



Michael Abate  
(502) 2540-8280  
mabate@kaplanjohnsonlaw.com

VIA EMAIL

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Hon. Daniel Cameron  
Attorney General of Kentucky  
700 Capitol Avenue, Suite 118  
Frankfort, KY 40601-3449  
[oagappeals@ky.gov](mailto:oagappeals@ky.gov)

Attorney General Cameron:

This firm and the undersigned represent Perry Boxx, the News Director for WPSD Local 6 in Paducah Kentucky. The purpose of this letter is to request a review, pursuant to KRS § 61.880(2), of the unjustified refusal by Murray State University ("MSU") to provide the public records requested by Mr. Boxx.

#### **REQUEST AT ISSUE**

Circuit Court Judge Jamie Jameson was recently removed from the bench by the Judicial Conduct Commission ("JCC"). (JCC Order, **Exhibit 1**). The JCC found Judge Jameson guilty of all seven charges brought against him. *Id.* at 35. One of those charges (Count VII) concerned Judge Jameson's efforts to "use the power and prestige of [his] office" to pressure Chad Lampe—the former station manager of public radio station WKMS<sup>1</sup>—to stop reporting an unflattering story about Judge Jameson walking around the Marshall County Courthouse in his underwear. *Id.* at 34-5.

The JCC unanimously found by clear and convincing evidence that after Judge Jameson learned Mr. Lampe filed an open records request seeking security footage of the Marshall County Courthouse, Judge Jameson called Mr. Lampe to inform him that he had spoken to MSU's President who "was not happy" about Mr. Lampe's reporting. *Id.* Judge Jameson "asked Mr. Lampe to confirm that the news station was not going to run a story about the camera footage of [him] walking around in the courthouse in [his] underwear." *Id.* Within days of that conversation, MSU leadership also contacted Mr. Lampe "requesting information about the Open Records Act request." *Id.* Judge Jameson's pressuring Mr. Lampe, according to the JCC, violated several Supreme Court Rules and Canons of the Code of Judicial Conduct, including Canon 1, Rule 1.1 "which requires a judge to comply with the law." *Id.* at 35.

This Open Records Act appeal concerns Mr. Boxx's open records request seeking communications between certain MSU employees regarding Mr. Lampe's open records request discussed in the JCC's Order. In other words, this appeal concerns the only public records that can

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<sup>1</sup> WKMS is a "non-commercial, educational FM station licensed to Murray State University."  
<https://www.wkms.org/about-us>

confirm that MSU officials joined in Judge Jameson's scheme to use his position to kill an unflattering story about Judge Jameson. Mr. Boxx's request sought specifically:

- A. Correspondence, including but not limited to emails and attachments, responses and threads, letters and other forms of communications from and/or to Dr. Robert Jackson, President, Tim Todd, Provost and Vice President for Academic Affairs, David Eaton Dean of the Arthur J. Bauernfeind College of Business, Circuit Court Judge Jamie Jameson, and former WKMS Station Manager Chad Lampe in any combination, the content of which regards a Kentucky Open Records Request filed by the news department of WKMS Radio News seeking courthouse security video showing Circuit Court Judge Jamie Jameson walking around the courthouse security video showing Circuit Court Judge Jamie Jameson walking in the Marshall County Courthouse in his underwear.
- B. Correspondence, including but not limited to emails and attachments, responses, and threads, letters and other forms of communications regarding WKMS News, both prior to and subsequent to the open records request described above in item "A" from and/or to Dr. Allen White, former Chair, Department of Journalism and Mass Communications, former WKMS News Director Rachel Collins, WKMS News Director Derek Operle, Kevine Qualls, Chair, Department of Journalism and Mass Communications, Asia Burnett, WKMS interim Station Manager, WKMS reporter Liam Niemeyer, Jordan Smith, Executive Director Governmental and Institutional Relations, Jill Hunt, Senior Executive Coordinator for the President and Coordinator for Board Relations, and Shawn Touney, Executive Director, Marketing and Communications.

The time period for the request is March 1, 2022 to the present date.

(Open Records Request, **Exhibit 2**).

