exclusively for the charitable and educational purpose of Kentucky State University.”
  - “The Foundation shall maintain copies of the plans, budgets, and donor and alumni records developed in connection with the performance of its obligations.”
  - “The Foundation will provide access to data and records to the University . . . . The Foundation will provide copies of its annual report, and other information that may be publicly released.”

While the MOU explicitly identifies the University and the KSU Foundation as separate legal entities, the substance of the above-referenced provisions nevertheless evidence University control of the business affairs of the KSU Foundation. Indeed, the bulk of the MOU outlines the “Foundation’s Responsibilities” with no corollary section for responsibilities assigned to the University as one might expect in an arm’s-length arrangement. In addition, numerous MOU provisions reference the purpose of the KSU Foundation as advancing the “mission,”

“priorities,” (or both) of the University. Where the KSU Foundation’s purpose is inextricably tied to the University’s purpose, these linkages alone logically support the existence of University “control.” That is, any change to the mission or priorities of the University would necessarily require the KSU Foundation to alter its own priorities.

Beyond this method of control, the MOU also explicitly dictates how the KSU Foundation must carry out various aspects of day-to-day operations (*e.g.*, document retention, data access, financial accounting). Finally, in certain circumstances, the KSU Foundation is required to comply with University policies as might be expected of a subdivision of the University rather than an independent, stand-alone entity.

The primary purpose, indeed the sole purpose, of the KSU Foundation, Inc. is to provide support for KSU. It is clearly an agency of KSU, established to advance the mission of the University, and to provide support for the institution. It derives its tax exempt status from its relationship with this public institution. As previously noted, the KSU Foundation’s governing documents require:

- “The Foundation will maintain its tax-exempt status . . . and carry on its work exclusively for the charitable and educational purpose of Kentucky State University.”

Support of KSU and its mission is the sole reason for the Foundation’s existence. Its operations are inextricably intertwined with the University. As the Kentucky Supreme Court noted in the *University of Louisville Foundation* case, “[t]he public has a legitimate interest in the functions of the Foundation. . . . [T]he Foundation and the University essentially act as one and the same, and that the Foundation was established, created, and wholly controlled by the University. As a public institution that receives taxpayer dollars, the public certainly has an

interest in the operation and administration of the University.” 260 S.W.3d at 822. If the KSU Foundation deviates from this purpose, it would jeopardize its tax-exempt status. It is not authorized to use funds for non-KSU expenses. It exists solely as an arm of KSU for the purpose of fundraising and support of KSU’s students, faculty, programs and mission.

It is, at a minimum, a principal-agent relationship, with KSU being the principal, and the KSU Foundation being the agent. Accordingly, the provisions of the Open Records Act apply to both principal (KSU) and agent (KSU Foundation). Otherwise, the plain requirements of the Open Records Act would be ridiculously easy to circumvent, the stewardship of funds held in trust for a public university would be shielded from public scrutiny, and the purpose of the Open Records Act would be completely thwarted. If the principal (KSU) is subject to the Open Records Act, then the agent (KSU Foundation) must also be subject to the Open Records Act. Here, we have a request for public records concerning funds held in trust for the public agency, and the Open Records Act requires that such funds shall be subject to the public accountability that comes with public disclosure under KORA.

**B. The University Exercises Control Through Practices Related to the Receipt and Disbursement of Funds**

In addition to the University’s exercise of “control” through the MOU provisions, the University also exercises control over the KSU Foundation through practices surrounding the receipt and disbursement of Foundation funds. More specifically, these practices show the two entities “acting as one and the same,” which the Court of Appeals has found to equate with “control.”

With regard to receipt of funds, the University’s web page explicitly asks for donations to be made payable to the Foundation but mailed to the University. Defendant’s Memo at 15 and

Exhibit 6 (The Foundation's Answers to The State Journal's Interrogatories), 8 ("Checks mailed to [the University] for [the Foundation]" are "brought to the Foundation by courier."). Through this process, the University controls the manner in which donations are made as well as the logistics of how such donations are physically delivered to the Foundation.

