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

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

UNIVERSITY OF LOUISVILLE FOUNDATION, INC

APPELLANT

APPELLEE

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

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

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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; Hon. Stephen K. Mershon, Judicial Center, 700 W. Jefferson, Room 325, Louisville, KY 40202; Hon. Julia K. Tackett, Court of Appeals, Tate Bldg., 124 Lisle Industrial Ave., Suite 140, Lexington, KY 40511-2062; Hon. Laurance B. VanMeter, Court Of Appeals, 1999 Richmond Road, Suite 5, Lexington, KY 40502-1200; and Hon. John D. Miller, Court Of Appeals, Corporate Centre #A-102, 401 Frederica Street, Owensboro, KY 42303 on this 27th day of January, 2006.

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d/b/a The Courier-Journal

INTRODUCTION

This is an Open Records Act case in which Cape Publications, Inc. d/b/a the Courier-Journal ("the Courier-Journal") appeals from an opinion of the Court of Appeals that held that the University of Louisville Foundation, Inc. ("Foundation") may, in all cases, withhold information relating to transfers of funds from individuals to the Foundation because the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

STATEMENT CONCERNING ORAL ARGUMENT

Because of the public importance and complexity of the issues addressed in this appeal, Appellant believes that oral argument would be beneficial to the Court. The opportunity to address the Court's particular questions or concerns would be in furtherance of justice.

STATEMENT OF POINTS AND AUTHORITIES

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

A. The Open Records Request and the Lawsuit.

On April 23, 2001, Keith L. Runyon, Opinion Editor for the Courier-Journal, made an open records request of the Foundation for certain donor identities and amounts of donations to the University of Louisville ("University"). (*See* Compl., TR 1-4.) The Foundation rejected the request claiming that it is a private corporation not subject to Kentucky's Open Records Act and, in the alternative, claiming that disclosure of the records would constitute a clearly unwarranted invasion of personal privacy. (*Id.*) On May 15, 2001, the Courier-Journal filed this lawsuit in the Jefferson Circuit Court pursuant to KRS 61.882. (*Id.*)

After engaging in discovery, the parties submitted cross motions for summary judgment. The Circuit Court granted summary judgment in two separate orders, the first dealing primarily with whether the Foundation is a public agency and the second dealing with the application of the Open Records Act's personal privacy exemption, KRS 61.878(1)(a), to Foundation records concerning donations by individuals.

B. The Public Agency Question.

In its first summary judgment entered on July 19, 2002, the Jefferson Circuit Court held that the Foundation is a public agency as that term is defined in KRS 61.870 and that records relating to corporate and private foundation donors and previously publicized individual donors, are not exempt under the personal privacy exemption. (*See* Opinion & Order, TR 855-867.)

The Foundation appealed that decision. In an opinion dated November 21, 2003, the Court of Appeals found that the Foundation and the University act as one and the same and therefore affirmed the judgment of the Circuit Court that the Foundation is a public agency.[1] The Court of Appeals remanded the personal privacy exemption issue related to corporate and foundation donations to the Circuit Court for a more fact-specific inquiry as to the circumstances of particular donations. (*Id.*) The Foundation moved for discretionary review before this Court, and the motion was denied. (*See* Order Denying Discretionary Review in Case No. 2003-SC-1034-D.)

C. The Personal Privacy Exemption Question and the Court of Appeals Opinion at Issue in this Appeal.

While the public agency question was pending in the appellate courts, the parties continued to litigate the issue of whether records containing the identities of previously unpublicized individual donors had been properly withheld under the personal privacy exemption. Upon the Courier-Journal's motion for summary judgment on this issue, the Circuit Court ruled that the identities of 62 individual donors who specifically requested anonymity are protected by the personal privacy exemption, while the identities of approximately 47,000 individual donors who did not request anonymity are not.

The parties both appealed this judgment to the Court of Appeals, and in an opinion dated May 20, 2005, the Court of Appeals held that all records containing individual donor information are protected by the personal privacy exemption. The Court of Appeals held that donors' privacy interests outweigh the public interest in disclosure, regardless of whether the donors requested anonymity and regardless of any other

[1] A copy of the Court of Appeals November 21, 2003 Opinion is attached hereto as Appendix C.

circumstances surrounding the donation. (May 20, 2005 Op., p.5.) The Court of Appeals reasoned that disclosure of donor information would reveal little or nothing about the operations of the Foundation and the University but would reveal much about the individual donors, "inviting unwanted attention and unwarranted intrusion." (*Id.* at p.4.) On the other hand, the Court of Appeals reasoned that the Courier-Journal's interest in the records is but "mere curiosity" and that the public interest is but "a notch above" *de minimis*. (*Id.* at 5.)

The Courier-Journal sought this Court's discretionary review, which was granted in an order dated December 14, 2005.

II. THE UNIVERSITY AND ITS FOUNDATION.

The University of Louisville ("University") is an institution of the Commonwealth of Kentucky. *See, e.g.,* KRS 164.810, *et seq.* The University is governed by a Board of Trustees ("Board"), the membership of which is determined by a statute that calls for most of the Board to be appointed by the governor. KRS 164.821. In adopting the University as an arm of the Commonwealth, the General Assembly charged the Board with a number of duties and powers. The Board has the power of eminent domain and the authority to buy and sell University property in the name of the Commonwealth. *See* KRS 164.410; KRS 164.830(2). The Board is also charged with the "[r]eceipt, retention, and administration, on behalf of the university, subject to the conditions attached, [of] all revenues accruing from endowments, appropriations, allotments, grants or bequests, and all types of property." KRS 164.830(1)(d). The General Assembly has specifically recognized that support of the University is a public purpose, appropriate for the expenditure of the Commonwealth's funds. KRS 164.026(1).