MSU responded by denying the vast majority of Mr. Boxx's request. Regarding item "A", MSU claimed that the requested records are not "readily available" and informed Mr. Boxx that it would "complete its review and provide responsive records regarding item 'A' by November 4, 2022." (MSU Response, **Exhibit 3**). However, MSU refused to even search its records for any emails regarding WKMS because, according to MSU, they are absolutely protected from disclosure by "the First Amendment to the U.S. Constitution." *Id.*

MSU refused to provide any documents responsive to item "B" in the request. In doing so, MSU repeated its incorrect assertion that records "regarding WKMS news are protected from disclosure by the First Amendment." *Id.* at 3. MSU also claimed that Mr. Boxx did not "precisely describe" the records he is requesting because the request "does not identify a specific date" or a "record of correspondence between a specific sender and a recipient." *Id.* at 2. But MSU directly contradicts that reasoning in the very next paragraph when it complains that complying with the request will be unduly burdensome because the date range and number of individuals identified in the request "potentially result in thousands of individual emails and attachments." *Id.* In other words, MSU is simultaneously claiming that Mr. Boxx has not identified a specific date range and individuals in his request, and that producing records responsive to the specific date and individuals identified in the request is unduly burdensome. MSU cannot have it both ways.

On November 4, MSU produced only 31 heavily redacted emails responsive to item "A" in the request. (MSU Production, **Exhibit 4**). Accompanying the documents was a letter reiterating that MSU was not providing any communications regarding WKMS and a log of MSU's redactions identifying the exemption claimed for each redaction. (MSU Supplemental Response, **Exhibit 5**)

The claimed exemptions are: 1) The First Amendment, which is incorporated into the Open Records Act by KRS 61.878(1)(k); 2) The Act's preliminary records exemption, KRS 61.878(1)(j); 3) Attorney-Client Privilege, which is incorporated into the Open Records Act by KRS 61.878(1)(k); 4) the Act's personal privacy exemption, KRS 61.878(1)(a).<sup>2</sup>

For the reasons explained herein, MSU has violated the Open Records Act by failing to produce documents responsive to Mr. Boxx's request and inappropriately redacting information from the few records it has produced. This office should order MSU to produce all documents responsive to Mr. Boxx's request without redaction immediately.

### **ANALYSIS**

"[T]he basic policy of [the Open Records Act] is that free and open examination of public records is in the public interest." KRS 61.871. Accordingly, all public records are subject to disclosure unless expressly exempted by the Act. KRS 61.872. The Act's exemptions "shall be strictly construed" in favor of disclosure regardless of any "inconvenience or embarrassment to public officials or others." KRS 61.871.

MSU's denial flouts this basic policy. Its denial is particularly troubling given the JCC's findings that MSU potentially joined Judge Jameson's efforts to intimidate WKMS reporters into stopping an unflattering story about Judge Jameson. MSU's attempt to shield these records from the public by invoking the First Amendment is, at best, misguided. This office must order MSU to release all responsive records in full.

#### **1. The First Amendment**

It is perverse for MSU to invoke the First Amendment's protections of "the free exercise of the press" to avoid disclosure of the requested records. (**Exhibit 5** at 1). By its plain terms, Mr. Boxx's open records request does not seek records that invade WKMS's news-gathering process. Rather, it seeks communications between certain MSU administrators, Judge Jameson, and/or Chad Lampe that will reveal the extent of Judge Jameson's and MSU administrator's coordinated effort to pressure Mr. Lampe into stopping publication of a story unflattering to Judge Jameson. It is Judge Jameson and MSU—not Mr. Boxx—that have impeded Mr. Lampe's right to gather and report news. See **Exhibit 1** at 34-5.

There is simply no basis to claim—and MSU suggests none—that any communication among MSU administrators and employees "regarding WKMS" is somehow protected by the First Amendment. *Id.*<sup>3</sup> It would be absurd to allow MSU to invoke the First Amendment's press protections to prevent the public from accessing public records that may reveal MSU's attempts to infringe on Mr. Lampe's fundamental First Amendment right to report the news. But that is precisely what MSU asks this office to do. MSU asks this office to disregard the Open Records Act—the public's primary vehicle for holding its government officials accountable—in favor of secreting away public records that may reveal serious misconduct by MSU officials. Still worse, it does so by wrapping itself in the protections of the First Amendment after the JCC found by clear

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<sup>2</sup> MSU used the Act's personal privacy exemption to redact three personal cell-phone numbers contained in the produced emails. Mr. Boxx is not appealing those redactions.

