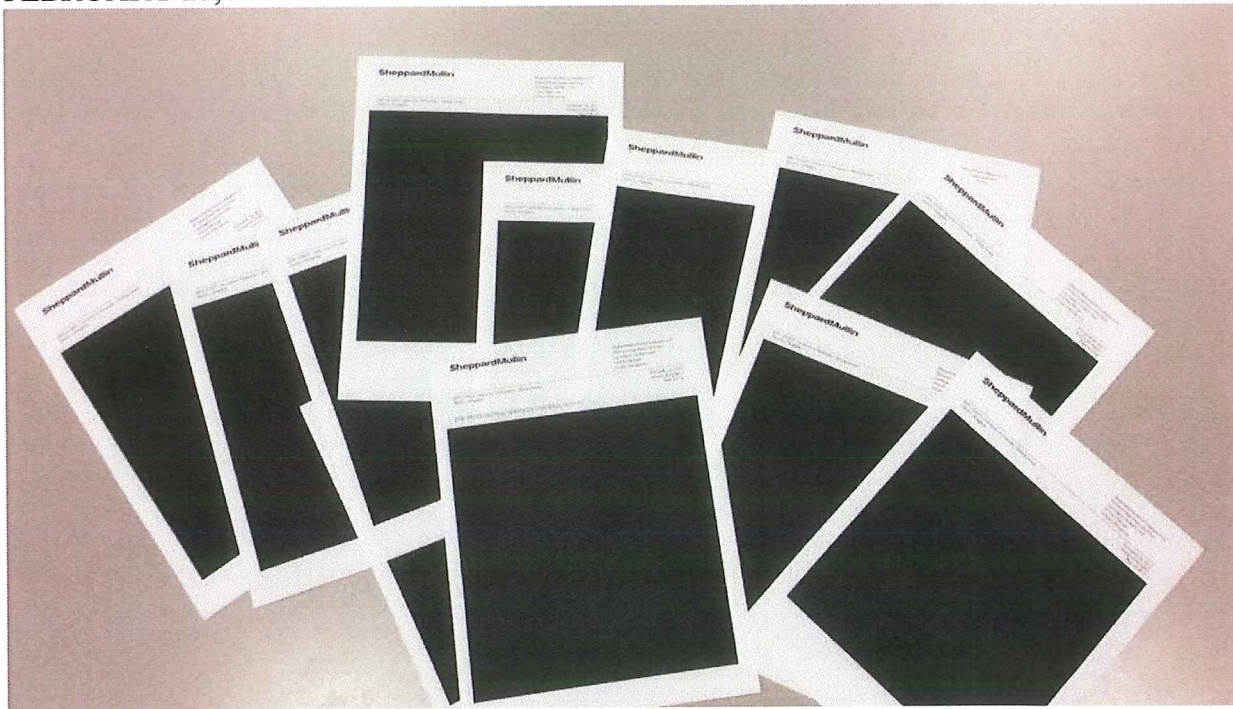


# 9 pages or 15,000? After 4-year legal battle, UK turns over clinic records to Herald-Leader.

BY HERALD-LEADER EDITORIAL BOARD

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It's taken four years, but the Lexington Herald-Leader has finally prevailed against the University of Kentucky in an open records case that should have ended shortly after it was filed.

It's taken four years and four courts to decide that UK did not have the right to withhold documents that would explain why [it paid \\$4 million back](#) to the federal government

because of a cardiology clinic it acquired in Hazard. Although the Herald-Leader prevailed at all levels of the case, from the Attorney General's office to the Supreme Court, UK kept fighting to keep this public business hidden away.

When the Kentucky Court of Appeals ordered UK to turn over related documents, UK attorneys said only nine pages were relevant. When the Herald-Leader challenged that, UK turned over the real number — at least 15,000 pages.

In all, this case has cost taxpayers roughly \$118,000 in legal fees to an outside law firm in the past four years. That's small potatoes at a school with a \$2 billion budget. But it's still public money used in a misguided and stubborn quest to show that UK knows best and the public does not need to be aware of what the state's flagship university is doing.

## **SECRETS, SECRETS**

It all started with a secret meeting.

On May 2, 2016, the University of Kentucky Board of Trustees attended their regular dinner gathering the night before their monthly meeting. But they neglected to announce the main course: A Power Point presentation by a national healthcare lawyer who explained why UK had suddenly paid \$4.1 million back to the federal Medicaid and Medicare programs that had been charged by a UK cardiology clinic in Hazard.