The Board has largely delegated its statutory functions related to the receipt, retention and administration of University funds to the Foundation. The Foundation solicits, receives and spends money and other assets on behalf of the University. The Financial Statements for the Year Ended June 30, 2000 reveal that the Foundation held University funds valued at more than half a billion dollars at that time. (*See* Foundation's 1999-2000 Financial Statement, TR 434-448.)

III. THE UNIVERSITY AND FOUNDATION ROUTINELY PUBLICIZE INDIVIDUAL DONOR INFORMATION.

Part of the funding for the University and the Foundation derives from transfers from individuals. The University and the Foundation routinely publish lists of donors as a way to publicly recognize and encourage donations.

For example, the Foundation has produced a directory entitled, "University of Louisville Society" which publicizes the identities of individuals who have given money to the University, along with the amounts.[2] "The first section of the directory lists the members of the *U of L Society* whose cumulative giving and pledge commitments total $50,000 or more. The second part of the directory recognizes the *1798 Society* donors who made a contribution or pledge commitment of $1,000 or more." (*Id.* at TR 463.) The directory states "The *U of L Society*, established in 1989, formally recognizes our most generous benefactors. *U of L Society* members distinguish themselves as leaders among the University community." (*Id.* at TR 464.)

The University bestows particular benefits and privileges upon members of the elite *U of L Society*:

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[2] This pamphlet was attached as Exhibit 6 to The Courier-Journal's first motion for summary judgment and is contained in the original record at TR 459-518.

Members of the *U of L Society* are accorded privileges honoring the significant role they play in advancing U of L's goals.

Membership provides opportunities for contacts among the members of the organization. Frequently, they are invited to represent the University on special occasions on and off campus. They gather each year at the *U of L Society* dinner. At this annual event, new members, and those members who advance new giving levels, are **recognized publicly with a gift to commemorate the occasion**.

As valued members of the University of Louisville community, *U of L Society* members receive special recognition on campus and their **names are displayed prominently** on the *U of L Society* Wall of Honor located in the Alumni Center.

(*Id.* at TR 464) (emphasis added).

Similarly, the University and the Foundation conduct an annual fundraising campaign in which individuals are encouraged to become a member of various "Annual Fund Giving Clubs" which qualify the individuals for "special recognition and distinction." (*See* Annual Fund form[3], attached hereto at Appendix E.)

IV. THE 62 REQUESTS FOR SECRECY.

At issue in this lawsuit are records relating to approximately 47,000 individuals who transferred funds to the Foundation or the University. Only 62 of those individuals (approximately one tenth of one percent) requested that the Foundation and the University not disclose their identities. For convenience, these 62 individuals have sometimes been referred to throughout this case as the "anonymous donors." However, this is something of a misnomer. The identity of a truly anonymous donor would not be known. Here, it is undisputed that the Foundation and the University know the identities

[3] This form was attached as Exhibit 11 to the Courier-Journal's first motion for summary judgment and is contained in the original record at TR 531.

of each of the 62 individuals and are simply withholding that information from the public because the individuals have requested secrecy.

Under the Circuit Court's protective order, the Foundation disclosed to the Courier-Journal's counsel the names of the 62 individuals and their requests for secrecy. The Foundation failed to produce any evidence of a request for secrecy for five of the individuals. Pursuant to the protective order, the Courier-Journal filed a sealed memorandum to the Circuit Court with specific arguments relating to the 62 individual donors and with accompanying exhibits supporting its arguments. This memorandum, along with its supporting exhibits, is contained in the record on appeal in sealed envelopes and, for the Court's convenience, is also submitted herewith under seal in a separate volume as Appendix F. Because the identities of the individuals are currently sealed, they are addressed only in generalities in this brief.

A. Individuals Were Previously Publicized.

At least nine of those 62 individuals had already been publicized as University donors in publications similar to the *University of Louisville Society* and the *1798 Society*. (*Id.*)

B. Individuals Requested and Received Benefits from the University and Foundation in Exchange for their "Donations."

Although the terms "donor" and "donation" have been used throughout this case, the record makes clear that money given to the University and the Foundation is often not a purely munificent gift with no strings attached. As described in the *University of Louisville Society* publications, *supra*, "gifts" are often in exchange for various benefits. This is no less true for individuals simply because they requested that their identities remain secret.

For example, at least 32 of the 62 individuals who requested secrecy specifically demanded consideration for their "donations" in the form of basketball tickets, invitations to social functions, matching funds from the University, or promises by the University to use the funds for a particular purpose. (*Id.*)

C. Individuals Depend Upon the University for their Livelihoods.

Similarly, the record demonstrates that approximately 20 of the 62 anonymous donors were themselves University employees who depend upon the University for, for example, their employment status, compensation, research grants, tenure status, and course assignments. (*Id.*) Many others of the 62 individual donors either do business with the University or are otherwise in a position to do business with the University. (*Id.*)

ARGUMENT

The Court of Appeals opinion should be reversed. The Court of Appeals' interpretation and application of the personal privacy exemption was erroneous for several reasons. The Court of Appeals completely discounted the significant public interest in the University's funding and its inevitable effect upon the University's operations. As the Ohio Supreme Court put it,

> There is, moreover, significant public interest in knowing from whom donations come and how that relates to where the university, as a public institution, chooses to spend its money. Nondisclosure by the Foundation would obscure the sometimes significant link between a gift and its eventual use.

State ex. rel. Toledo Blade Co. v. University of Toledo Foundation, 602 N.E.2d 1159, 1163 (Oh. 1992).

