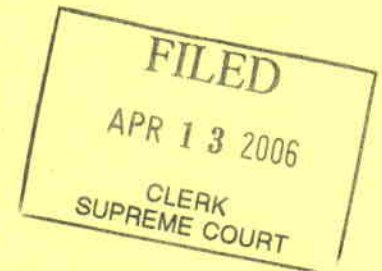


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
NO. 2005-SC-0454



CAPE PUBLICATIONS, INC.  
d/b/a THE COURIER-JOURNAL

APPELLANT

v.

REPLY BRIEF FOR THE APPELLANT  
CAPE PUBLICATIONS, INC. d/b/a THE COURIER-JOURNAL

UNIVERSITY OF LOUISVILLE FOUNDATION, INC

APPELLEE

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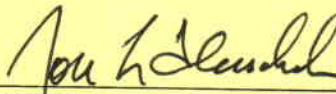
ON DISCRETIONARY REVIEW FROM THE  
COURT OF APPEALS  
NO. 2003-CA-2040 & 2003-CA-2049

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of this Appellant Brief has been served via Federal Express Overnight Delivery upon: Kennedy Helm, III and Michael D. Risley, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202-3352; Clerk, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601-3488; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on this 12th day of April, 2006.

  
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Jon L. Fleischaker

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## ARGUMENT

In its opinion below, the Court of Appeals held that the Open Records Act's personal privacy exemption, KRS 61.878(1)(a), supports a blanket rule permitting public records that contain details of financial transfers from individuals to a public agency to be kept secret. In an effort to uphold this unprecedented departure from this Court's requirement of a fact-specific balancing approach, Appellee University of Louisville Foundation, Inc. (the "Foundation") makes a number of arguments that go far astray from the actual issue of this appeal. Contrary to the Foundation's arguments, this case has nothing to do with individuals' income information, their personal checkbooks, or how much they spent on groceries. Nor does this case bear on the fundraising abilities of state universities.

This case concerns one of the largest and most significant public-owned entities in the Commonwealth, the University of Louisville ("University"), and the undeniable reality that there can be, and often is, a significant link between a "gift" and its eventual use by that public institution. The Court of Appeals erred by imposing a blanket rule that all donor information is inherently private and that it always necessarily outweighs the public interest in monitoring that significant link.

### **I. The Open Records Request at Issue Does Not Seek Individuals' Income or Personal Financial Information.**

The Foundation's initial argument, that individuals' personal finances are private in nature, is a classic straw-man argument. This case is not about individuals' personal finances. Contrary to the Foundation's hyperbole, there is nothing about this case that would "force every individual making a gift to a public agency to open up his or her personal checkbook for public inspection." (Appellee Brf. at p.12.) Rather, it is the

University's checkbook that must be open. Further, citing *Zink v. Department of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 828 (Ky. App. 1994), the Foundation claims that one's income is a private fact. Yet this case has nothing to do with individuals' income.<sup>1</sup> It has to do with a public agency's income and how the source of that income affects the University's operations.

The Foundation's claim that an individual's expenditure of funds is inherently private is an over-generalization. The issue in this case is much narrower than how an individual chooses to spend his money. To suggest that every expenditure by an individual is a private or personal matter contradicts numerous laws. Where, as in this case, an individual's expenditure of funds has to do with government activities, it is not a private or personal matter. *See, e.g.*, KRS 121.005(1)(a)(mandating public disclosure of individuals' donations to political candidates); KRS 6.821 (mandating disclosure of lobbying expenditures); KRS 382.135 & .110 (mandating public disclosure of real estate purchases by individuals); KRS 6.080 & 432.350 (criminalizing certain payments and offers to pay legislators); KRS 121.045 (proscribing, *inter alia*, payments or loans made on behalf of any candidate); KRS 205.8461 & 216.2950 (proscribing certain payments for medical referrals); KRS 518.030 & 518.050 (proscribing certain payments in commercial and sports settings); KRS 521.040 (proscribing certain payments to public employees); *Roman Catholic Diocese of Lexington v. Noble*, Ky., 92 S.W.3d 724, 731 (2002)(holding that court records, which routinely contain individuals' financial information, are presumptively public); *see also United States v. Miller*, 425 U.S. 435,

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<sup>1</sup> There is no correlation between an individual's transfer of funds to the University or the Foundation and that individual's income. Neither the fact that an individual transferred funds to the Foundation nor the amount of the transfer discloses what that individual's income is.

442-43 (1976)(holding that there is no legitimate expectation of privacy in bank records concerning an individual's account)<sup>2</sup>.