<sup>3</sup> MSU's near total withholding of the requested records is wholly improper under the Act. Mr. Boxx's request is plainly targeted at MSU employees' attempts to contact WKMS staff about Mr. Lampe's open records request. 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.

and convincing evidence that MSU administrators acquiesced to Judge Jameson's request to contact Chad Lampe for information about his reporting on Judge Jameson using the Open Records Act.

This office must reject MSU's obstructionism and fulfill the purpose of the Act: "to open the operations and activities of the state's agencies to public scrutiny, to 'reveal whether the public servants are indeed serving the public.'" *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 85-86 (Ky. 2013) (internal citations omitted) It must not allow MSU to avoid production of these public records with disingenuous appeals to the First Amendment. All records responsive to Mr. Boxx's request must be released.

## 2. The Specificity of the Request

MSU withheld all documents related to item "B" in Mr. Boxx's request in part because the request "does not precisely describe the records" requested "as required by KRS 61.872(3)(b)." (**Exhibit 3** at 2). MSU claims the request "does not identify a specific or approximate date" for the requested records, "nor does it identify a University record of correspondence between a specific sender and a recipient." *Id.* MSU states that the request "requires the University to guess" what records were composed "regarding WKMS news." *Id.* Each of MSU's stated reasons for withholding the requested records are entirely without merit.

As an initial matter, KRS 61.872(3)(b) has no application in these proceedings. By its plain terms, it applies only if the requester resides in a different county than the agency and requests to receive "copies of the public records **through the mail.**" KRS 61.872(3)(b) (emphasis added) *see also, Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008) (KRS 61.872(3)(b) 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."). Here, Mr. Boxx informed MSU that "[d]igital delivery of these documents is preferred." (**Exhibit 2** at 2). He even offered to supply a "jump drive" for MSU to upload the documents at their convenience. *Id.* Accordingly, KRS 61.872(3)(b)'s particularity requirement is irrelevant to these proceedings. Rather, the request is controlled by KRS 61.872(2)(a), which required Mr. Boxx only to "describe the records to be inspected." KRS 61.872(2)(a) does not contain "any sort of particularity requirement." *Chestnut*, 250 S.W.3d at 661. Mr. Boxx "clearly described the records he wanted to see"—the communications between the named individuals in the identified time frame. It is "obvious" that Mr. Boxx's "request was adequate for a reasonable person to ascertain the nature and scope of [Mr. Boxx's] open records request. He was required to do nothing more." *Id.*

Moreover, MSU's complaints about the specificity of Mr. Boxx's request are refuted by the text of the request itself. Mr. Boxx clearly identified a date range for the records he seeks: "The time period for the request is March 1, 2022 to the present date." (**Exhibit 2** at 2).<sup>4</sup> MSU also denied the records because they do not "identify a record of correspondence between a specific sender and a recipient." (**Exhibit 3** at 2). But Mr. Boxx clearly identified the group of MSU employees whose communications he seeks, which is all the Act demands. Indeed, Mr. Boxx "likely could not have done anything more because he could not reasonably be expected to request blindly, yet with particularity, documents...he has never seen." *Chestnut*, 250 S.W.3d at 661. Accepting MSU's denial would prevent open records requesters from accessing the vast majority of public records. After all, the purpose of the Act is to allow Kentuckians access into the inner workings of their government. It is rare that a requester can provide proof that a specific conversation occurred **before** he files an open records request. Such a rule would gut the Open

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<sup>4</sup> Mr. Boxx submitted his open records request on October 20, 2022.

Records Act and run counter to the Act's demand that its exemptions "shall be strictly construed." KRS 61.871.

Finally, the request does not require MSU to "guess" which documents "regard[] WKMS News." (**Exhibit 2** at 2). The meaning of that phrase is self-evident. Fulfilling the request only requires MSU to review potentially responsive documents to determine if the communications "regard WKMS News" as it would in response to any Open Records Request. See *Chestnut*, 250 S.W.3d at 664.

MSU's denial has no merit. Open records requests seeking communications between certain public officials, concerning a definitive topic, within an identified date range (even ranges much broader than Mr. Boxx's request) are commonplace under the Act. Indeed, this office has held that requests like Mr. Boxx's satisfy even the heightened pleading standard under KRS 61.872(3)(b): if the request "describes 'communications' to or from the [agency] or [its] staff, within a specific time frame of 17 months, containing certain search terms. We find this a sufficiently precise description of the records under KRS 61.872(3)(b)." 19-ORD-084.

