COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2013-CA-446

UNIVERSITY MEDICAL CENTER, INC. — APPELLANT

v.

BRIEF OF APPELLEES THE COURIER-JOURNAL, INC., PATRICK HOWINGTON, BELO KENTUCKY, INC. AND ADAM WALSER

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, THE COURIER-JOURNAL, INC., PATRICK HOWINGTON, BELO KENTUCKY, INC., D/B/A WHAS-TV, AND ADAM WALSER — APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 11-CI-7219

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this Brief of Appellees has been served via first class mail, postage prepaid, upon: Philip W. Collier, Bethany Breetz, Stites & Harbison, PLLC, 400 W. Market St., Suite 1800, Louisville, KY 40202; Mark R. Overstreet, Stites & Harbison, PLLC, 421 W. Main St., P.O. Box 634, Frankfort, KY, 40602; William E. Sharp, ACLU of Kentucky, Inc., 315 Guthrie St., Louisville, KY 40202; Hon. Angela McCormick Bisig, Jefferson Circuit Court, Division 10, 700 W. Jefferson St., Louisville, KY 40202, on this 4th day of September, 2013. It is further certified that the record on appeal has been returned to the Jefferson Circuit Court Clerk.

Jeremy S. Rogers

STATEMENT CONCERNING ORAL ARGUMENT

Appellees, The Courier-Journal, Inc., Patrick Howington, Belo Kentucky, Inc. and Adam Walser request oral argument and state that oral argument would be helpful to the parties and the Court in resolving the important public issues raised in this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellees, The Courier-Journal, Inc., Patrick Howington, Belo Kentucky, Inc. and Adam Walser do not accept the Statement of the Case set forth in the brief of Appellant University Medical Center, Inc. ("UMC"). Appellees' Counterstatement of the Case is as follows.

I. INTRODUCTION.

The sole issue in this appeal is whether UMC is a "public agency" for purposes of the Open Records Act. The Court of Appeals should affirm the Jefferson Circuit Court's decision that UMC is a public agency pursuant to KRS 61.870(1)(i) because UMC's governing body, its Board of Directors, is appointed by a public agency, the University of Louisville ("University"). The Court should also hold, as the Attorney General did, that UMC is a public agency pursuant to KRS 61.870(1)(j) because UMC is established, created and controlled by the University and is an alter ego of the University.

The public's right to know, under the Open Records Act, extends to UMC. UMC was created for the sole purpose of operating the University of Louisville Hospital ("University Hospital") for the benefit of the University and under the University's control. University Hospital is an important public asset. It is a vital public healthcare provider, an essential part of Kentucky's public medical education and the primary source for government-funded indigent medical care in the Louisville region. University Hospital and its public importance should not be removed from accountability under the Open Records Act merely because of a corporate façade that falsely suggests it is somehow "privately" owned and operated. UMC is a public agency for Open Records Act purposes under both KRS 61.870(1)(j) and (i).

II. UMC WAS CREATED SOLELY TO FULFILL THE UNIVERSITY'S REQUEST TO OPERATE UNIVERSITY HOSPITAL.

From the opening of the current University Hospital facility in 1983 until 1995, the University Hospital facility was managed for the University by Humana of Virginia, Inc. and its affiliated entities and successors (collectively referred to as "Humana"). (See Compl., R. 1, *et seq.,* at ¶ 16.) In 1995, the Commonwealth of Kentucky ("the State") gave notice to Humana of its intent to terminate the arrangement. (See id. at ¶ 25.) The State and the University then developed a request for proposals to solicit a new entity to operate University Hospital. In response, UMC was incorporated on June 27, 1995 as a Kentucky non-profit corporation. (See UMC's Art. of Inc., R. 667, *et seq.*)

