COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
OPEN RECORDS DIVISION
Log# 202200436

PERRY BOXX and WPSD LOCAL 6 **CLAIMANT**

VS.

MURRAY STATE UNIVERSITY **RESPONDENT**

RESPONSE OF MURRAY STATE UNIVERSITY

Comes now the Respondent, Murray State University, pursuant to 40 KAR 1:030, and makes its response to the appeal filed by Claimant, as follows:

I. Introduction. On October 20, 2022 Claimant submitted numerous requests for records of correspondence regarding thirteen current or former employees and one non-employee. Murray State University identified and thoughtfully applied the several exemptions at issue in this appeal consistent with state law. Respondent's position that the First Amendment to the U.S. Constitution applies to a public news gathering organization seems to have garnered the most attention in this matter. Respondent argues that WKMS, a radio station operating pursuant to an FCC license issued to Murray State University, is entitled to the same First Amendment protection as other media outlets, and its status vis-à-vis a public university does not affect this protection. In conjunction with its exhibits referenced below, Respondent submits its full response. At the outset, Murray State University has not been the subject of an open records appeal for many years which is a testament to the thoughtful efforts and attention given to assisting the public in receiving non-exempt university records. However, in this case, request B in particular is a broadly worded request wherein the request would

require journalists to make public all of their emails and communications for a lengthy time period. This is not consistent with their First Amendment rights.

II. Background of Requests and Responses. On October 20, 2022 Perry Boxx on behalf of WPSD Local 6, Claimant, submitted open records requests to Respondent via email. The requests were separated as request A and request B. Responses were provided as follows:

October 27, 2022 – Respondent's first response (Ex. R1)
November 4, 2022 – Respondent's supplemental response (Ex. R2)

The University's responses in Ex. R1 and Ex. R2 are relied upon and incorporated into this appeal response.

III. Analysis –This response places emphasis on the facts and applicable law while looking past unnecessary statements which may reasonably be perceived as aspersions injurious to the reputation of Murray State University and its employees. The appeal contains inaccurate and conclusory statements which are addressed herein. Respondent has provided (see Ex. R3) a set of unredacted emails responsive to request A for review by the Attorney General in a good faith effort to expedite this matter to conclusion. Respondent also provides a detailed list of exemptions applicable to the thirty-one emails and documents generated in response to request A. (see Ex. R4)

a. **First Amendment to the U.S. Constitution (requests A and B)**. Although the appeal includes a new explanation that was not provided when the request was made on October 20, 2022, Respondent asserts that the original request is the correct subject of the appeal and not the new explanation provided in footnote three which was first provided to Respondent via this appeal.

i. Contradictory argument. The appeal asserts (p. 3 ¶5) that it "…is perverse for MSU to invoke the First Amendment's protections…." However, this statement is contradicted by a statement buried in footnote three on page three. Footnote three states:

"To the extent the request could include emails between WKMS staff discussing their reporting and editorial processes, Mr. Boxx does not appeal the withholding of that narrow category of records."

These positions are contradictory. Request B asks for reporters and news directors to provide all of their emails "regarding WKMS News." Next, there is an objection to the application of the First Amendment to these journalists, and then a concession in footnote three that the First Amendment does at least partially apply. [Note that on October 20, 2022, Respondent could not have known that Claimant intended to inform Respondent that Claimant was not interested in WKMS' "reporting and editorial processes." Request B clearly states otherwise.] Request B asks Murray State University to collect and read communications created over a period of 234 days by the WKMS station manager, its former station manager (Chad Lampe per request A), its former news director, its current news director, and a former reporter. Request B requires the University to read and study hundreds, if not thousands of emails (the vast majority of which written by news personnel are "…communications regarding WKMS news…."). Contrary to the assertion on p.3 ¶5 that certain records were not sought, request B on its face seeks "records that invade WKMS's news-gathering process." Claimant has thus conceded his position via his concession in footnote three regarding the First Amendment.

ii. Inaccurate Premise. On page 3 ¶6 of Claimant's appeal, the appeal incorrectly asserts that the Judicial Conduct Commission found that "MSU administrators acquiesced to Judge Jameson's request to contact Chad Lampe for information…" There was simply no allegation that Judge Jameson asked anyone to contact Mr. Lampe, and the Commission did not make a finding that the University "acquiesced" to any such request. Instead, the Commission found that Judge Jameson did "attempt to use the power and prestige of your office for personal gain." (JCC Order, Claimant's Exhibit 1 at 34-35). This is much different than the inaccurate charge and finding asserted in the appeal. Respondent understands that this error has no direct bearing on the use of the statutory exemption found in KRS 61.878(1)(k), however, to the extent Claimant attempts to question Respondent's good faith efforts, this correction is necessary.