The request is more than adequate under the Act; the requested records must be released.

### **3. Undue Burden**

Immediately after complaining that Mr. Boxx's request "did not precisely describe" the records he is requesting because the request "does not identify a specific date" or a "record of correspondence between a specific sender and a recipient", MSU makes the contradicting claim that the request is "unduly burdensome because the time period—234 days, and the nine different individual email accounts you referenced potentially result in thousands of individual emails and attachments which would each require individual review." (**Exhibit 2** at 2). MSU apparently concedes that Mr. Boxx did identify a date range and specific individuals in his request, thereby vitiating its prior specificity objection. MSU's inconsistent, "boilerplate paragraph—this but if not this then that—used for every withheld document [is] wholly unacceptable" under the Act. *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43, 56 (Ky. 2021). MSU's kitchen-sink denial of the request is a willful violation of the Open Records Act that should be soundly rejected by this office.

MSU's "undue burden" objection is also meritless. To deny a request on this basis, MSU "faces a high proof threshold." *Chestnut*, 250 S.W.3d at 664. It must prove Mr. Boxx's request creates an unreasonable burden "by clear and convincing evidence." KRS 61.872(6). MSU falls far short of this exacting standard. Indeed, MSU's denial indicates that it has not even attempted to determine how many records are responsive to Mr. Boxx's request. Rather, MSU simply asserts that it may "potentially" result in "thousands of individual emails and attachments." (**Exhibit 2** at 2). MSU's assumptions about how many documents are "potentially" responsive to Mr. Boxx's request cannot possibly sustain its denial.

Moreover, even if MSU has presented some evidence to support its denial it would inevitably fall far short of establishing an "undue burden" under the Act. The only "burden" MSU identifies is the time and manpower it will take to "individually review" each document responsive to the request. In other words, "it appears that [MSU's] position is that its obligations under the open records system, even before [Mr. Boxx's request] was filed, were unduly burdensome." *Chestnut*, 250 S.W.3d at 664. Kentucky courts and this office have consistently rejected precisely this argument from withholding agencies. The General Assembly has "mandated that all public agencies...must separate materials exempted from disclosure" from nonexempt documents. *Id.* "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.” *Id.*; see also 08-ORD-231; 19-ORD-08. But that is all MSU offers.

Rather than abide this black-letter law, MSU misrepresents a prior opinion from this office (22-ORD-182) to claim that the “potential” for reviewing thousands of documents to respond to a request *ipso facto* creates an undue burden on an agency. (**Exhibit 3** at 2). What that opinion actually says is that the number of records responsive to a request is just one factor that must be considered when determining whether an undue burden exists. 22-ORD-182, p. 2 (“When determining whether a particular request places an unreasonable burden on an agency, the Office considers the number of records implicated, whether the records are in a physical or electronic format, and whether the records contain exempt material requiring redaction.”). That opinion makes clear “neither the number of records at issue nor the fact that they must be redacted, in isolation, is dispositive of whether a request is unreasonably burdensome.” *Id.* And, of course, “the agency always carries the burden of proving that any particular request...actually places an unreasonable burden on the agency.” *Id.* (citing KRS 61.872(6)). MSU “does not carry [that] burden...merely by citing th[is] Office’s prior decisions that found ‘any-and-all’ types of requests were unreasonably burdensome.” *Id.* Rather, MSU “must provide sufficient information about the potential number of responsive records, whether such records are in electronic or physical format, whether such records require redaction to comply with law, and whether the agency is capable of searching for records based on the request as framed.” *Id.* MSU “has not provided this information, and thus, it has not carried its burden under KRS 61.872(6).” MSU, “therefore, violated the Act.” *Id.*

#### 4. Preliminary Records Exemption

Ten of MSU’s 31 redactions were made pursuant to the Act’s preliminary records exemption, KRS 61.878(1)(j). (**Exhibit 5** at 4). Preliminary records are recommendations, drafts, notes, correspondence, and memoranda used to create opinions or policy recommendations. KRS 61.878(1)(j). Preliminary records are exempt from production by the Open Records Act—but only temporarily. They lose their protected status “once they are adopted by the agency as part of its action.” *Univ. of Kentucky*, 830 S.W.2d at 378. At that moment the Act’s exemption no longer applies, and the records are subject to release. See *Kernel Press, Inc.*, 620 S.W.3d 43.