In addition, despite the fact that all the evidence in the record supports the commonsense notion that the significant public interest in University funding outweighs

any purported privacy interests, the Court of Appeals refused to hold the Foundation to its statutory burden of proof. Instead the Court of Appeals ignored this Court's direction to engage in a case-specific application of the personal privacy exemption and instead fashioned a blanket rule of secrecy for Foundation donor information with no regard for important factors such as the purpose of the donation, the conditions placed on the donation, the University's exchange of consideration for the donation, or the particular donation's effect upon the operations of the University. Such a blanket rule is contrary both to this Court's precedents and to the presumption of openness that is the bedrock of the Open Records Act.

Against what the Court of Appeals erroneously believed to be a *de minimis* public interest in disclosure, the court balanced a nebulous and undefined privacy interest that the court itself failed even to articulate. This skewed balance resulted in the extreme result that the Foundation's donor records, *ipso facto*, contain "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" (KRS 61.878(1)(a)) in all instances, except those where the donor expressly has waived his or her privacy interests.

I. THE OPEN RECORDS ACT CREATES A PRESUMPTION FAVORING OPENNESS THAT STRONGLY APPLIES TO THE FOUNDATION'S RECORDS.

The Open Records Act's basic policy "is that free and open examination of public records is in the public interest." KRS 61.871. This Court has observed that this is the Act's "unambiguous purpose" despite the fact that such disclosure may cause "inconvenience or embarrassment to government official **or others**." *Beckham v. Board of Ed.*, 873 S.W.2d 575, 577 (Ky. 1994) (quoting KRS 61.871) (emphasis added).

This presumption of disclosure under the Open Records Act has been said to be premised in part upon the public's right to monitor agencies' proper performance of their statutory functions. *Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). Public inspection of government records reveals whether public agencies are serving the public and also motivates public agencies "steadfastly to pursue the public good." *Id.*

In the spectrum of public agencies' performance of their public duties, the functions of the Foundation and the University at issue in this case are substantial. The Foundation manages more than half a billion dollars of public funds[4] and receives a significant amount of public funding each year from individuals. Those funds are intended to support various programs and policies of the University which, in turn, have a wide-ranging effect on the public throughout the Commonwealth and beyond. Put simply, University funding and its inevitable effect on University operations is very important. This is especially true in light of the fact that the University routinely confers benefits upon individuals who transfer funds to the Foundation. Therefore, the public oversight of these activities as envisioned by the Open Records Act is equally important.

II. THE FOUNDATION RECORDS MAY NOT BE WITHHELD UNDER THE PERSONAL PRIVACY EXEMPTION.

In recognition of the strong public policies favoring disclosure of public agency records, the Open Records Act creates a presumption of openness and mandates that the

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[4] According to the University's then-existing website at http://www.louisville.edu/alumni/dev/foundation/ foundation.htm, the Foundation had assets worth $503 million in 2001. (*See* Exhibit 7 to Courier-Journal's first motion for summary judgment, contained in the original record at TR 520.) The current version of that website at http://www.give.louisville.edu/foundation.htm states that, as of March 31, 2004, the Foundation held assets worth $589.3 million.

public agency must shoulder the burden of proving that records fall within the "strictly construed" exceptions to disclosure. KRS 61.882(3) & .871; *see Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001). In this case the Court of Appeals erred by failing to hold the Foundation to its burden of proof and by failing to strictly construe the personal privacy exemption.

The personal privacy exemption excepts from disclosure,

> Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

KRS 61.878(1)(a). The determination of whether the personal privacy exemption may shield a public record from public disclosure is a two-step process. First, there must be a cognizable personal privacy interest in the public agency's records; there must be "information of a personal nature." KRS 61.878(1)(a). If the records contain information of a personal nature, then a court must proceed to inquire whether public disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. In applying the personal privacy exemption, this Court has observed that "there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests." *Board of Examiners of Psychologists*, 826 S.W.2d at 327.

Here, both steps of the inquiry must be resolved in favor of public disclosure. The information at issue -- the source of University funds and its effect on University operations -- is not personal in nature, and as such, there is no cognizable privacy interest in such information. Furthermore, because of the compelling public interest in University funding and operations, disclosure would not constitute a clearly unwarranted invasion of personal privacy.

A. The Sources of University and Foundation Funds is Not Information of a Personal Nature.

There is nothing personal about the source of a *public* agency's funding. Both the Foundation and the University are public agencies, and the records at issue in this case involve the flow of funds intended by donors to be directly channeled to the University and applied for the public purposes of the University. The public importance of the University's receipt, retention, and administration of funds is the very reason the General Assembly bestowed upon the University's Board of Trustees the exclusive authority to perform these functions. *See* KRS 164.026, .830 & .870. The right of privacy under Kentucky law has never been interpreted to apply to the kind of information at issue in this case. More specifically, the personal privacy exemption to the Open Records Act, which must be strictly construed, has never been interpreted -- until the Court of Appeals decision in this case -- as categorizing the kind of information at issue here as "of a personal nature."

1. The Right of Privacy Does Not Apply to Information Concerning Funds Transferred to A Public Institution.

The right of privacy has a long tradition in the law of the Commonwealth. *See Yeoman v. Commonwealth Health Policy Board*, 983 S.W.2d 459, 473 (Ky. 1998) (and cases cited therein). The right is inherent to the person. *Commonwealth v. Wasson*, 842 S.W.2d 487, 496 (Ky. 1992). In the seminal 1927 decision of *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927), the Court defined the right of privacy as "the right to be left alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned." Even drawing upon the Kentucky common law right of privacy,

which is substantially more liberal in scope than the strictly construed privacy protections of the Open Records Act, the information at issue in this case is not the kind of personal information that is protected by the right of privacy.

