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

CAPE PUBLICATIONS, INC. D/B/A THE COURIER-JOURNAL

APPELLANT

v.

BRIEF OF APPELLEE UNIVERSITY OF LOUISVILLE FOUNDATION

THE UNIVERSITY OF LOUISVILLE FOUNDATION, INC.

APPELLEE

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS
No. 2003-CA-2040 and 2003-CA-2049

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this Brief has been served by first class mail, postage prepaid, upon Jon L. Fleischaker, Esq., R. Kenyon Meyer, Esq., Dinsmore & Shohl, LLP, 1400 PNC Plaza, 500 W. Jefferson Street, Louisville, Kentucky 40202, and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on this 31st day of March, 2006. It is further certified that no part of the record on appeal has been withdrawn from the clerk of the trial court.

Michael D. Risley
Michael D. Risley

STATEMENT CONCERNING ORAL ARGUMENT

The Foundation agrees that this Court should hear oral argument. The parties' ability to address any questions the Court may have would be of benefit to everyone.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The University of Louisville Foundation, Inc. ("Foundation") does not agree with the Newspaper's statement of the case.

At issue in this case are the privacy interests of thousands of individuals who made a donation of some amount to the Foundation. These are people who have decided to support public higher education in Kentucky at a time when public universities can count on state funding less and less.

Privacy has been described as the right to be left alone, free from unwarranted publicity. Brents v. Morgan, 299 S.W.2d 967, 970 (Ky. 1927). Every person enjoys a right of privacy, particularly with regard to his or her financial affairs.

The position espoused by the Appellant, Cape Publications, Inc. d/b/a The Courier-Journal ("Newspaper"), squarely rejected by the unanimous Court of Appeals panel, is that every person making a donation to the Foundation, no matter the size of the donation and no matter whether a specific request for anonymity accompanied the request, abandoned his or her right of privacy and subjected himself or herself to public scrutiny by making a donation to the Foundation. The Court of Appeals correctly rejected the Newspaper's position. This Court should do the same.

A. The Foundation

A brief history of the Foundation is relevant to understanding why the individuals at issue who made donations to the Foundation reasonably had an expectation of privacy.

The Foundation was created in 1970, prior to the University of Louisville's becoming a part of the state higher education system. The purpose in creating the Foundation prior to the University of Louisville's becoming a part of the state system was

to create a private entity not subject to the political pressures and other burdens imposed upon public universities.

In The Courier-Journal and Louisville Times Co. v. University of Louisville Board of Trustees, 569 S.W.2d 374 (Ky. App. 1979), the Kentucky Court of Appeals concluded that the Foundation was not a public agency subject to Kentucky's Open Meetings law. That conclusion was consistent with the actions taken by the Foundation's Board of Directors to insure that the majority of its members were not directly affiliated with the University, but instead were required to come from the community at large. Thus, up until the present litigation, those donating to the Foundation, including all donors whose privacy rights are at stake in this case, reasonably believed that they were making gifts to a private entity.

B. The Donors at Issue

At issue are the identities of over 47,000 persons who made donations to the Foundation. Each of these persons made his or her donation to the Foundation prior to the trial court's declaring the Foundation to be a public agency subject to the Kentucky Open Records Act.

The trial court dealt with these donors in two groups. The first group consisted of persons who made donations to the Foundation without a specific request for anonymity. That group totals in excess of 47,000. The second group consisted of persons who accompanied their donation with a specific request that their identity and details about their contribution remain confidential. With regard to these 62 individuals, the Foundation provided the Newspaper's counsel information concerning the donors, subject to a protective order that prevented disclosure of the donor's identities. The parties submitted memoranda dealing with the 62 individuals to the trial court under seal.

The Newspaper has submitted its memorandum dealing with the 62 persons to this Court under seal. The Foundation will do likewise. Its memorandum dealing with those 62 individuals is submitted under seal as Exhibit F to this brief.

C. This Lawsuit

The Newspaper commenced this action for declaratory relief on May 15, 2002. Prior to filing the complaint, the Newspaper had served on the Foundation a request pursuant to the Open Records Act. The request sought certain information from the Foundation, principally the identity of donors who made donations in support of the McConnell Center at the University of Louisville. The Foundation declined to produce the requested documents because it was not a "public agency" as that term is defined in KRS 61.870(1). While the Newspaper had the right to seek review of the denial of its request by the Kentucky Attorney General, KRS 61.880, the Newspaper did not seek such review for the obvious reason that prior Attorney General Opinions had sided with the Foundation's position. See OAG 86-76 (Open Records Act did not require disclosure of the names of donors or potential donors to the University of Louisville); OAG 94-ORD-67 (same result with regard to donors to foundations supporting Western Kentucky University). Instead, the Newspaper filed suit in the Jefferson Circuit Court.