The process for disbursements also demonstrates that the University and the KSU Foundation "act as one and the same." The University requests disbursements from the Foundation using a Disbursement Request Form, which is printed on dual University/Foundation letterhead. *Id.* at Exhibit 11. The Form requires University information (*i.e.*, the department, campus address, and campus phone number of the person making the request) as well as Foundation information (*i.e.*, name and account number of the Foundation account from which disbursement is requested). *Id.* The fact that the form is printed on dual letterhead and requires information from both the University and the Foundation is indicative of the two entities "acting as one and the same." The University's possession of Foundation account numbers is also indicative of the University exercising control over the Foundation.

The University's control of the Foundation can also be seen in the practices around everyday use of the Disbursement Request Form. That is, in instances where information is omitted from the Form, the Foundation nevertheless complies with the request and disburses funds. *Id.* at Exhibit 6 (KSUF's Answers to The State Journal's Interrogatories) at 5-6 (listing two instances in which the Foundation denied University disbursement requests over the past five years neither of which involved failure to provide information on the Disbursement Request Form); *see also Id.* at Exhibits 12-23 (Disbursement Request Forms completed on behalf of various University departments/activities). Moreover, the types of Foundation accounts from which disbursements are requested also evidence the University and Foundation "acting as one

and the same.” For example, the Foundation maintains both an unrestricted fund and a discretionary fund for the University President. *Id.* at Exhibits 12 and 13. The Foundation also maintains operational accounts for various University departments, such as Athletics and Career Services. *Id.* at Exhibits 14 and 15. Finally, the Foundation maintains accounts for specific University groups or teams, such as the University’s Jazz Ensemble, Football team, Basketball team, Baseball team, Softball team, Golf team, Cheerleading team, and the Delta Sigma Theta sorority chapter. *Id.* at Exhibits 16-23.

## **II. The KSU Foundation is a Public Agency Because of How Its Board is Appointed**

Under KRS 61.870(1)(i), the Foundation is a public entity if “the majority of its governing body is appointed by a public agency[;] . . . by a member or employee of such a public agency; or by any combination thereof[.]”

Initially, the KSU Foundation’s Board of Trustees consisted of the University’s President, the President of the University’s Alumni Association, and the Chairman and Vice Chairman of the University’s Board of Regents, individuals which are all “member[s] or employee[s]” of the University, a “public agency,” under KRS 61.870(1)(i). Compl., Exhibit 6. This Board of Trustees was then tasked with electing all future members of the Board of Trustees. *Id.* Although the KSU Foundation’s Articles of Incorporation were subsequently amended, its Board of Trustees was still tasked with electing all future members of the Board of Trustees. Compl., Exhibit 7. Applying these rules, from the time of the amendment of the Articles of Incorporation to present, each time a member of the Board of Trustees was appointed, he or she was appointed by a public agency. This self-perpetuating appointment of new members for the Board of Trustees does not somehow break the chain of appointment by a public agency. *See University Medical Center, Inc. v. American Civil Liberties Union of Kentucky, Inc.*, 467

S.W.3d 790, 799 (holding that the University Medical Center, which operates University of Louisville Hospital and related facilities, was a “public agency” because the substance of its Board member selection process gave the University the ability to appoint a majority of the Board).

### CONCLUSION

For all the reasons set forth above, the Court hereby **GRANTS** Defendant’s Motion because there is no genuine issue of material fact as to whether the Foundation is a “public agency” for purposes of the KORA. As a “public agency,” the Foundation is subject to the KORA’s record inspection provisions, and the Foundation is required to provide copies of the requested records in compliance with KORA. The Foundation is directed to provide copies of the requested records to the Defendant State-Journal within 10 days of the entry of this Order.

So **ORDERED** this, 11th day of August, 2022.



PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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