iii. Novel Issue. Respondent believes the application of the First Amendment freedom of the press provision is a case of first impression as it relates to open records requests in Kentucky. The uniqueness of this matter is understandable considering the circumstances. To arrive at this point, specific tumblers must fall into place including (1) an overbroad request for all communications possessed by working journalists, (2) that is propounded upon an FCC licensed entity (the University), (3) that is subject to the Kentucky Open Records Act. In the case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 at 506 (1969), the Court reiterated that students and teachers do not shed their First Amendment right to freedom of expression or speech at the schoolhouse gate. Likewise, professional journalists engaged in newsgathering and news publishing activities

should have the right to practice their profession without concern that every communication is subject to public disclosure at any time. The concession in footnote three does nothing to alter the fact that on October 20, 2022 the university was presented with a request for <u>all communications from WKMS journalists</u> regarding WKMS news for a 234-day period without exception, without explanation, and without any dialogue from Claimant. The concession in footnote three is convenient now, but it does not change the plain language of the October 20, 2022 request.

iv. <u>Chilling Effect</u>. As Claimant would likely agree, news media often depend on confidential sources to pursue stories that may be newsworthy for their audience. Confidential sources may or may not be anonymous, and the distinction is important since news organizations generally do not publish based only on information obtained from truly anonymous sources. Often, the source is known to the particular media entity, but not known to the public. Importantly, there may be many reasons a requester would seek the name of a confidential source, and media should take every reasonable step to protect those sources. As evidenced by the concession in footnote three, there are limits to requests for journalist's records. Notwithstanding the late concession in footnote three, Request B would require the university to review every communication, including notes, emails, letters, and memos created or possessed by working journalists. Respondent argues that the act of requiring the university administration to broadly review the communications of journalists presents an intrusion upon the journalism process which may itself dissuade future confidential sources from working with WKMS.

Respondent understands that there must be a path for reviewing emails that are requested by the public even when the creator or possessor of emails is a member of the media (WKMS), and while the Kentucky journalist shield statute is helpful, and KRS 421.100 protects journalists from disclosing confidential sources in legal proceedings, the statute limits the protection to occasions where a story is ultimately published. Unfortunately, cases in Kentucky on this topic are quite limited. Respondent asserts that (1) KRS 421.100 is applicable to these types of requests, and (2) guardrails need to be established to help public universities (with public radio stations) balance the competing interests of the public's right to access government records with the First Amendment rights of journalists to exercise the freedom of the press. A starting point is to permit the exclusion of a journalist's records wherein there is discussion of "their reporting and editorial processes" as Claimant suggests in footnote three. If Claimant's position is permitted by the Attorney General as an acceptable exemption, this would provide needed guardrails for these types of requests, and would allow the Respondent to evaluate this request and future requests through a more exact lens.

b. **Specificity (request B)**. Claimant asserts on p.4 ¶3 of his appeal that KRS 61.872(3)(b) is inapplicable based on the language of the statute and *Commonwealth v. Chestnut*, 250 S.W.3d. 655, 661 (Ky. 2008).

i. <u>KRS 61.872(3)(b)</u>. Based on the plain language of the statute, Claimant's offer for the university to use alternative methods of document delivery does not override the fact that Claimant and Respondent reside in different counties and therefore Claimant is required to describe his request with particularity. In any event,

Respondent asserts that request B also fails to meet the most basic requirement to adequately describe the records being requested as required in KRS 61.872(2)(a).

ii. Commonwealth v. Chestnut, 250 S.W.3d. 655, 661 (Ky. 2008). The citation in the appeal to the *Commonwealth v. Chestnut* case leaves out an important portion of the court's opinion. The full passage states as follows:

> "But the applicability of KRS 61.872(3), if any, is not properly before us because the DOC admits that it did not raise that subsection's applicability when it presented its case to the circuit court. So we express no opinion as to what effect, if any, KRS 61.872(3) may have on this case. **But we do observe in passing** that KRS 61.872(3) **seemingly** applies when someone residing outside the county in which the public records are located desires to receive copies of the public records through the mail." *Id*. (emphasis added)

The full statement provides the context needed to understand that the statement is *obiter dictum,* and was said in passing without the force of law. Thus, a proper request must describe with particularity the records that are sought based on the plain language of the statute. In addition, Respondent asserts that the reference to receiving records by mail is merely a distinction from KRS 61.872(3)(a) which concerns the personal inspection of records.