1. The Trial Court's Opinion And Order On Whether The Foundation Is A Public Agency

The trial court decided the issue of whether the Foundation is a public agency subject to the Open Records Act on cross motions for summary judgment, entering its Opinion and Order on July 19, 2002. See Appendix, Exhibit A. In that Opinion and Order, the trial court held that, even though the Court of Appeals previously had found that the Foundation was not a "public agency," the Foundation was now a "public

agency" as defined in KRS 61.870(1)(g) and (j). The court so held even though the court recognized that the Foundation "serves as an independent entity separate from the University and was never intended to be part of state government." Opinion and Order, at 2.

The trial court then went further and held that the privacy exception of the Open Records Act can never be applied to corporate donors or private foundations. While the trial court recognized that corporate information may be confidential, the court held that there can be no expectation of privacy or confidentiality "when a corporate or private foundation makes a charitable donation to a public agency." Opinion and Order, at 11.

2. The Appeal From That Opinion And Order

The Court of Appeals rendered its not-to-be-published decision in that appeal on November 21, 2003. See Appendix, Exhibit B. In that decision, the Court of Appeals affirmed the Jefferson Circuit Court's conclusion that the Foundation was a public agency. According to the Court of Appeals, the Foundation was a public agency subject to the Open Records Act because the University "controls" the Foundation. See Opinion, at 16 – 17.

However, the Court of Appeals reversed the trial court with regard to the conclusion that the privacy exception could never be applied to corporations or other foundations. The Court concluded that the trial court's blanket rejection of the potential application of the privacy exception was improper, because "there may be an expectation of personal privacy for some corporations or private foundations." Opinion, at 20. Accordingly, the Court of Appeals remanded the case back to the Jefferson Circuit Court on that issue.

The Foundation filed a motion for discretionary review with this Court with regard to this Court's affirmance of the decision that the Foundation is a public agency subject to the Open Records Act. That motion was denied in an Order dated May 12, 2004. Since that time, the Foundation has operated as a public agency subject to the Kentucky Open Records Act.

3. The Trial Court's Subsequent Order On Donor Confidentiality

Following the declaration that the Foundation was a public agency subject to the Open Records Act, the Newspaper moved the trial court for summary judgment, asking the Jefferson Circuit Court to enter judgment in its favor as a matter of law on the issue of whether the Act's privacy exception applied to donors to the Foundation. The Jefferson Circuit Court issued its decision in an Opinion and Order entered on September 18, 2003. See Appendix, Exhibit C. The Jefferson Circuit Court entered summary judgment in the Newspaper's favor with regard to persons who did not specifically request anonymity with regard to their donations to the Foundation. Even though the Foundation was believed to be a private entity at the time the donations were made, the Jefferson Circuit concluded that "individual donors who did not request anonymity have no reasonable expectation of privacy . . . ." Opinion and Order, at 4.

In the same Opinion and Order, the trial court concluded that the individuals who specifically requested anonymity deserved to have those requests honored. As the Jefferson Circuit Court recognized:

> The University of Louisville as well as thousands of other institutions similarly situated depends on having the ability to honor requests for anonymity which may be based on something as simple as an individual wanting to keep his or her affairs private. Without the ability to honor such a request, the Foundation has a legitimate fear that donations may otherwise be lost. Anonymity can serve an important

> and valid purpose, both for the individual seeking anonymity and for the University which benefits from the donor's gift.

Opinion and Order, at 6.

The Jefferson Circuit Court separately considered each of the 62 individuals who had specifically requested anonymity and concluded that the Foundation was not required to disclose the identities of any of those individuals.

4. The Court of Appeals Opinion

On May 20, 2005, the Court of Appeals issued its Opinion, a copy of which is attached as Exhibit D. The Court of Appeals reversed the trial court's holding that the Foundation should disclose the identity of any of its donors. In so holding, the Court of Appeals recognized that the Foundation's operations could be scrutinized without impinging upon the privacy interests of its donors. Opinion, at 4. Acknowledging that there might be a theoretical connection between the identity of donors and the way the University eventually expends money, the Court of Appeals correctly perceived "a possibly significant intrusion on the donors' privacy should these records be held subject to disclosure." Id., at 5. In balancing the competing interests, the Court of Appeals concluded that "the privacy interests of the donors to the Foundation outweigh the public interest in disclosure . . . ." Id.