MSU has not even attempted to make the showing required to invoke KRS 61.878(1)(h). It has not indicated what agency decision—if any—the redacted information was preliminary to. Rather, its redaction log indicates that it used KRS 61.878(1)(h) to redact any document “in which opinions are expressed or policies formulated or recommended.” (**Exhibit 5** at 4). That is plainly insufficient under the Act. To withhold any record under the Act, a public agency must “include a statement of the specific exemption authorizing the withholding of the records and a brief explanation of how the exception applies to the record withheld.” *Univ. of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43 (Ky. 2021) (citing KRS 61.880). The explanation “must be detailed enough to permit the court to assess its claim and the opposing party to challenge it.” *Id.* (citing *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 81 (Ky. 2013)). At a minimum, that requires MSU to identify both 1) what agency decision the document is preliminary to, and 2) whether the agency has made a final decision. What it cannot do is simply disclaim responsibility to produce any document that contains an opinion or policy recommendation. MSU’s attempt to do so here “reflects a misunderstanding of [the preliminary records exemption].” *Id.* at 61. It must produce unredacted versions of the 31 documents already produced immediately.

## 5. Attorney-Client and Work Product Privilege

Finally, MSU implemented 9 redactions pursuant to the “attorney-client/attorney work product” privileges. (**Exhibit 5** at 4). However, it is impossible to determine the propriety of these redactions because MSU has applied them so broadly it is impossible to derive any context from the few documents MSU has produced. Moreover, MSU explains each of the supposedly privileged redactions with exactly the same boilerplate language that claims both the attorney-client and work-product privilege applies. (**Exhibit 5** at 4). Again, that kind of “this but if not this then that” denial is “wholly unacceptable” under the Act. *Kernel Press, Inc.*, 620 S.W.3d at 56.

Moreover, the Attorney-Client/Work Product claims are not self-evident. Mr. Boxx did not include MSU’s General Counsel (or any other lawyer) on the list of individuals in the Complaint. MSU cannot manufacture privilege by simply copying an attorney on an email. The attorney-client privilege “protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege...and is triggered only by a client’s request for legal, as contrasted with business, advice.” *Lexington Pub. Libr. v. Clark*, 90 S.W.3d 53 (Ky. 2002) (collecting cases); KRE 503. The work-product privilege protects only information “prepared in anticipation of litigation.” *Duffy v. Wilson*, 289 S.W.3d 555 (Ky. 2009). MSU has not adequately explained how the claimed privileges apply to its redactions in the produced documents.

To ensure that these privileges are not being misused, Mr. Boxx requests this office exercise authority to review the allegedly privileged redactions to determine if either the attorney-client or work product privilege applies. See KRS 61.880(2)(b)(c). Only this office can determine if MSU has properly applied the privileges after reviewing the unredacted documents in camera.

## CONCLUSION

The Open Records Act promotes the policy that “free and open examination of public records.” KRS 61.872. MSU has violated this policy by withholding responsive public records they are required by statute to disclose. It did so by invoking the First Amendment to shield its response to Judge Jameson’s attempt to suppress WKMS’ reporting of a story critical of Judge Jameson at his request. Indeed, it is difficult to imagine a more cynical attempt to withhold production of public records than MSU’s efforts here.

MSU’s contempt for its obligations under the Act is further evidenced by its illogical claim that Mr. Boxx’s request is at once too general and too specific. MSU complains that the request is not sufficiently precise because it is not limited by date; yet, in the very next paragraph complains the provided date range is too burdensome. MSU cannot have it both ways.

The few records MSU has provided are improperly redacted. MSU has not even attempted to make the showings required to invoke its claimed exemptions. Its attempt to assert multiple exemptions over large swaths of records without explanation is “simply put...not how the ORA process works.” See *Kernel Press, Inc.*, 620 S.W.3d at 55.

For all these reasons, this office should require the MSU to immediately produce the requested records without redaction. Thank you for your prompt attention to this appeal. If you need further information, please feel free to contact us.

Sincerely yours,

s/ Michael P. Abate

Jon L. Fleischaker  
Michael P. Abate  
William R. Adams  
KAPLAN JOHNSON ABATE & BIRD LLP  
710 W. Main St., 4<sup>th</sup> Floor  
Louisville, KY 40202

*Counsel for Perry Boxx and WPSD*