This is primarily because the information at issue directly concerns the public, public funds, and their connection to the operations of public agencies. Analyzing nearly a century of Kentucky courts' application of the right of privacy, this Court articulated various exceptions to the right of privacy in *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981). Chief among them is the principle that, in matters of public interest or public concern, there is no cognizable privacy interest. *Id.; see also, e.g., Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959); and *Brents*, *supra*. The Court of Appeals has correspondingly observed that, "when an individual enters on the public way, breaks a law, or inflicts a tort on his fellow man he forfeits his privacy to a certain extent." *Zink v. Department of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 828 (Ky. App. 1994) (internal citation omitted). Recognizing that the personal nature of information is determined as much by its context as its content, Kentucky's decisions generally recognize the right of privacy as existing in the first instance only when the information at issue is divorced from matters of public concern.

This nuance is powerfully illustrated by Kentucky's decisions regarding the quintessential category of personal information: sexual matters. Sexual matters are generally considered to involve the "most intimate and personal features of private lives" and are therefore accorded the highest degree of privacy protection. *See Board of Examiners of Psychologists*, 826 S.W.2d at 328. For example, in *Wasson*, 842 S.W.2d at 498, this Court held that statutes criminalizing consensual adult homosexual relations

violated the right of privacy because they proscribed behavior between consenting adults behind closed doors not because it "results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior." On the other hand, where sexual matters involve government action or the welfare of the public at large, personal privacy is inapposite. For example, this Court has held that otherwise personal information relating to those listed on a sex offender registry "is not truly personal data that is subject to privacy" because of its relevance to the public. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 574 (Ky. 2002). In *Lexington Herald Leader Co. v. Tackett*, 601 S.W.2d 905 (Ky. 1980), the Court held that privacy concerns could not justify a trial court's sealing from the public the testimony of multiple pre-teen sodomy victims. The child sodomy victims had done nothing intentional to waive their privacy interests, other than fall prey to a sexual predator, and they were likely to suffer embarrassment and emotional strain from public testimony. *Id.* at 907. Nonetheless, the public's interest in the work of its courts and its law enforcement officials brought even this otherwise highly personal information outside the realm of protected personal privacy. *Id.* at 907.

This case, of course, deals with purported privacy interests that cannot begin to measure up to that at issue in *Tackett* and *Wasson*. This case deals with the purported privacy interests of individuals in the nondisclosure of the fact that they transferred funds to the Foundation. In general terms, a great many of Kentucky's cases on the right of privacy have concerned financial information. *See, e.g. Wheeler v. P. Sorensen Mfg. Co.*, 415 S.W.2d 582, 585 (Ky. 1967). However, the Court in *Wheeler* noted that those cases generally have centered on unwarranted and humiliating methods put in motion by creditors to collect private debts, or on the publication or use of individuals' names,

pictures, or other financial information solely to promote private enterprise. *Id.* at 582 (citing cases). Those cases do not concern the kind of information at issue here -- the sources of a public agency's funds -- information that is central to public agencies and their public functions.

The decision in *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 88 (Ky. 1966), illustrates that difference. The Court in *Bell* held that the publication of the fact that an individual was delinquent in the payment of his taxes was not actionable as an invasion of his right of privacy. Distinguishing *Brents*, 299 S.W. 967, on the basis that it involved the publication of a delinquent debt owed to a *private* enterprise rather than to the government, the Court stated that "[m]atters which are so public as to be spread upon a public record (such as delinquent taxes) come within the knowledge and possession of the public and cease to be private." *Bell,* 402 S.W.2d at 88.

Here, the asserted privacy interests in donor information are not clear because the Court of Appeals failed even to articulate them except to say that "the information sought would reveal ... much about the private individuals" and would possibly invite "unwanted attention and unwarranted intrusion." (May 20, 2005 Op., pp.4-5.) However, the revelation of "much" does not necessarily equate to "information of a personal nature" worthy of protection under the right of privacy. Nor is it clear what the Court of Appeals meant by "much." It is difficult to imagine exactly what the information at issue would in fact reveal about the individuals other than that they transferred particular amounts of money or property to the Foundation at particular times and for particular purposes, and, in many cases, in exchange for particular goods, services, or other consideration from the University. There is nothing personal or private about this kind of information because it

directly pertains to the Foundation's and the University's public functions. As the Court observed in *Wasson*, 842 S.W.2d at 496, privacy rights inhere in the person and not in property. *See also Maysville Transit Co. v. Ort*, 177 S.W.2d 369, 370 (Ky. 1943) (right of privacy "is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business, or other pecuniary interests.") Once the funds are transferred to the Foundation, they become public funds in which the public interest necessarily inheres, and any privacy interest in their amounts, their purposes, their origins, and the consideration exchanged for them ceases to exist.

The Foundation has argued that information regarding how an individual chooses to use his or her funds is very personal in nature. Yet this indiscriminate assertion is unsupported, and in fact belied, by all of the evidence in the record. First, the routine publication of donor information by the Foundation and the University makes clear that neither the Foundation nor the overwhelming majority of its donors consider this information to be personal and private. Moreover, numerous laws require the public disclosure of information regarding how individuals choose to spend their money where that choice relates to the functions of government and carries with it the potential to influence the operations of government. For example, there is no privacy in an individual's use of his or her money to support a candidate for public office. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 66-69 (1976) (upholding against privacy claim federal requirement to disclose campaign contributions). Nor is an individual's use of funds to lobby government officials considered a personal or private matter. *See* KRS 6.821 (mandating disclosure of lobbying expenditures); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding federal lobbyist disclosure requirements). Similarly, Kentucky law

requires public disclosure of the buyers, sellers and purchase prices when individuals choose to buy or sell real estate based in part upon the government's duty to regulate and safeguard "private" property rights. *See* KRS 382.135 & .110. Further, court records, which routinely contain a plethora of information concerning individuals' financial matters, are presumptively available to the public under the First Amendment and the common law because of their relation to the operations of the judiciary, which belongs to the public. *See Roman Catholic Diocese of Lexington v. Noble,* 92 S.W.3d 724, 731 (Ky. 2002). This kind of information can be readily distinguished from, for example, individual tax returns which, by themselves, reveal nothing more than an individual's income information, are mandatory government filings, and have nothing to do with attempts to influence government operations.

