COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CASE NOS. 16-CI-3065 &16-CI-3594

UNIVERSITY OF KENTUCKY

PLAINTIFF/APPELLANT

v.

OPINION & ORDER

LEXINGTON H-L SERVICES, INC.
d/b/a LEXINGTON HERALD LEADER

DEFENDANT/APPELLEE

This matter is before the Court on appeal by the Plaintiff/Appellant, University of Kentucky ("University"), from the Attorney General's Open Records and Open meetings decisions *In re Lexington Herald-Leader/University of Kentucky, 16-ORD-161 (2016) and 16-OMD-154 (2016)*. At the heart of the matter is the University's prior relationship with the Appalachian Heart Center in Hazard, Kentucky ("the Clinic"), an investigation over billing practices involving Medicaid at the Clinic, and 100% reimbursement of any payments to Medicare/Medicaid after the investigation.

BACKGROUND

In the summer of 2013, the University pursued an affiliation with the Clinic and its three cardiologists. Under the terms of the affiliation, the University would purchase the Clinic's assets and enter into professional and adjunct medical facility staff agreements with the cardiologists. In order to accomplish this, the University, through its General Counsel, undertook a due diligence review of the Clinic to identify potential legal risks. As part of this due diligence, and at the direction of General Counsel, the University sought an independent valuation of the compensation agreements with the physicians, an independent review of the care provided by the physicians, and an independent review of the Clinic's operations and revenues.

Approximately a year after the acquisition, the University received two complaints concerning treatment practices at the Clinic. In response to these complaints, the University's Chief Compliance Officer directed an audit of the physicians' medical documentation and the billing for their services. The Herald-Leader requested a copy of the audit performed in response to the University's description of the problems that were uncovered at the Clinic. The Herald-Leader also requested a copy of the PowerPoint presentation prepared by outside counsel, David Douglass, for the May 2, 2016 dinner meeting of the University's Board of Trustees. The University denied both requests.

On June 7, 2016, the Herald-Leader sought the Kentucky Attorney General's review of the University's failure to produce the documents requested as well as the University's failure to prepare an agenda for or keep minutes of the dinner. The University did not grant the Attorney General's office access to review the materials *in camera* because they felt it would be a waiver to allow a non-judicial officer to view the materials.

The Attorney General held that: 1) The University violated the requirements of KRS 61.835 by not creating minutes for the dinner meeting; 2) the Board of Trustees' discussion at the dinner meeting with attorney David Douglass was not privileged; 3) the University was required to create minutes that "reflect the substance" of the Board of Trustees' discussion with Douglass; and 4) even if the Board of Trustees' discussion with Douglass at the May 2, 2016 dinner was privileged, the privilege is not a viable exemption to the Open Meetings Act unless the discussion concerned actual proposed or pending litigation per KRS 61.810(1)(c). The University contends these findings are erroneous. The Court disagrees.

LEGAL ANALYSIS

The unambiguous purpose of KRS 61.871, the Open Records Act, is the disclosure of public records even though such disclosure may cause inconvenience or embarrassment. *See Beckham v. Board of Education of Jefferson County,* Ky., 873 S.W.2d 575 (1994). Despite its manifest intention to enact a disclosure statute, the General Assembly determined that certain public records should be excluded from disclosure. *Id.* at 577.

According to the statute, these records include "[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency; and [p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended[.]" *See KRS* 61.878(1)(i) and (j). The University contends that its internal audit and subsequent PowerPoint presentation fall under this exclusion and further contends they are protected by attorney-client privilege.

Following oral arguments, the Court reviewed *in camera* the following documents:

1. The audit initiated by the University's Chief Compliance Officer in August 2014, as more specifically described on page 4 of the University's November 21, 2016 brief in this case (Bates No. UK *in camera* 000001 through 000009)(as directed by the Court), exclusive of the thousands of actual patient records reviewed in the course of that audit;

2. The PowerPoint presentation presented by attorney David Douglass to the University's Board of Trustees at the Board's May 2, 2016 dinner meeting (Bates No. UK *in camera* 000010 through 000025); and

3. The unredacted invoices of Attorney David Douglass and the law firm of Sheppard Mullin Richter & Hampton, LLP to the University of Kentucky from April 2, 2015 through May 31, 2016 (Bates No. UK *in camera* 000026 through 000161).