UMC's initial incorporators are listed as Henry C. Wagner and Stephen A. Williams, who were the presidents of Jewish Hospital Healthcare Services ("Jewish") and Alliant Health System, Inc. (now known as Norton Healthcare) ("Norton"). (Id.) The Articles make clear that UMC was incorporated specifically "to operate and maintain the hospital affiliated with the University of Louisville School of Medicine, and to provide medical care for the people who are in need of those, or related, medical services." (Id. at Art. 2A.[1].) Three days after UMC was incorporated, on June 30, 1995, UMC submitted its proposal to operate University Hospital, which was followed by a final proposal submitted on October 2, 1995. (Proposal, R. 677, *et seq.*) UMC wrote that it was formed "to ensure the fulfillment of the University of Louisville needs and specifically to oversee the operation of University of Louisville Hospital ..." (Id., R. 690.) The proposal contemplated the University, Jewish and Norton as being UMC's "members." (Id., R. 691.) The proposal also listed tens of millions of dollars in financial benefits for the University, including guaranteed surplus cash distributions (above and beyond lease

payments and other commitments) of at least $33 million for the first three years of operation. (Id., R. 693.)

UMC remained a corporate shell. It had no bylaws, and it could not perform its stated corporate purpose of operating University Hospital before October 16, 1995, when the University's Board of Trustees voted to establish UMC as the operator of University Hospital. (Compl., R. 1, *et seq.*, at ¶ 31.) On February 4, 1996, UMC adopted its first Bylaws. (2/4/96 Bylaws, R. 721, *et seq.*) The Bylaws named Jewish, Norton and the University as UMC's members. (Id. at § 2.01.) The Bylaws provided for a 12-person Board of Directors with the University to appoint half of the Directors, including the chairperson. (Id. at §§ 3.01, 3.02, 5.01.)

On February 6, 1996, UMC entered into a Lease Agreement and an Affiliation Agreement with the State and with the University. (2/6/96 Affiliation Agr., R. 788, *et seq.*) Through the agreements, the University controlled the details of UMC's operation and management. (See id.) Among other things, the Affiliation Agreement required UMC to implement multiple specified program objectives (id. at § 4.3); to develop a state-of-the-art regional trauma network (id. at § 6.1.1); and to market University Hospital (id. at § 6.2). UMC was required to develop and implement new programs, "subject to the consent of the University." (Id. at § 7.1.) UMC was required to appoint University School of Medicine faculty to University Hospital's medical and professional staffs, with the Dean of the University School of Medicine serving as Chief of the Hospital Medical Staff, and other University department chairs as corresponding department heads at University Hospital. (Id. at §§ 8.1, 8.2.) The Affiliation Agreement prohibited UMC from operating any training program or rotation "without the prior

written consent of the University." (Id. at § 5.1.1.) Similarly, UMC could not withdraw any existing training program without the University's prior written consent. (Id. at § 5.2.) UMC was required to develop annual operating budgets with specific provisions, including funding. (Id. at § 4.4.) UMC was also required to distribute all surplus cash to the University, and UMC could not distribute any such cash to Jewish, Norton, or anyone else. (Id. at §§ 11.1, 11.4.1.)

In short, the University, through its request for a new entity to operate University Hospital and through its Affiliation Agreement, created, established and controlled UMC.

III. IN 2007, THE UNIVERSITY RE-CREATED AND RE-ESTABLISHED UMC, AND DIRECTLY APPOINTED ALL OF UMC'S DIRECTORS, WHEN JEWISH AND NORTON WITHDREW FROM UMC.

In 2007, both Jewish and Norton withdrew as members of UMC. (7/1/07 Withdrawal Agr., R. 826, *et seq.,* R. 841, *et seq.*) The Withdrawal Agreements acknowledged that the University had "join[ed] Jewish and Norton in the formation and corporate membership of UMC." (Id. at p. 1, ¶ B) (emphasis added). The withdrawal was at the University's request – not at Jewish's or Norton's request. (Id. at p. 1, ¶ E.)