The Court of Appeals also explained why a specific request for anonymity was not required. The right of privacy exists for all persons without the necessity of a request that confidential information remain confidential. Thus, according to the Court of Appeals, "unless the donor specifically waives the right to privacy, it should remain protected whether requested or not." Id., at 6.

ARGUMENT

The Court of Appeals' decision is correct. A donor's identity is a matter of a personal nature, and the disclosure of the identities of the Foundation's donors would constitute a clearly unwarranted invasion of personal privacy. In addition, the public interest in public universities being supported by private individuals would be subserved by not allowing supporters of public universities to remain anonymous. Accordingly, the Court of Appeals decision should be affirmed.

A. The Court of Appeals Correctly Held That The Open Records Act's Privacy Exception Applies To All Of The Foundation's Donors.

The Open Records Act's privacy exception reflects a public interest in privacy. Kentucky Board of Examiners v. Courier-Journal and Louisville Times Co., 826 S.W.2d 324, 327 (Ky. 1992). Indeed, a right to privacy has been recognized in Kentucky since as early as 1909, Board of Education v. Lexington-Fayette County Human Rights Commission, 625 S.W.2d 109, 110 (Ky. App. 1981), and perhaps as early as 1867. Trammell v. Citizens News Co., 148 S.W.2d 708, 709 (Ky. 1941).

The Open Records Act's privacy exception is found in KRS 61.878(1)(a). It provides:

> The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction . . . :
>
> (a) 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).

According to this Court, a plain reading of that subsection "reveals an unequivocal legislative intention that certain records, albeit they are 'public,' are not subject to inspection, because disclosure would constitute a clearly unwarranted invasion of personal privacy." Kentucky Board of Examiners, supra, 826 S.W.2d at 327. Put another way, "with respect to certain records, the General Assembly has determined that the public's right to know is subservient to statutory rights of personal privacy and the need for governmental confidentiality." Beckham v. Board of Education, 873 S.W.2d 575, 578 (Ky. 1994).

This right of privacy recognized by the Open Records Act is of sufficient importance to overcome the disclosure bias of the Act. Id. In fact, the Court of Appeals has recognized that it does not "subscribe to the tilting towards disclosure doctrine but rather appl[ies] the test of balancing the interests of the parties as well as those of the public measured by the standard of a reasonable man." Board of Education v. Lexington-Fayette County Human Rights Commission, 625 S.W.2d 109, 111 (Ky. App. 1981). See also Kestenbaum v. Michigan State University, 327 N.W.2d 783, 785 (Mich. 1982) ("It is logically persuasive that the public policy implicit in the exemptions only can be served if nondisclosure prevails in those situations . . . .").

A two-part test has been developed for determining whether the privacy exception should be applied in a particular situation. See Kentucky Board of Examiners, supra, 826 S.W.2d at 326. First, a court has to determine whether the information at issue is of a personal nature. Second, the Court is to determine whether the public disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. Because a donor's identity is of a personal nature and its public disclosure would

individual makes as to how to spend his or her personal funds likewise is inconsistent with the Open Records Act's privacy exception. The recognition of an exception for personal privacy, plus the other exclusions, establish an "absence of unrestricted access to records." Beckham v. Board of Education, 873 S.W.2d 575, 578 (Ky. 1994). The personal privacy exception in particular establishes "an unequivocal legislative intention that certain records, albeit they are 'public,' are not subject to inspection." Kentucky Board of Examiners v. The Courier-Journal and Louisville Times Co., 826 S.W.2d 324, 327 (Ky. 1992).

The privacy exception in Kentucky is significant. It "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion of unwarranted public scrutiny." Id. The right to be left alone is "one of our most time-honored rights." Zink v. Commonwealth, supra, 902 S.W.2d at 829. That is why the courts of Kentucky have stated that the personal privacy exclusion is "highly regarded," Beckham, supra, 873 S.W.2d at 578, and "highly valued." Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., 941 S.W.2d 469, 472 (Ky. 1997).

The right to privacy applies to all individuals. For example, even the most public of individuals has a right to maintain the privacy of his or her personal affairs: "Even the President of the United States possesses this right [to avoid disclosure of personal matters]." State ex rel. Beacon Journal Publishing Co. v. City of Akron, 640 N.E.2d 164, 167 (Ohio 1994). Likewise, acceptance of employment at a public entity does not diminish an individual's right to privacy. See, e.g., Kassell v. Gannett Co., 875 F.2d 935, 941 (1st Cir. 1989).

The Newspaper glosses over the significance of an individual's right to privacy by arguing that financial transfers to a state institution are not personal in nature. The Newspaper is simply wrong. Whether an individual spends his or her income on groceries, on a new car, or by making a donation to the University of Louisville Foundation, the information is of a personal nature. While the identity of the recipient of the gift may enter into the analysis as to whether disclosure of such information constitutes a clearly unwarranted invasion of personal privacy,[1] the Open Records Act was not designed to force every individual making a gift to a public agency to open up his or her personal checkbook for public inspection.