With respect to the internal audit, the nine pages reviewed by the Court revealed how the patient complaints were brought to the attention of University officials. The University argues that before deciding the best course of action, governing boards must be able to obtain preliminary data, recommendations and perspectives without fear that these often competing and contradictory materials will be revealed. The General Assembly has clearly and unambiguously exempted certain materials from disclosure. *See* KRS 61.878(1)(i) and (j).

In response to the complaints, the University's Chief Compliance Officer directed an audit of the physicians' medical documentation and their billing for their services. The audit discovered possible documentation problems with billing at the clinic. Determining the cause and the University's legal obligations required further investigation and the University sought out David Douglass, an expert in Health Care law, to assist with the investigation.

The University summarizes counsel's investigation as a comprehensive effort to determine (a) what was wrong; (b) the University's potential liability, if any (c) how to correct the problem; (d) how to ensure problem does not happen again. The investigation determined that the problem was a miscommunication during the conversion process of clinic's medical record documentation and billing systems to the University's systems and affected approximately 70% of the records for the period at issue. It was determined that no intentional violation of the law had occurred and that patients had, in fact, received excellent care. This was summarized in the PowerPoint presentation to the University's Board of Trustees.

The University determined that it would be expensive to determine precise amount of the overpayment. Thus, the University elected to refund 100% of payments received. Once the University made that decision, the University had 60 days to make the refund. The University began sending repayment checks in September 2015. The University says risk and anticipation of litigation was real and that additional steps needed to be taken, and decisions made.

The University cites two reasons for its conclusion that the records reviewed were preliminary and thus exempt from disclosure: (1) the University argues that the text of KRS 61.878 (1)(i) and (j) does not suggest that preliminary materials cease to be exempt once an agency takes final action. (2) The Kentucky Supreme Court declared "investigative materials that were once preliminary in nature lose their exempt status once adopted by the agency as part of its action. *See University of Kentucky v. Courier-Journal,* 830 S.W.2d 373, 378 (Ky. 1992). The University argues in this case that the audit and investigative materials have not been "adopted into" a final agency action." *See City of Lawrence v. Courier-Journal,* 637 S.W.2d 658, 659 (Ky. App 1982)("Of course if the Chief adopts its notes or recommendation as part of his final action. . .the preliminary characterization is lost to that extent"). The University argues that here the only final agency action was the University's repayment of monies due to billing errors.

The University argues that the audit document(s) fall within either the attorney client privilege and/or the work product doctrine because the University's Chief Compliance Officer who directed that the audit be conducted, understood that non-compliance with fraud and abuse laws can result in litigation. This argument falls short of establishing that the documents were "confidential communication[s] made for the purpose of facilitating the rendition of professional

legal services." *Lexington Public Library v. Clark*, 90 S.W.3d 53, 58 (Ky. 2002)(citing KRE 503).

The documents Bates No. UK *in camera* review 000001 through 000009, are communications, emails and memoranda by and between several individuals requesting that patient data/records be pulled and reviewed in response to patient complaints relayed to the University's leadership by a physician. These were not communications within the meaning of the attorney-client privilege. Investigative audits consisting of systematic analyses of data is not the type of statement traditionally protected as a 'communication'" within the meaning of the attorney-client privilege. "The privilege protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege. . .and is triggered only by a client's request for legal, as contrasted with business, advice. . ." *Id.* at 60. The fact that the audit was ultimately provided to either the University's General Counsel or Mr. Douglass is not sufficient to cloak it with the attorney-client privilege. *Id.* ("if the communication would not have been privileged if made to the attorney, it did not become privileged just because it was subsequently forwarded to the attorney").