iii. 19-ORD-1984 The appeal relies upon this opinion for the proposition that any request that lists a date range of seventeen months or less that is to or from the agency or its staff automatically fulfills the specificity requirements. Importantly, the relevant portion of 19-ORD-1984 relies on the inclusion of "certain search terms." Those terms were "food truck," food trucks," "vendor," "vendors," "vending," "restaurant," or "restaurants." 19-ORD-1984 at 2. In the instant matter, **Request B does not contain any useful search terms** for Respondent to use. Instead, request B contains the broad, ill-defined phrase of "regarding

WKMS News" and expects Respondent to collect emails (likely thousands) and sift through each one, all the while guessing which ones are "regarding WKMS News."

c. **Undue Burden (request B)**. Respondent's argument regarding specificity is intertwined with the undue burden placed on the university to retrieve thousands of records. That is, because request B was not adequately specific, this lack of clarity multiplies the records Respondent would be required to review. If the request contained any search terms at all, the number of records implicated may or may not be unduly burdensome, but at least the review process would have eliminated many unresponsive emails. Request B would require the university to review **all** emails sent or received by nine different individuals over a 234-day period. If each of the nine employees sent **or** received an average of 10 emails each business day over the 234-day period, the number of emails the university would be required to carefully review would approach, and perhaps exceed, 15,000 records. The university submits that requiring it to review 15,000 or more records without the assistance of a single specific search term is on its face an undue burden on the operations of the university. Request B also requires the university to guess as to which emails are about WKMS News. In addition, as stated by the Attorney General in 22-ORD-221, while the number of records implicated is the most important factor, a combination of factors is to be considered. 22-ORD-221 at 2. Because the university would be required to review and determine which records are responsive, and redact large numbers of records out of the pool of thousands of emails, an undue burden is placed on the university. In consideration of the lack of specificity, the lack of search terms

and the (estimated) voluminous records implicated by the request, Respondent has met its burden.

d. **Preliminary Records (request A)**. Although the appeal incorrectly cites KRS 61.878(1)(**h**) on p.6 ¶3, Respondent's argument is limited to KRS 61.878(1)(**j**). Respondent is aware that opinions expressed by an agency lose their exempt status once they become part of a final agency decision. However, the appeal argues that unless an opinion is part of a path toward a final decision, the opinion must be disclosed simply because a final decision was not rendered. Hypothetically, for example, if a dean, seeking input from university officials, opines in an email that a particular discipline should or should not be emphasized or promoted, then the dean's opinions, thoughts and perceptions would be subject to disclosure even if no formal action was taken. Respondent asserts that such opinions are exempt from disclosure, and that the appeal misapplies *University of Kentucky v. Kernel Press, Inc*., 620 S.W.3d. 43 (Ky. 2021) by expanding an exemption (final agency decision) to an exemption (preliminary memoranda) which would practically eliminate KRS 61.878(j). In *University of Kentucky*, the disputed records were preliminary materials that were ultimately adopted in a final agency action. Here, there is simply not a final action, and therefore the records are exempt from disclosure. See 21-ORD-213. To argue that unless a public employee's opinions, thoughts and ideas are part of a course leading to a final action, such opinions, thoughts and ideas are subject to disclosure is incorrect. This is the very reason the exemption exists – so that public officials and administrators can discuss opinions, ideas and alternatives in furtherance of a public agency's mission.

e. **Attorney Client and Work Product Privilege (request A)**. As stated above, Respondent will provide a set of unredacted emails for in camera review by the Attorney General. Claimant's statement that he did not seek emails regarding university counsel may render this issue moot, however Respondent asserts the applicability of this exemption which protects "confidential communications made for the purpose of facilitating the rendering of professional legal services to a client." KRE 503(b).

IV. **Conclusion**. Respondent has a strong record of meeting every open records request in a timely and efficient manner. The university is always willing to speak with requesters early in the process to gain a clear understanding of what records are being sought. The university invites the Claimant, especially given the First Amendment issues which are important to both parties, to engage in constructive dialogue in an effort to receive non-exempt university records as efficiently as possible.

/s/Robert L. Miller

Robert L. Miller
Office of General Counsel
Murray State University
107 Oakley Applied Science Building
Murray, KY 42071
(270) 809-3399
(270) 809-3471 (facsimile)
rmiller47@murraystate.edu

ATTORNEY FOR RESPONDENT