While relying on cases which call for this Court to equate the Foundation's donors to sex offenders (Hyatt) or delinquent taxpayers (Bell), the Newspaper ignores the several opinions from the Kentucky Attorney General addressing this precise issue. In fact, the Newspaper made the same argument it now makes in connection with a request for the disclosure of donors and potential donors to the University of Louisville in 1986. In rejecting that argument, the Attorney General recognized that while some persons may enjoy what publicity they receive as a result of their donations, "other persons or organizations prefer that their efforts and considerations to donations be kept confidential." OAG 86-76. The Attorney General concluded that the University's honoring the confidential nature of the identities of donors or potential donors to the University "can be supported by the privacy exception set forth in KRS 61.878(1)(a) of the Open Records Act. . . . " To the same effect is OAG 94-ORD-67 (privacy exception applied to the identities of the donors to two foundations supporting Western Kentucky

[1] As explained below, the fact that an individual decides to make a gift to the Foundation is not enough to make the Open Records Act's privacy exception inapplicable.

University). See also OAG 94-ORD-1 (names of donors to the construction of the Riverpark Center in Owensboro, which was found to be a public agency, should not be disclosed in light of the Open Records Act's privacy exception).

The Newspaper makes much of the fact that the identities of some donors are publicized through their inclusion in the University of Louisville Society. See Newspaper Brief, at 4-5. In the wording of the Court of Appeals, the persons listed as members of the University of Louisville Society have "specifically waived" their right of privacy. Prior to being included in the Society, these persons have specifically agreed to have their donations made known to the public.

That a few donors decided to have their donations made known to the public does not take away from the fact that the other thousands of donors have not specifically waived their privacy rights. As the Court of Appeals correctly recognized, a donor is entitled to have his or her private affairs kept private absent a specific waiver of that right, and a decision by a particular donor to be publicly identified does not affect the privacy right of any other donor.

Finally, the Newspaper also tries to bolster its argument by citing to some instances where donors are to be identified, such as persons making donations above a certain level to political candidates. Significantly, neither Congress nor the legislature of Kentucky has seen any need to enact such a statute with regard to donors to entities such as the Foundation. Perhaps that means that the state legislature is comfortable with the long-standing Attorney General Opinions not requiring disclosure of donor information. As for Congress, it has expressed its views on the subject in 26 U.S.C. § 6104(d)(3)(A), which expressly excludes from the information the Foundation must make public the

name and address of any contributor to the Foundation. Thus, the actions of the appropriate legislative bodies with regard to donors to entities such as the Foundation supports the nondisclosure of donor information.

2. Revealing The Identities Of The Foundation's Donors Would Be A Clearly Unwarranted Invasion Of Personal Privacy.

To be weighed against the significant interest in preserving the privacy of a person's finances is the alleged public interest in disclosure of the information. The Court of Appeals properly balanced those interests, and correctly reached the conclusion that requiring the Foundation to disclosure to the public the identities of its donors would be a clearly unwarranted invasion of the donors' personal privacy.

The Open Records Act is not premised on the need to satisfy the Newspaper's or the public's curiosity. Instead, "the only relevant public interest in disclosure to be considered is the extent to which disclosure would serve the principle purpose of the Open Records Act." Zink, supra, 902 S.W.2d at 828. That primary purpose is to allow the public to see if government is properly executing its statutory functions. Kentucky Board of Examiners, supra, 826 S.W.2d at 328.

That purpose is not served by requiring an entity to disclose the identities of its donors. As explained by one court which considered a similar balancing of interests under the federal FOIA:

> This language [from the United States Supreme Court] makes it clear that when a balance is struck between the competing interests of the privacy of individual citizens and the public's right to knowledge concerning agency action, that balance clearly weighs in favor of the protection of privacy through withholding of the information regarding individuals.

Schoettle v. Kemp, 733 F. Supp. 1395, 1398 (D. Haw. 1990).

Here, requiring the Foundation to disclose the identities of its donors would serve no purpose in allowing the public to make sure that the Foundation is serving any statutory purpose. The funds received by the Foundation from the individual donors are not governmental funds, in the sense that the funds do not come from the government. Instead, the funds at issue come from private individuals. Thus, with regard to these donations, the Foundation is not serving any "statutory purpose."