More specifically, with regard to funds transferred to support the University, the General Assembly has unequivocally stated that such transfers are for a "public purpose," not a private or personal purpose. KRS 164.026. The Foundation suggests that individuals may have had some expectation of privacy in their transfers to the Foundation because, at the time, the Foundation had not yet been held to be a public agency under the Open Records Act. (*See, e.g.* Appellee Brf. at pp. 2, 23.) However, the record in this case establishes that transfers were diverted to the coffers of the Foundation even when made directly to the University, which has always been a public agency.<sup>3</sup>

The Courier-Journal is not seeking access to any individual's checkbook, bank account, or income tax return. The Courier-Journal is simply seeking access to public records maintained by the Foundation that reflect the Foundation's receipt of funds on behalf of the University. There is nothing personal or private about that.

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<sup>2</sup> The United States Supreme Court in *Miller* held that an individual has no legitimate expectation of privacy in checks because they are negotiable instruments to be used in commercial transactions and "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Miller*, 425 U.S. at 442; *see also United States v. Payner*, 447 U.S. 727, 732 (1980). Here, presumably, many of the transfers made to the Foundation were effected by negotiable instruments which contained the relevant information and were disclosed to employees of the Foundation's bank and the individual's bank.

<sup>3</sup> *See, e.g., "University of Louisville Society"* (Appx. D. to Appellant Brf., at p. TR 514) ("The University of Louisville Foundation, Inc. was founded in 1970 to oversee funds donated to the University of Louisville") (emphasis added).

**II. The Internal Revenue Code Does Not Make the Transfer of Funds to the Foundation a Personal Matter.**

The Foundation also cites a provision of the federal Internal Revenue Code, 26 U.S.C. § 6104(d)(3)(A), as evidence of a congressional policy that the identities of donors to the Foundation is personal information. (Appellee Brf. at pp.10, 13); *Kentucky Bd. of Examiners v. The Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992) (threshold question under personal privacy exemption is whether information is of personal nature). However, there is nothing about this portion of the Internal Revenue Code that makes the information personal in nature.

The provision of the Internal Revenue Code cited by the Foundation deals exclusively with tax records and concerns only which information particular entities are required by federal law to include with their annual returns. *See* 26 U.S.C. § 6104. The fact that entities like the Foundation are not required to include the identities of donors in their tax returns does not make that information private or personal in nature. The Foundation cites nothing from the congressional record or elsewhere that suggests 26 U.S.C. § 6104(d)(3)(A) was intended to protect any privacy interests.

As a general matter, 26 U.S.C. § 6104 mandates that tax records of certain tax exempt entities like the Foundation must not only be filed with the IRS but must also be made available for public inspection. If anything relevant to this case can be inferred from this portion of the Internal Revenue Code, it is that the financial dealings of entities like the Foundation are matters of legitimate public interest.

### III. The University's Ability to Raise Funds is Not At Issue in this Appeal.

In addressing the balancing function required by this Court in *Board of Examiners of Psychologists*, 826 S.W.2d 324,<sup>4</sup> the Foundation argues that public institutions will suffer if funds cannot be transferred to them anonymously. (See Appellee Brf., pp. 21-22.) The Foundation's ability to raise funds has nothing to do with the question of whether the information at issue is of a personal nature or whether the public has a legitimate interest in the information. The Open Records Act does not make a public agency's ability to maximize its donations a factor in determining whether the public is entitled to access its records. See KRS 61.870, *et seq.*; see also *Board of Examiners of Psychologists*, 826 S.W.2d 324.

In fact, this appeal is not even about anonymous donations. There is nothing about the Open Records Act that would prevent the Foundation or the University from accepting truly anonymous gifts (i.e. gifts from individuals whose identity the Foundation and University do not know). Here, the Foundation and the University know the identities of the "anonymous" donors, and that information is contained in public records. Rather than true anonymity, this case is about individuals who transferred funds to the Foundation wishing their identities to be known by the Foundation and the University but kept secret from everyone else. Certain individuals at issue in this appeal needed the Foundation to know their identities in order to receive direct benefits that were expected to be bestowed in exchange. Others may have desired the Foundation and University to know their identities in order to receive indirect benefits. Where donations are truly anonymous, and neither the Foundation, the University, nor the public know the source of

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<sup>4</sup> A balancing not required by the Court of Appeals since all names of all donors were considered to be private.



the funds, then the Open Records Act could not impinge upon that anonymity. On the other hand, where the University and the Foundation know the source of their funds and the public does not, the public is left without the ability to monitor the inevitable connection between the source of the University's funds and its operations. This is at the heart of the public's right to know as recognized by the Open Records Act.