Kentucky's law of privacy makes clear that the otherwise personal nature of certain information -- whether sexual or financial -- ends where the government's public functions begin. The information at issue is not "of a personal nature." KRS 61.878(1)(a).

2. The Sources and Amounts of Foundation Funding is not "Information of a Personal Nature" Under the Personal Privacy Exemption.

Turning from Kentucky's common law right of privacy, the more specific standard under the Open Records Act's personal privacy exemption also fails to recognize the sources of the Foundation's funding as information of a personal nature. The standard for what constitutes information of a personal nature under the first prong of the personal privacy exemption has properly been subjected by this Court to the strict construction

required by KRS 61.871. The Court of Appeals decision in this case, however, erred in this regard.

At the extremes, the question of what constitutes information of a personal nature is not a difficult one. For example, this Court had no trouble finding that records of patients' allegations of sexual misbehavior against their psychologist were personal in nature because they touched upon the "most intimate and personal features of private lives" and fell under the aegis of the psychologist-patient privilege. *Board of Examiners of Psychologists*, 826 S.W.2d at 328. However, like the common law of sexual privacy, discussed *supra*, where sex-related information is also informative of government operations, the analysis presents more difficulty. *See Cape Publications, Inc. v. City of Louisville*, 147 S.W.3d 731, 736 (Ky.App. 2003) (McAnulty, J. dissenting) ("I believe this policy we authorize today [permitting redaction of alleged rape victims' identities from police reports pursuant to the personal privacy exemption] allows the City to conduct its business in contravention of our Constitution.")

In matters concerning individuals' financial information, where financial information relates both to individuals and to the operations of public agencies, Kentucky's courts have held that the information is not of a personal nature. This Court's most recent decision applying the personal privacy exemption, *Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co.*, 941 S.W.2d 469 (Ky. 1997), addresses this very issue. As a threshold matter, the Court phrased the relevant first-prong inquiry as whether the release of the information "would be likely to cause serious personal embarrassment or humiliation." *Id.* at 472. While one might imagine such

humiliation for those who have been sexually victimized, the fact that an individual transferred money to the Foundation is unlikely to be humiliating or embarrassing.

At issue in *Lexington-Fayette Urban County*, were several confidential settlement agreements between a police department and individual tort plaintiffs. The Court rejected the police department's attempt to classify such information as of a personal nature. *See id.* There simply was nothing personal about the transfer of funds between a public agency and an individual as part of the settlement of a lawsuit. *See id.* Rather, the Court held that "a settlement of litigation between private citizens and a governmental entity is a matter of legitimate public concern." *Id.* at 473.

This Court's analysis in *Lexington-Fayette Urban County* is particularly apt in this case because it also demonstrates that information regarding public funds and their inevitable correlation to the operations of government cannot be transfigured into information of a personal nature simply because individuals request that the information be kept secret. *Id.* at 469. This Court adopted the Court of Appeals' decision that "a confidentiality clause reached by the agreement of parties to litigation cannot in and of itself create an inherent right to privacy superior to and exempt from the statutory mandate for disclosure contained in the Open Records Act." *Id.* at 472. Because a police department's settlement of litigation brought by private citizens is an inherently public matter, "[a] confidentiality clause in such an agreement is not entitled to protection." *Id.* at 473. In this regard, the Court of Appeals was correct in this case in holding that a donor's request for anonymity does not weigh in the analysis. (May 20, 2005 Op., p.6.) This reasoning has also been adopted in cases applying the federal Freedom of Information Act. In *Robles v. Environmental Protection Agency*, 484 F.2d 843, 846 (4th

Cir. 1973), the Fourth Circuit held that "a promise of confidentiality ... is not enough to defeat the right of disclosure." *See also Ackerly v. Ley,* 420 F.2d 1336, 1339-40, n. 3 (D.C. Cir. 1969) (same); *Legal Aid Society of Alameda County v. Shultz,* 349 F. Supp. 771, 776 (D.C.Cal. 1972) (same).

This reasoning applies with equal force here. The arrangements for secrecy between the Foundation and several of its donors, like the confidentiality agreements between the police department and the private tort claimants in *Lexington-Fayette Urban County*, cannot turn the inherently public nature of University financial operations into information of a personal nature. The mere desire of individuals or of the Foundation to keep information secret does not mean that the information is personal in nature. To the contrary, a variety of factors can motivate the desire for secrecy, some of which are in diametric opposition to personal privacy.

Here, the Court of Appeals distinguished *Lexington-Fayette Urban County* on the basis that it dealt with the government's transfer of public money to individuals while this case, in turn, deals with the transfer of money from individuals to the government. (May 20, 2005 Op., pp.3-4.) This, however, is a distinction without a difference. The Court of Appeals' implicit suggestion that this Court's conclusion in *Lexington-Fayette Urban County* would have been different if that case had involved secret settlements where the government was the plaintiff, instead of the defendant, is facile. This Court's analysis in *Lexington-Fayette Urban County* was not limited to the simple question of whether public funds are being paid to individuals or *vice versa*. The public has a strong interest in knowing what consideration its public agencies are exchanging with individuals, whether in the form of money, the release of a personal injury claim, or the like. Here, it

is clear that the University and Foundation are doling out various forms of consideration in exchange for some individuals' "donations." Whether such consideration comes in the form of money, tickets to sporting events, admission to elite social functions, political favors, a promise to create a program in a certain field of study, or favorable publicity, the result is the same as that in *Lexington-Fayette Urban County*. There is nothing personal or private where public agencies trade with individuals in public resources.