The balancing of the privacy interests of individual donors against the public's right to know donor information was addressed in depth by the Kentucky Attorney General in OAG 86-76, which dealt with a request for the disclosure of the identities of donors and potential donors to the University of Louisville. After analyzing both the privacy right at issue and the public's right to know, the Attorney General concluded:

> An integral part of the operation of any university or college is the school's efforts to raise funds and secure donations. Perhaps some persons enjoy whatever publicity they receive as the result of their donations. However, other persons or organizations prefer that their efforts and considerations to donations be kept confidential. This may be particularly true in the case of those making or considering the making of large donations since if this becomes known, generally, they may be contacted and pressured by many other organizations seeking donations. Thus, the expectation of privacy of the donors or potential donors in this particular situation is of importance.
>
> . . . .
>
> Therefore, it is the opinion of the Attorney General that the University's refusal to release the names of the donors and potential donors on whose behalf the University expended money in connection with University fund raising efforts can be supported by the privacy exception set forth in KRS 61.878(1)(a) of the Open Records Act . . . .

OAG 86-76.

The Attorney General, who holds primary responsible for enforcement of the Open Records Act, has reaffirmed the applicability of the privacy exception to donor information on several occasions. For example, in OAG 94-ORD-1, the Attorney General held that the names of donors to the construction of the Riverpark Center in Owensboro, which was found to be a public agency, should not be disclosed in light of the Act's privacy exception.

In OAG 94-ORD-67, the Attorney General analyzed whether the privacy exception could be applied to the identities of donors to two foundations supporting Western Kentucky University. Finding OAG 86-76 and OAG 94-ORD-1 to be dispositive of the issue, the Attorney General concluded that the privacy exception applied to the identities of the donors to those foundations.

The Court of Appeals properly adopted the same rationale here. Under a proper balancing of the competing interests, the Foundation should not be required to disclose the identities of its donors, regardless of whether a specific request for anonymity was made.

The main thrust of the Newspaper's argument is that persons making donations to the Foundation can have no expectation of privacy and that, even if they did, the public has a right to know whose money is being used to support the University of Louisville. It makes that argument even with regard to the smallest of donations. Thus, according to the Newspaper, the public has a right to know whether an individual has given $50.00 to the Foundation because somehow that $50.00 will translate into the individual's potential exertion of influence over the University.

The flaw in the Newspaper's argument is that the University of Louisville is a public entity, and the Foundation has now been declared to be a public agency. Thus, the Newspaper already has access to how the Foundation and the University spend their funds. As the purpose served by the Open Records Act is to allow persons to inspect whether governmental agencies are properly executing their statutory functions, Kentucky Board of Examiners, supra, the Newspaper can monitor whether the Foundation's and University's statutory functions are being properly executed without knowing the source of the funds. See also Zink, supra, 902 S.W.2d at 829 (the right to be informed as to whether governmental agencies properly execute their statutory functions is not fostered by disclosure of information that reveals little or nothing about an agency's conduct).

The Newspaper's reliance upon The State ex. rel. Toledo Blade Co. v. University of Toledo Foundation, 602 N.E.2d 1159 (Ohio 1992), in arguing that the Foundation should be required to publicly disclose the identities of all of its donors, is misplaced. Indeed, reliance upon that decision without explaining the differences between Ohio's version of its Open Records Act and Kentucky's version is misleading.

Kentucky's Open Records Act contains an express provision recognizing the importance of maintaining the privacy of information of a personal nature. Ohio's Open Records Act does not contain a personal privacy exception. The Court in Toledo Blade refused to add one by judicial fiat, indicating that its duty was to enforce the statute as written. As written, there is no personal privacy exception in Ohio's Open Records Act.

Significantly, the Toledo Blade court distinguished the situation in Ohio from states in which the Open Records Act contains a privacy exception. As recognized by the

Ohio court:

> A Michigan case, Clerical-Technical Union of Michigan State University v. Board of Trustees, Michigan State University, (1991), 190 Mich. App. 300, 475 N.W.2d 373, held that Michigan State University did not have to release to a labor union the names of certain donors to the University. The Michigan Freedom of Information Act, however, contains a specific privacy exception. Mich. Stat. Ann. 4.1801(13)(1)(a). The court held in that case the exception applied. Ohio's Open Records Act, as noted above, had no such exemption.