Likewise, there is no indication that the audit was prepared in anticipation of litigation or for trial, and the University's general awareness that non-compliance with fraud and abuse laws may lead to litigation is not enough to place this document(s) within the work product doctrine. *Love v. Sears, Roebuck & Co.*, 2014 WL 1092270, *2(W.D. Ky. 2014)(a remote prospect of litigation will not place a document within the work product privilege).

In light of the fact that a full refund to Medicaid and Medicare has been made and there is no present litigation or threat of litigation, and the fact that the University has provided no support for the assertion that the audits consists wholly of legal advice as opposed to

unprivileged factual information, the Court finds and concludes that the communications which brought the problem to light and the University's request for patient data, shall be disclosed with a narrow exception. Some of the emails reviewed by the Court *in camera* regarding the internal audit contains patient information or otherwise irrelevant information to this topic/issue that should be redacted. The patient information is contained on pages 000005 through 000007 and on page 000009 and shall be redacted prior to production. This ruling applies only to the nine pages reviewed *in camera* and does not include the thousands of actual patient records reviewed in the course of the investigation.

Next, the University explained that the Board of Trustees almost always meet for dinner on the night before the full board meeting and again for lunch on the day of the board meeting. Because these meals involve a quorum of the Board of Trustees and because there is the possibility that the Board's informal discussion might touch on a matter of public business, the University posts these meals as regular meetings of the Board of Trustees. Any member of the public is welcome to attend these meetings. In the past the Herald-Leader reporters have attended these meetings. The University concluded that since neither the Herald-Leader nor any other person outside of the University's leadership attended the dinner meeting, the University's outside attorney David Douglass was able to brief the Board of Trustees on legal issues related to the Clinic that still needed to be addressed. There was no reason to do this in a public setting. Rather, this could have waited for the full meeting of the Board of Trustees the following day.

The Attorney General found that the University was not required to post an agenda for the May 2, 2016 dinner meeting; and, thus, the University did not violate KRS 61.820. The University, of course, agrees with this finding. The Court also agrees with the Attorney General

that the University was not required to post an agenda of the May 2, 2016 dinner meeting. However, the University was required to prepare minutes of the meeting.

The Court agrees that there appears to be some intent on the part of the University to mislead the public about the nature of the May 2, 2016 "dinner" meeting, implying that it was merely a social event. This implication occurred by the omission of an agenda on the website when one had been given for other meetings but not purely social events. Though the Court finds that the University was not required to post an agenda, the University was required to prepare minutes of the meeting. The Court understands that it may be difficult to go back and try to construct minutes of that meeting. The PowerPoint presentation can certainly serve as documentation of the topics discussed.

The University's claim of attorney-client privilege as to the entire PowerPoint presentation made by Mr. Douglass fails for the primary and simple reason that it was received during a meeting that the University has repeatedly characterized as an open meeting, properly convened pursuant to Kentucky's Open Meetings Act. "Where there is no expectation that communications between a client and his attorney remain confidential, the privilege is absent." *U.S. ex rel Burns v. A.D. Roe Co.*, 904 F.Supp. 592, 594 (W.D. Ky. 1995). The decision to receive the report in an open meeting reflects a complete lack of such an expectation. Either the dinner was a regular called open meeting, such that the Board could have no legitimate expectation of confidentiality, or it was not. If it was not, then the Board was required to cite the provision of KRS 61.810 that would allow it to enter into closed session and adhere to the requirements for conducting a closed session. While the University dismisses those requirements as a "technicality", technical compliance with Open Meetings Act is exactly what the law demands. *Floyd Cty. Bd. of Educ. v. Ratliff,* 955 S.W.2d 921, 923 (Ky. 1997)("failure to

comply with the strict letter of the law in conducting meetings of public agency violates the public good.")