The Court of Appeals was also incorrect to suggest that the outcome of *Lexington-Fayette Urban County* would outcome have been different if the confidentiality clauses in that case had been at the insistence of the individual plaintiffs and not the police department. (May 20, 2005 Op., p.3) That issue was squarely addressed in *Courier Journal v. McDonald*, 524 S.W.2d 633, 635 (Ky. 1974), a case in which this Court held that the payment of city funds in settlement of a suit against the city and its officers "is a matter with which the public has a substantial concern, against which little weight can be accorded to any desire of the plaintiff in that suit to keep secret the amount of money he received."

The critical connection between *Lexington-Fayette Urban County* and this case is that the manner in which a public agency receives, retains and administers public funds is inextricably intertwined with the agency's public operations and is, therefore, not information of a personal nature. In other words, information that might, in a vacuum, be considered of a personal nature necessarily loses that designation when it also pertains to the operations of a public agency. Here, the requested donor information pertains to the sole and central public function of the Foundation, which also happens to be an undeniably public purpose as well as the statutory function of the University's Board: the

receipt, retention, and administration of funds and other property on behalf of the University, subject to the conditions attached. *See* KRS 164.026 & .830.

In addition to inferring false dichotomies from this Court's analysis in *Lexington-Fayette Urban County*, the Court of Appeals erred by equating the personal privacy interests in this case with those at issue in *Zink,* 902 S.W.2d 825, and *Hines v. Commonwealth of Kentucky, Dept. of Treasury*, 41 S.W.3d 872 (Ky.App. 2001). (*See* May 20, 2005 Op., p.4.) *Zink* and *Hines* merely demonstrate the point that certain information can properly be classified as "of a personal nature" where it has nothing to do with a public agency's public operations. The requested information in those cases is readily distinguishable from that at issue in this case, and neither *Zink* nor *Hines* held that information concerning the funding of a public agency (much less the funding of an agency whose sole public purpose is funding) is personal in nature.

Zink was an attorney who, in an attempt to solicit workers' compensation clients, requested initial injury report forms that detailed injured employees' names, home addresses, telephone numbers, dates of birth, social security numbers, marital status, wage rates, and number of dependents. *Zink*, 902 S.W.2d at 827. The court held that such information was generally accepted by society as information in which an individual has "at least *some* expectation of privacy." *Id.* at 828 (emphasis added). The court therefore went on to balance this limited privacy interest against an altogether nonexistent public interest in disclosure. *See id. Zink* has been recognized as representing the outer limits of information that can properly be characterized as personal in nature. For example, in *Lexington-Fayette Urban County Gov't,* this Court characterized the personal information at issue in *Zink* as "transgress[ing], albeit not greatly, upon the privacy of the

subject individuals" and recognized that the outcome in *Zink* derived principally from the fact that there simply was no public interest in the requested information because it had nothing to do with the public agency's operations. *Lexington-Fayette Urban County*, 941 S.W.2d at 472. Notably, the information that did pertain to the agency's operations, such as the employees' names, dates of injury, county of injury, nature of injury, and days absent from work for each of the reported injured workers was disclosed by the Department. *Zink*, 902 S.W.2d at 827.

Likewise, *Hines* does not support the Court of Appeals decision in this case. That case involved the request by a commercial locater of unclaimed property owners for records disclosing the values of unclaimed property held by the Department of Treasury. *Hines,* 41 S.W.3d 872. The Department of Treasury had ceased publishing the exact values of unclaimed property and instead only published the names and addresses of property owners, the total value of property held by the agency, and the fact that each unit of property was worth at least $500. *Id.* at 873, 875. Notably, the court distinguished *Lexington-Fayette Urban County* on the basis that the funds at issue in *Hines* were at no time actually owned by the public agency. *Id.* at 875. For this reason, the court reasoned that "information concerning the value of each private citizen's items of property would reveal 'little or nothing' about [the agency]'s own conduct in executing its statutory functions." *Id.* at 876. In other words, the value of the property had no direct relation to how the agency conducted its operations.

Here, however, funds that are received, retained and administered by the Foundation belong to the University and therefore belong to the people of the Commonwealth. Not only does the source of those funds directly relate to the

Foundation's and the University's statutory function under KRS 164.830 and .870, but it also has the potential of bearing a significant link to the University's decisions regarding where it spends its money, which can never be characterized as information of a personal nature.

Another case erroneously relied upon by the Court of Appeals is the Michigan decision in *Clerical-Technical Union of Michigan State University v. Board of Trustees of Michigan State University*, 190 Mich. App. 300, 475 N.W.2d 373 (Mich.App. 1991) ("*MSU*"). The Court cited *MSU* for the overly broad proposition that, where state freedom of information laws contain a privacy exception, records relating to public university donors should be withheld. (*See* May 20, 2005 Op., p.5.) *MSU* concerned a labor dispute where a union requested the names and addresses of certain classes of donors to the university pursuant to Michigan's Freedom of Information Act, MCL 15.231 *et seq.* & MSA 4.1801(1) *et seq.* *Id.* at 374. In response to the request, the university disclosed most of the information sought by the union, and therefore, the court's decision in *MSU* was actually limited to donors' home addresses, which the court held had nothing to do with the operations of the university. *Id.* at 374. *MSU* did not concern the identities of donors, the amounts of their donations, or the other conditions of donations because that information had already been disclosed. *See id.* at 374.

Examined in both the historical context of Kentucky's right of privacy and the specific context of the personal privacy exemption to the Open Records Act, the sources of Foundation funds with their attendant effect on the operations of the University can hardly be characterized as "touch[ing] upon most intimate and personal features of private lives." *Board of Examiners of Psychologists,* 826 S.W.2d at 328. Because, under

the strict construction of Open Records Act exceptions required by KRS 61.871, the information at issue in this case is not of a personal nature, the Court of Appeals decision should be reversed and the Court need not address the second prong of the personal privacy exemption.