602 N.E.2d at 1165 n.3.

The Michigan decision cited in Toledo Blade followed the earlier Michigan case of Kestenbaum v. Michigan State University, 327 N.W.2d 783 (Mich. 1982), in which the Michigan Supreme Court affirmed the denial of a Freedom of Information Act request for a magnetic tape containing the names and addresses of students at Michigan State University. After recognizing that the policy underlying the Act was to allow citizens the right to complete information concerning the official acts of public officials, 327 N.W.2d at 785,[2] and also recognizing the significant interest in an individual's privacy, which includes "the ability to choose with whom and under what circumstances they will communicate," id. at 786, the Court concluded that the personal information at issue should be protected from disclosure:

> We hold that the university was justified in denying plaintiff's request because the release of the magnetic tape containing the names and addresses of students would run afoul of the exception set forth in §13(1)(a) – information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted

[2] The policy underlying Kentucky's Open Records Act is similar, having been described as allowing the public to see if government is properly executing its statutory function. Kentucky Board of Examiners v. Courier-Journal and Louisville Times Co., 826 S.W.2d 324, 328 (Ky. 1992).

> invasion of an individual's privacy. In fact, despite the wording of §13, which seems to make withholding of exempt information discretionary with the public body, the university arguably would not have been justified if it had granted plaintiff's request. It is logically persuasive that the public policy implicit in the exemptions only can be served if nondisclosure prevails in those situations described in § 13.

Id. at 785.

Thus, the Newspaper's main authority and the cases upon which it is based suggest that the result reached in that case would be different if the Open Records Act being considered contained a privacy exception. Of course, Kentucky's Open Records Act contains a privacy exception, one that evidences a strong public interest in maintaining personal privacy.

Similarly, the Newspaper's reliance on Lexington-Fayette Urban County Government v. Lexington Herald-Leader Co., supra, is misplaced. The issue presented there was whether the Lexington-Fayette Urban County Government was required to disclose the details of the settlement of three lawsuits against the Urban County Government, including the identities of the recipients of the settlement funds. In withholding that information, the Urban County Government relied in part on confidentiality clauses in two of the three agreements by which the settlement recipients and their attorneys agreed not to disclose any terms of the agreement. See 941 S.W.2d at 470.

In ordering disclosure of the information, this Court was concerned about the public's right to know how public money was being spent, not who was contributing funds to the public entity. Indeed, it was significant to this Court that the individuals in question had not requested the confidentiality provisions; the Urban County Government

had. That negated the contention that issues of personal privacy were involved:

> The record in this case gives no indication that significant privacy rights of the settling plaintiffs are implicated here. Only two of the three settlement agreements said anything about privacy and in those, the provisions were clearly for the benefit of the government and not the other parties. We will not speculate, therefore, whether anything about these settled claims would have been entitled to privacy protection.

Id., at 473.

This Court expressly stated in Lexington-Fayette Urban County Government that it was not announcing a flat rule, indicating that "we recognize that in some cases there may be a legitimate concern for personal privacy which would be sufficient under the Act." Id. In addition, the Court of Appeals has subsequently recognized that the Lexington-Fayette Urban County Government decision has no application when "there is no concern as to the expenditure of public money." Hines v. Commonwealth, Dept. of Treasury, 41 S.W.3d 872, 875 (Ky. App. 2001). Thus, the Newspaper's efforts to make the decision stand for something it does not should be rejected.

In the circumstances presented here, the significant public interest in maintaining a person's right to personal privacy far exceeds the purported public interest advanced by the Newspaper. What an individual does with his or her individual funds is at the very heart of an individual's personal privacy, and the Newspaper can monitor the activities of both the University and the Foundation without having access to that information. While the Newspaper obviously is curious to learn the identities of the Foundation's donors, such curiosity is insufficient to overcome the significant interest in protecting personal privacy. See Kentucky Board of Examiners, supra, 826 S.W.2d at 328 (Open Records Act's policy of disclosure is not meant to satisfy the public's curiosity).

3. Public Institutions Will Suffer If Gifts Cannot Be Made Anonymously.

Not to be lost in the battle between the Newspaper and the Foundation is the potential impact upon the public universities of the Commonwealth. In balancing the competing interests, this Court must consider the significant public interest in allowing individuals to provide financial support to public universities.

The Foundation's potential inability to receive gifts from individuals who may wish to remain anonymous will damage the Foundation's ability to raise funds, particularly from individuals with the ability to make the largest gifts. Just since 1997, the following universities and colleges have benefited from the following substantial anonymous gifts (only gifts of $50,000,000 or higher are listed):

- Cornell University - $100,000,000 – 1999;
- John Hopkins University - $100,000,000 – 2001;
- Iowa State University - $80,000,000 – 1999;
- John Hopkins University - $58,500,000 – 1997;
- Carnegie Mellon University - $54,000,000 – 1997;
- Cornell University Medical College - $50,000,000 – 2003;
- Middlebury College - $50,000,000 – 2004;
- University of Texas Southwestern Medical Center at Dallas - $50,000,000 - 2003.