The University appears to concede that there was no pending or proposed litigation and so KRS 61.810(1)(c) would not have permitted it to enter a closed session for purpose of receiving the report. The University instead makes the assertion that its Board is entitled to go into closed session any time "privileged communications" are received or discussed. Not only is such a position contrary to Kentucky law, but it is also contrary to the plain language of the Open Meetings Act and would entirely subvert the Act's important purpose of preserving governmental accountability and transparency.

At the time the presentation was made, the University had already made the decision to sever its affiliation with the Center and the cardiologists. All payments from Medicare and Medicaid had been refunded. In light of these facts as well as Mr. Douglass's public confirmation that there was no wrongdoing by the University, the claim that every part of the presentation was privileged is not well taken.

Even if the presentation could be shown to have included legal advice, any factual information contained within the document does not qualify for the privilege. "Factual information appropriately discoverable from a party through deposing an employee or former employee must be differentiated from mental impressions and advice protected by the attorney-client privilege, trial preparation materials protected by the work-product rule as covered by CR 26.02, and trade secrets." *Meenach v. Gen. Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1995).

The University's assertion that the presentation is protected by the work product doctrine is even weaker. Like the attorney-client privilege, the doctrine does not protect underlying facts. *Duffy v. Wilson,* 289 S.W.3d 555, 589 (Ky. 2009). Instead, it applies only to documents

"prepared in anticipation of litigation or for trial" and only insofar as the documents disclose "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Had the Board or its attorney had a genuine belief that litigation was likely, then the Board would have gone into a closed session. The University's General Counsel has confirmed that there is no pending litigation.

Based on the foregoing, the Court concludes that the PowerPoint presentation presented by attorney David Douglass to the University's Board of Trustees at the Board's May 2, 2016 dinner meeting (Bates No. UK *in camera* 000010 through 000025) is a comprehensive summary of the investigation, actions taken and lessons learned and was presented to the Board of Trustees during a public meeting with an open dialogue. As a result, there can be no expectation of privacy. Therefore, PowerPoint presentation, (Bates No. UK *in camera* 000010 through 000025) shall be provided to the Herald-Leader.

Finally, as it relates to the requested billing records and invoices of David Douglass and his law firm, the University has provided the Herald-Leader with the a total dollar amount of the bills/fees paid to the law firm of Sheppard Mullin Richter & Hampton, LLP from invoices produced from April 2, 2015 through May 31, 2016. The Herald-Leader knows why the University hired David Douglass and how much the University has paid to him and/or his firm. Thus, production of itemized billing records is unnecessary.

The Herald-Leader's demand for more than it already has received is plainly unnecessary and contrary to all the privilege is meant to preserve. *See Grand Jury Witness Salas v. United States*, 695 F.2d 359, 362 (9th Cir. 1982)(finding a demand for more than the amount of fees and manner of payment "to be an unjustified intrusion into the attorney-client relationship" and stating that "bills, ledgers, statements, time records and the like which also reveal the nature of

the services provided, such as researching particular areas of law, also should fall with the privilege"). Therefore, the Court finds and concludes that the total dollar amount paid is sufficient. Thus, the unredacted invoices of Attorney David Douglass and the law firm of Sheppard Mullin Richter & Hampton, LLP to the University of Kentucky from April 2, 2015 through May 31, 2016 (Bates No. UK *in camera* 000026 through 000161) **SHALL NOT** be produced. These documents shall be placed under seal in the record.

Based on the foregoing, the Attorney General's Opinion, the relevant statutes and case law, the Court finds and concludes that the findings of the Attorney General were not erroneous. The findings of the Attorney General are hereby **AFFIRMED**. The Herald-Leader's request for information is **GRANTED in part** and **DENIED in part** as set forth above. There being no just cause for delay, this is a final and appealable Order.

SO ORDERED, this 27th day of June, 2017.

/S/ PAMELA R. GOODWINE
A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY: _____ DEPUTY

JUDGE, FAYETTE CIRCUIT COURT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order was mailed first class, postage pre-paid on this _____day of June, 2017 to the following:

JUN 27 2017

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