B. The Balancing of Interests Greatly Favors Public Disclosure of the Requested Records.

The second prong of the personal privacy exemption inquiry, whether an invasion of personal privacy is "clearly unwarranted" is intrinsically situational, and can only be determined by balancing the competing interests within a specific context. *Board of Examiners of Psychologists,* 826 S.W.2d at 328. Even assuming there is *some* cognizable privacy interest in the information at issue in this case, rather than the kind of "intimate and personal features of private lives" recognized as carrying a significant amount of weight in the balance, any privacy interests in the nondisclosure of donor information are at best minimal. *Id.* Disclosure of an individual's transfer of funds to the Foundation and the University can hardly be characterized as an intrusion that rises above the kind of "inconvenience or embarrassment" that must yield to openness under KRS 61.871.

Such interests are clearly outweighed by the substantial public interest in monitoring the Foundation's and the University's statutory duty to receive, retain and administer University funds, subject to the conditions attached, for the public purposes of the University. KRS 164.830 & .870. Furthermore, in light of the intrinsically situational and fact-specific approach, the Court of Appeals erred by creating an impermissible blanket rule of nondisclosure that fails to take into account significant aspects of certain donations such as whether the "donation" was made as *quid pro quo* with the University, effectively constituting something more akin to a contract than to a purely charitable gift.

1. The Public Interest in Disclosure of the Requested Records is Considerable.

The Court of Appeals' most glaring error was its holding that the public interest in the disclosure of information regarding the receipt, retention, and administration of University funds is but "a notch above the de minimis." (May 20, 2005 Op., p.5.) Rather, the public interest in the disclosure of the requested records is substantial.

The public's "right to know" under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. *Board of Examiners of Psychologists*, 826 S.W.2d at 328. Freedom of information is strongly rooted in the law of Kentucky. To begin, Kentucky's Constitution reflects that the Commonwealth was founded upon ideals of popular sovereignty. Ky. Const. § 4 ("All power is inherent in the people"); *Beard v. Smith*, 22 Ky. 430, 475 (Ky. 1828) (Commonwealth was founded on the "unalienable rights of self-government which belong to the people.") Further, Kentucky's Constitution makes explicit that "no law shall *ever* be made to restrain the right" of "*every* person" to "undertake[] to examine the proceedings of the General Assembly or any branch of government." *Id.* at § 8 (emphasis added). These ideals are nowhere more purely embodied in our statutes than the Open Records Act.[5]

The idea that maximum disclosure of government records symbiotically optimizes both the processes of government themselves and the public's confidence in government,

[5] The late U.S. Supreme Court Justice Louis D. Brandeis, a native Kentuckian, is largely recognized as the father of the modern jurisprudence of the right of privacy under the United States Constitution. *See Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). Justice Brandeis is also widely quoted from a later writing in which he discusses matters of public concern: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, *Other People's Money*, 62 (1933).

however, is not unique to Kentucky or our Open Records Act. The United States and nearly every State have enacted similar legislation based upon the same democratic principles. *See, e.g.,* 5 U.S.C. 552 (federal Freedom of Information Act).

In recognizing a First Amendment right of access to judicial records and proceedings, the United States Supreme Court has explained in detail the numerous benefits that openness brings to all involved. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-72 (1980). The Court in *Richmond Newspapers* observed that public disclosure of court records and proceedings helps to ensure fairness and the appearance of fairness by discouraging perjury, misconduct, and decisions based on secret bias or partiality in addition to ensuring that the government does its job properly and that it minimizes mistakes. *Id.* Openness also serves a general educative purpose and permits the public to participate in and serve as a check upon government processes — an essential component in our structure of self-government. *Id.*; *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). These principles apply to the records of public agencies under the Open Records Act with equal force, and the University and its Foundation are no exception.

The Foundation is largely responsible for performing the statutory functions of the University's Board of Trustees as set forth in KRS 164.830(1)(d):

> Receipt, retention, and administration, on behalf of the university, subject to the conditions attached, all revenues accruing from endowments, appropriations, allotments, grants or bequests, and all types of property.

Not only do records that show the source of Foundation and University funds go to the very heart of those public agencies' proper performance of these functions, but effective

public scrutiny of these particular functions cannot be achieved in the absence of disclosure of the requested records.

The Court of Appeals opined that "[s]ince the Foundation has been held to be a public agency, there are other ways in which its operations may be scrutinized through the Open Records Act without impinging on the privacy interests of its donors." (May 20, 2005 Op., p.4.) However, this suggestion that the public's ability to scrutinize some facets of a public agency's operations should license the agency to operate secretly in other facets finds no support in the Open Records Act or its underlying policies. As a public agency, it is possible that certain facets of the Foundation's operations can be scrutinized without disclosure of the donor records. However, the important public operations at issue in this case cannot. There is no way to monitor the Foundation's and the University's receipt, retention and administration of "*all* revenues ... subject to the conditions attached" without knowing from whom the revenues are received, the amounts of the revenues, and what conditions, if any, are attached. KRS 164.830(1)(d) (emphasis added). Similarly, there is no alternative method of monitoring the Foundation's and University's performance of their duty under KRS 164.870 to acquire all personal property for the University's use and benefit "in accordance with provisions of KRS 164.830." Under the Court of Appeals decision, the public would be foreclosed from discovering what monies have been granted or bequeathed to the University and what, if any, conditions are attached to such funds. Moreover, the public would be prevented from monitoring "the sometimes significant link between a gift and its eventual use." *Toledo Blade Co.*, 602 N.E.2d at 1163.