See Chronicle of Higher Education, Largest Private Gifts to Higher Education Since 1967 (May 7, 2004).

Additional recent anonymous gifts benefiting public institutions, information concerning which was gained from the website or other source indicated for each gift, include:

- University of Mississippi - $31,800,000 (http://ww.umf.olemiss.edu/newsletter7/trust.html);

- University of Texas Health Service Center

at Houston - $25,000,000 (http://distinctions.uth.tmc.edu/archive/2004/May/25.html);

- University of Virginia - $20,000,000 (Jim Ready, Anonymous Gift Boosts U-Va. Arena, Washington Post, June 16, 2001, at D2);
- Penn State University - $20,000,000 (http://www.development.psu.edu/News/landmarks/AnonymousGift.com);
- University of California, Irvine - $20,000,000 (http://www.rednova.com/news/stories/2/2004/01/06/story109.html);
- University of Wisconsin - $20,000,000 (No Smoking at UW Dorms, Capital Times (Madison, WI), April 16, 2004, at 10A);
- Mississippi State University - $10,000,000 (http://www.ur.mstate.edu/news/stories/2003/anonymousgift03.asp);
- University of Kentucky - $1,200,000 (Associated Press, Sports News (September 19, 2003);
- University of Kentucky - $250,000 (http://www.uky.edu/PR/News/MCPRNews/2000/anonymouspledge.htm); and
- Western Kentucky University - $750,000 (Associated Press, Donation to Benefit Student–Athletes (April 22, 2003).

The Foundation and the public universities of Kentucky will suffer greatly if they cannot accept such gifts. Particularly at a time when universities cannot count on adequate funding from the state budget, public universities will be even further harmed if they must reject any gift from a donor who wishes to remain anonymous.

4. The Act's Privacy Exception Applies Regardless Of Whether A Specific Request For Anonymity Was Made.

In differentiating between donors who specifically requested anonymity and those who did not, the trial court recognized that donors' identities are of a personal nature and that their identities can be protected from disclosure in certain circumstances. The trial court's error in requiring disclosure of the identities of those donors who did not

specifically request anonymity was in concluding that those donors could have no reasonable expectation of privacy. See Appendix, Exhibit C, at 4.

As properly recognized by the Court of Appeals, the above analysis as to why the Open Records Act's privacy exception applies to the Foundation's donors is true regardless of whether the donor specifically requested anonymity at the time the donation was made. A person enjoys a right of privacy without being required to specifically ask for it, and any analysis which calls for a person to specifically ask for a right the person implicitly holds is flawed. No one should be forced to affirmatively ask that the Newspaper not snoop into his or her personal financial affairs.

In addition, at the time all of the donors in question made their donations, the Foundation had never been found to be a public agency and all donations were (and continue to be) treated as confidential, with public disclosure occurring only if the donor gave express permission for the disclosure. In fact, in OAG 86–76, the Kentucky Attorney General had agreed that even the University itself was not required to disclose the identities of its donors and potential donors. Thus, the trial court's conclusion that disclosure would be appropriate because there could be no reasonable expectation of privacy in making a donation to the Foundation is absolutely wrong. To the contrary, each of the individual donors in question has a right to spend his or her funds as he or she sees fit, and the information concerning who made the choice to donate funds to the Foundation is entitled to be protected from disclosure. See, e.g., OAG 86-76.

The fact that some donors confirmed that their donations would be treated confidentially by specifically requesting anonymity simply reinforces the confidential nature of the information. Some information, by its nature, is confidential in nature and

should be treated with the utmost of confidence. A donor's identity is exactly that type of information. For the reasons discussed herein, the Open Records Act's privacy exception should be applied to all donors to the Foundation, regardless of whether any individual made a specific request for anonymity.

B. If The Court Holds That The Privacy Exception Does Not Apply To All Donors, The Foundation Still Should Be Able To Honor A Donor's Request For Anonymity.

Even if this Court does not apply the Open Records Act's privacy exception to all of the Foundation's donors, the privacy exception should be applied to the donors who specifically confirmed that they wish to remain anonymous with regard to their gifts.[3] A request for anonymity serves to heighten the personal privacy at stake. Absent a very compelling public interest to be served by requiring the Foundation to publicly disclose the identities of the donors who specifically requested anonymity, their requests for anonymity should be honored.

Indeed, the Foundation and similar entities have an obligation to honor such requests, as donors have a right "to be assured that information about their donations is handled with respect and with confidentiality to the extent provided by law." Donor Bill of Rights, adopted by The Council for Advancement and Support of Education, the American Association of Fundraising Counsel and other organizations, attached as Exhibit E. Absent a very compelling public interest to be served by requiring the Foundation to disclose the identities of donors who specifically request anonymity, their requests for anonymity should be honored.