The Lexington Herald-Leader challenged the meeting as being illegal under the state Open Meetings law, and asked for a host of documents, including audits of the clinic. UK refused, citing two exemptions to the Open Records law: That the documents were preliminary (even though the payments had been made and the clinic had been sold) and that they were protected under attorney-client privilege. So the case went to the state Attorney General.

The Attorney General said that it would review the documents "in camera," or privately, to see if they should be released. UK refused, and appealed to Fayette Circuit Court.

Circuit Judge Pamela Goodwine said UK should turn over the documents. UK handed over records detailing its attorney's \$1 million in billing and the Power Point presentation that was given to the board. But it refused to release additional records, including audits, and appealed the case to the Kentucky Court of Appeals.

The Kentucky Court of Appeals flatly rejected UK's argument that the records were preliminary and agreed with Tom Miller, the Herald-Leader's attorney.

"The University's position is novel, but we do not find any authority supporting it," the decision says. "Indeed, there is no dispute that the University took its final action based upon the information revealed during the audits. Records which are of an internal, preliminary and investigatory nature lose their exempt status once they are adopted by the agency as part of its action."

UK then asked the Kentucky Supreme Court to review the decision. The Supreme Court declined to hear the case.

It returned to Fayette Circuit Court, where both Judge John Reynolds and his successor, Judge Julie Goodman, ordered UK to give the documents to the Herald-Leader, which it did last week. In coming weeks, the Herald-Leader will read through all of them and report to the public exactly what UK was trying to hide.

There are larger principles at stake than the fate of one clinic. In recent cases, UK, led by General Counsel William Thro, has argued that it is above the law, above the private scrutiny of the Attorney General, and above the public interest.

It is difficult to understand this recalcitrance, which not only keeps what could be short-lived controversies in the public eye for years, but makes President Eli Capilouto's claims of openness and transparency look hollow. We've seen the same stubbornness in a far more serious case, that of the student newspaper, [the Kentucky Kernel](#), and its quest to uncover the truth about the abuse of students in a sexual harassment case involving a professor. The Kernel is also represented by Miller.

UK's blanket denial of documents was also [overturned](#) by the Court of Appeals and is now before the state Supreme Court.

"Here, there is more at stake than simple curiosity. The public has an interest in the investigative methods used by its public agencies and to know that a publicly funded university has complied with all federal and state laws," Judge Kelly Thompson of Bowling Green wrote in the Court of Appeals decision. "In this instance, the university has not yet made any attempt to comply with the Open Records Act in any meaningful way. It has taken the indefensible position that the records are exempt because it says

they are and it must be believed. That position is directly contrary to the goal of transparency under the Open Records Act.”

## **A DISTURBING TREND**

As UK points out, it does respond quickly and positively to 90 percent of the numerous information requests it receives every year.

“There have been a handful of cases where we have sought to protect records,” said spokesman Jay Blanton. “Those handful of cases revolve around three issues and exceptions that the law – and our moral obligations – provide for: protecting the privacy of students, victims and patients; protecting attorney-client communications and work product and protecting the preliminary recommendations of administrators to ensure the kind of candid conversations and dialogue necessary to get at the facts.”

Still, in this kind of case, UK’s thwarting of the Open Records Act is costing it both good will and good money. It is a tax-payer supported institution, devoted to learning, open minds and service to the Commonwealth. Its residents have a right to know what it is doing. This fight has done nothing for that greater good.

The case also shows the importance of Kentucky’s robust Open Records laws, and highlights an important issue now at stake in the shifting and challenging economic climate affecting local media. For decades, the Herald-Leader and other local newspapers in Kentucky and nationally have championed transparency, open records and open meetings as watchdogs of public agencies and government at all levels.

That role is more important today than ever as public institutions like UK increasingly push back against laws that require the public’s business to be done out in the open.

This case took four years, wound its way to the Kentucky Supreme Court and back, and involved thousands of dollars in legal fees paid by the Herald-Leader, with support from the Kentucky Press Association.

Amye Bensenhaver, a former assistant Attorney General who wrote numerous open records and meeting decisions, said the Herald-Leader decision is an important one.

“The court’s analysis in this case will be regularly cited to refute agency attempts to broadly construe the preliminary documents exception — long considered the most



abused exceptions — and the attorney-client privilege/work product doctrine — rising stars in the galaxy of overused exceptions,” she noted. “The final victory is the Herald-Leader’s and ours.”