Moreover, the Foundation's assertion is factually unsupported in the record and is simply untrue. The Foundation lists several large donations allegedly made to various colleges and universities and claims that the University will lose out on these donations if it cannot accept anonymous gifts. (See Appellee Brf., pp. 21-22.) None of this information was introduced in the record at the trial court and is therefore improperly proffered by the Foundation to this Court and should not be considered on appeal. See *Garrison v. Garrison*, 253 S.W.2d 626 (Ky. 1953); *Montgomery v. Koch*, 251 S.W.2d 235 (Ky. 1952); see also CR 76.12(4)(c)(vii).<sup>5</sup>

Regardless, the Foundation's claim that large anonymous gifts to other universities means anything with regard to the Foundation is flawed at each level. First, all of the listed donations were made to some other college or university, many of which are not public schools. Neither the Foundation nor the University appear on the list, so there is no indication that *they* would be losing out on anything. There is no proof in the record that the University has lost a gift because of the threat of publicity or that any donation would be lost if the University and Foundation were unable to promise secrecy. This highlights the fact that the Foundation has offered nothing in the record to support

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<sup>5</sup> Similarly, the Foundation quotes from and attaches an industry publication entitled "Donor Bill of Rights" which is not the law and was never introduced as evidence in the record before the trial court. (Appellee Brf. at p.24 & Appx. E.)

its burden of proof. *See* KRS 61.882(3).

Similarly, there is nothing in the record or in the Foundation's improperly submitted list of other schools' anonymous donations to indicate that anonymity was an absolute condition of the listed donations. To suggest that an individual who felt strongly enough to donate more than \$50 million to a school would have simply sent the money elsewhere if anonymity could not be guaranteed is quite a stretch which finds no support in the record.

**IV. Secret Transfers to the Foundation Shield the Foundation and the University from Public Oversight.**

The Foundation claims that the information at issue would reveal nothing about how the Foundation and the University perform their public functions. The Foundation, however, ignores the public interest in the connection between the source of the University's funds and the University's operations. Not only does this connection weigh heavily in favor of public disclosure, but contrary to the Foundation's arguments, it cannot be monitored where there is a blanket rule shielding all donor information.

In fact, without disclosure of the names of donors and their explicit or implicit conditions for gifts, it is impossible to give any credibility to the Foundation's claim. But we do know that certain large gifts were given with clear conditions attached. Presumably, the Foundation and the University agreed to these conditions and, as a result, affected the function of this public institution.

The Foundation asserts that, because the University and the Foundation are public agencies under the Open Records Act, the public can sufficiently monitor their public functions with knowledge regarding how they spend their money. As such, the public need not be concerned with where the money came from or whether there is any

connection between its source and the University's operations. In essence, the Foundation argues that the public's ability to monitor the University's right hand is a license for the University's left hand to operate in secret. For example, under the Foundation's view, disclosure of the University's granting a lucrative non-bid contract to a particular individual for the construction of a museum is sufficient for public oversight. Under the Foundation's argument, disclosure of the fact that the individual also happened to have donated \$1 million to the University the preceding week (or that the funds used for the museum were donated with other conditions) adds nothing to the public's oversight of the University's or the Foundation's functions. Of course, this is wrong. Donations are not only made in exchange for favors from the University, but they can affect the University's policies and operations in a variety of indirect ways.

To know how the University spends its money without knowing where the University receives its money does not enable the public to monitor the University's and the Foundation's proper execution of their statutory functions. *See Kentucky Bd. of Examiners of Psychologists*, 826 S.W.2d at 328. The source of the funds that flow to the Foundation and the University and any conditions placed upon those funds are -- regardless how the funds are eventually spent -- essential components of oversight of those entities' statutory functions. *See* KRS 164.026 (financial support of the University is a public purpose); KRS 164.830(1)(d)(governing University's receipt, retention, and administration of funds). In addition, the General Assembly specifically intended the public to monitor the financial dealings of those who control the University's funds. *See, e.g.,* KRS 45A.340(7) (requiring members of board of trustees to notify newspaper prior to bidding on any university contract); *see also* KRS 164.821(7) (prohibiting university

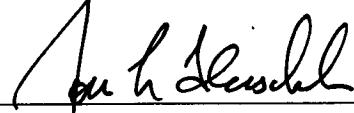
staff from any direct or indirect interest in any contract with the university). The potential link between the source of the University's funds and the University's operations is a matter of public interest, which, under the blanket rule of secrecy imposed by the Court of Appeals, the public is effectively precluded from monitoring.

The Foundation characterizes *State ex. rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159, (Oh. 1992) as the Courier-Journal's "main authority" and then proceeds to expound upon factors that distinguish Ohio's version of the Open Records Act. (Appellant Brf. at pp.17-19.) However, the primary reason for the Courier-Journal's citation to that Ohio decision is its recognition that there is considerable public interest in "the sometimes significant link between a gift and its eventual use." *Id.* at 1163. That "significant link" is not a product of nuances in any State's open records law. Surely the Foundation cannot suggest that in Kentucky -- unlike in Ohio -- there is no potential for a significant link between a "gift" and its eventual use.

#### CONCLUSION

For all of the reasons stated herein and those stated in the Courier-Journal's Appellant brief, the personal privacy exemption to the Open Records Act does not create a blanket rule that the Foundation may keep secret all records that concern the transfer of funds to that public agency by individuals. Transfers of funds to the University are not personal in nature. Moreover, the strong public interest in monitoring the Foundation's and University's public functions outweighs any privacy interest that might inhere in donor information. Accordingly, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,



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