The Kentucky Attorney General has recognized that if entities such as the

[3] As the Court of Appeals held that the personal privacy exception applied to all donors, it never got to this issue.

Foundation can in no circumstances promise confidentiality to potential donors, every such donor could be subjected to calls and pressure from other entities looking for donations. See OAG 86-76. The trial court likewise recognized that a request for anonymity is appropriate and should be honored:

> The University of Louisville as well as thousands of other institutions similarly situated depend on having the ability to honor requests for anonymity which may be based on something as simple as an individual just wanting to keep his or her affairs private. Without the ability to honor such a request, the Foundation has a legitimate fear that donations may otherwise be lost. Anonymity can serve an important and valid purpose, both for the individuals seeking anonymity and for the University which benefits from the donor's gift.
>
> Many times donors have legitimate interests for requesting anonymity other than simply keeping their affairs private. Some of those reasons are well expressed in one of the letters from donors which was disclosed through discovery. (Discovery p. No. FA029.) Donors are overwhelmed with request from legitimate charities. Donors of significant means have a legitimate concern of having a donation published and fear that their contribution will lead to solicitations by numerous other needy individuals and organizations. Given the choice of having a gift be made public or not giving, some donors will choose not to give. Particularly when the number of donors requesting anonymity is such a minuscule percentage of the whole, it appears that deference should be given to the choices of those few individuals.

Opinion and Order entered on September 18, 2003, attached as Exhibit C, at 6.

The trial court was absolutely correct on this point. Accordingly, donors should be allowed to protect their personal privacy by making gifts to the Foundation anonymously.

The Newspaper's position is that the Foundation should never be allowed to accept a gift on the condition that the donor's identity must remain confidential. As

discussed above, Kentucky's Open Records Act's privacy exception has been recognized as providing substantial protection to the identities of donors. See OAG 96-ORD-99. That protection must be provided to those donors who specifically request anonymity, for such requests are significant and should be honored. See, e.g., Lee Pharmaceuticals v. Kreps, 577 F.2d 610, 616 n.7 (9th Cir. 1978) ("[T]he fact that a promise of confidentiality attaches for all practical purposes to each application is a significant factor which weighs against [disclosure]").

The Newspaper argues that there is no set of circumstances by which a donor to the Foundation can successfully request anonymity. However, this Court must recognize the reality that anonymous donations are commonplace and can serve a very valid purpose. Entities such as the Foundation depend on having the ability to honor requests for anonymity, which may be based on something as simple as an individual just wanting to keep his or her private affairs to themselves. Without the ability to honor such requests, the Foundation fears that donations which otherwise would be made to the Foundation will be lost.

That a request for anonymity raises the privacy interest to an even higher level cannot be disputed. Most states expressly recognize that requests for anonymity are to be honored:

> Most states also exempt from their public records laws the names of people receiving public assistance, preliminary drafts of government reports **and the identities of people who anonymously donate gifts to state universities, museums and other entities**.

Thomas H. Moore, Comment, You Can't Always Get What You Want: A Look at North Carolina's Public Records Law, 72 N. C. L. Rev. 1527, 1537 (1994) (emphasis added).

The Newspaper's suggestion that some of the 62 individuals who specifically

requested anonymity have been publicly identified is a misinterpretation of the information provided to the Newspaper's counsel. Some donors have made more than one donation to the Foundation, and have specifically requested anonymity with regard to some donations but not others. For example, a donor may not have specifically requested anonymity with regard to an annual gift of $50 (or some other amount), but may have specifically requested anonymity with regard to a much more substantial gift. In such circumstances, the individual is identified as one of the 62 donors who specifically requested anonymity but also will have been publicly identified as a donor to the Foundation.

A donor should be allowed to agree to be publicly identified with regard to some donations but remain anonymous with regard to other donations. In the absence of such a right, donors will either (a) not make a donation, which will harm the public; or (b) not agree to be publicly identified with regard to any donation, which would not seem to be what the Newspaper would want.

The Newspaper's Sealed Supplemental Memorandum is the best evidence as to what happens when a donor's identity is made public. Counsel for the Newspaper went to great lengths to find out as much as possible about every person who requested anonymity with regard to their donations to the Foundation. Certainly, the Newspaper would do even more to attempt to gain information relating to those individuals. The Newspaper's brief shows how simply making public the names of donors to the Foundation will subject the individuals to unwanted and unwarranted publicity.

The Newspaper's concern about the potential for donors to seek some improper purpose in return for an anonymous donation is overstated. With the Foundation having