The Court of Appeals dismissed as "theoretical" the public's interest in monitoring the connection between donations to the Foundation and the operations of the University. (May 20, 2005 Op., p.5.) Yet, there is nothing theoretical about the connection. First, the evidence in the record is unequivocal that donors frequently attach an assorted variety of conditions to their donations. Donations are given on the condition that the University offer a particular kind of program, scholarship, or extracurricular activity, or that it grace a building or program with a particular name. Other donations are given expressly in exchange for access to sports or arts events, membership in clubs with elite networking and social functions, plaques, and even particular forms of publicity itself.

Further detracting from the "theoretical" nature of a connection between donations and University operations is the University's governing statute, which itself contemplates the University's receipt, retention and administration of funds with certain conditions attached. KRS 164.830(d). Moreover, common sense itself informs that significant donations carry with them the potential to influence University programs and policies, for good or ill. This well-established fact underlies, for example, the disclosure requirement in state and federal campaign finance laws. *See, e.g.,* 2 U.S.C. 434; KRS 121.005(1)(a).

To suggest that the public has no interest in the potential and actual effect that donations have on the operations of the University is to suggest that the public has no interest in the operations of the University at all.

Under the Court of Appeals decision, the Open Records Act's "impetus for [the Foundation] steadfastly to pursue the public good" is lost. *Board of Examiners of*

Psychologists, 826 S.W.2d at 328. The Foundation is now free to exchange any number of potential University actions for donations. For example, the Foundation may secretly award lucrative contracts, manipulate student academic, disciplinary or extracurricular decisions, and buy and sell influence all in exchange for "anonymous donations." The Open Records Act cannot countenance such a result. In concert with this Court's recognition "that the government belongs to the people" and "that its activities are subject to public scrutiny," the Open Records Act mandates that the requested records must be disclosed. *Courier-Journal & Louisville Times Co. v. Peers*, 747 S.W.2d 125, 128 (Ky.1988). Accordingly, the Court of Appeals decision should be reversed.

2. The Court of Appeals Erred by Failing to Engage in a Case-Specific Balancing of the Competing Interests.

In *Board of Examiners of Psychologists*, 826 S.W.2d at 327, this Court considered the personal privacy exemption at length:

> given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case-specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is "clearly unwarranted" is intrinsically situational, and can only be determined within a specific context.

Id. Despite its duty to engage in an individualized fact-specific inquiry, the Court of Appeals made no findings with regard to the privacy interests of donors and instead created a bright line rule that donor information is *never* subject to disclosure regardless

of the circumstances surrounding the donation. This is contrary to this Court's holding in *Board of Examiners of Psychologists*, 826 S.W.2d at 327-281, and should be reversed.

The creation of such a bright line rule by the Court of Appeals not only contravenes this Court's decision in *Board of Examiners of Psychologists*, 826 S.W.2d at 327-281, but forecloses the public's ability to monitor financial pressures and attempts at influencing the University while completely ignoring the specific facts and circumstances relating to any particular donation. For example, the evidence in the record is devoid of any suggestion that the individuals who did not request anonymity had any reasonable expectation of privacy. The rule defining the extent of the right of privacy is based on whether a reasonable man would have an expectation of privacy in a given circumstance, an inherently fact-specific inquiry with dual objective and subjective components. *See Board of Ed. of Fayette County v. Lexington-Fayette Urban County Human Rights Commission*, 625 S.W.2d 109, 110 (Ky.App. 1981). Thus, any expectation of privacy to be weighed on the Foundation's side of the balance must be a *reasonable* expectation of privacy, and the public disclosure would have to constitute "a clearly unwarranted invasion" of that expectation. Here, the only proof in the record is that the individuals who did not request secrecy had no expectation of privacy, reasonable or otherwise. Yet, the Court of Appeals decision requires an affirmative waiver of privacy, instead of taking this into account.

Another example of how the Court of Appeals' blanket rule violates the accepted notions concerning the right to privacy is how it pertains to those donors who have died. The right of privacy terminates upon the death of the person asserting it. *See Montgomery v. Montgomery*, 60 S.W.3d 524, 527 (Ky. 2001) (citing KRS 391.170); *Hazelwood v.*

Stokes, 483 S.W.2d 576, 577 (Ky. 1972) (right of privacy "died with the decedent"). In accordance with this principle, the Foundation could not justify under the personal privacy exemption the nondisclosure of records relating to any donors who are no longer living. Yet the Court of Appeals' imposition of an automatic and blanket rule of secrecy ignores this fact.

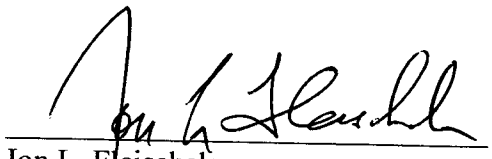
Further, the Court of Appeals decision ignores the inescapable fact that specific circumstances surrounding particular individuals -- especially those who requested secrecy -- can greatly tip the balance in favor of public disclosure. The fact that many Foundation donors are affiliated with the University in a professional capacity, and as such have a heightened potential to gain or lose something through their donations, should further affect the balancing of privacy interest and the public's right to know. Most obviously, where an individual donor specifically requested or received some form of consideration from the University in exchange for a "donation," the transaction is a contract and not a charitable gift, and the attendant likelihood of affecting University operations ceases to be a mere possibility.

CONCLUSION

For the reasons stated herein, Appellant Cape Publications, Inc. d/b/a The Courier-Journal respectfully requests that this Court reversethe decision of the Court of Appeals and hold that the personal privacy exemption to the Open Records Act, KRS 61.878(1)(a), does not apply to donations made to public agencies, including the University of Louisville and the University of Louisville Foundation, Inc.. Such information is not of a personal nature, and the public interest in monitoring the funding

and related operations of public agencies necessarily outweighs any possible privacy interest in this type of information.

Respectfully submitted,



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