On July 1, 2007, UMC and its sole member, the University, executed a new Affiliation Agreement with the State. (7/1/07 Affiliation Agr., R. 872, *et seq.*)[1] Aside from its exclusion of Jewish and Norton, the Affiliation Agreement contains virtually the same detailed University controls over UMC as the prior Affiliation Agreement, including the requirement for UMC to pass through to the University all of its surplus cash. (See id. at R. 881, § 11.4.1.)

[1] A copy of the Affiliation Agreement is included in the Appendix to this Brief.

The University also controls UMC's operations through numerous other contractual arrangements. When asked to disclose copies of the various contractual agreements that impose UMC's obligations to the University, UMC objected because the request called for the production of "hundreds of agreements." (UMC's Resp. to RFPD No. 1, R. 906.)

As the Jefferson Circuit Court held, when Jewish and Norton withdrew from UMC, the University had "sole and exclusive authority over UMC." (11/21/12 Order, R. 1867, *et seq.*, at ¶ 7.) The University was UMC's sole member, and it created a new set of Bylaws to establish all new requirements for UMC. (2007 Bylaws, R. 856, *et seq.*)[2] The Bylaws made clear that the University maintained the sole authority to amend UMC's Articles of Incorporation or Bylaws, to approve any merger or consolidation, to approve any sale or lease of substantially all of UMC's assets, to approve any dissolution of UMC, to approve transfers of funds, to set Directors' compensation, and to approve UMC's strategic plans. (Id. at § 2.03.)

In addition, the University had the sole power to appoint and remove all of UMC's Directors. (Id. at §§ 3.01, 3.02, 3.04, 3.06.) At its July 12, 2007 meeting, the University's Board of Trustees praised the University's President for achieving the goal of "sole[] U of L management" of "[t]he Board of Directors of University Hospital." (7/12/07 Univ. Bd. of Trustees Minutes, R. 916.) In the fall of 2007, the University appointed 10 new UMC Directors. (See UMC's Ans. to Interrog. No. 2, R. 1387-1389.)[3] At that time, each and every member of UMC's Board of Directors had been directly appointed by the University.

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[2] A copy of the Bylaws is included in the Appendix to this Brief.

[3] A copy of the Interrogatory Answers is included in the Appendix to this Brief.

IV. UMC'S CURRENT BYLAWS GIVE THE UNIVERSITY AND THE UNIVERSITY'S PRESIDENT THE ABILITY TO CONTROL ALL APPOINTMENTS TO UMC'S BOARD OF DIRECTORS.

After appointing all of UMC's Directors, on January 29, 2008, the University again revised UMC's Bylaws. (1/29/08 Bylaws, R. 918, *et seq.*)[4] UMC's Directors did not change, but the new Bylaws placed different labels on them, calling some of them "University Directors" and others "Community Directors." (See id. at § 4.02.) Under these Bylaws, UMC has a 17-member Board of Directors, which consists of 8 University Directors and 9 Community Directors. The slim majority of "Community Directors" is designed to give the false appearance that the University does not control UMC or its Board. Yet, the clear reality is that the University continues to control UMC and all appointments of UMC's Directors.

A. The University Directors

The University appoints the eight University Directors. They include the University's President (or his designee), who automatically acts as Chair of UMC's Board of Directors. (Id. at § 4.02(a).) As UMC's Board Chair, the University's President has the authority to control most aspects of UMC himself. Among other things, he is empowered to: (1) lead UMC's Board and all committees of the Board in formulating, developing and evaluating UMC's policies and goals; (2) preside at all UMC Board meetings; (3) call special Board meetings; (4) establish the agenda for all Board meetings; and (5) unilaterally appoint all members of all committees of the UMC Board. (Id. at §§ 6.01.B, 7.03.)

The University's President also has the power to appoint the other seven University Directors. (Id. at § 4.02(a).) They include the Dean of the University's

[4] A copy of the January 2008 Bylaws is included in the Appendix to this Brief.

Medical School, the University's Executive Vice President of Health Affairs, at least one department chair of the University's Medical School, and at least one member of the University's Board of Trustees. (Id. at § 4.02(a).) Unlike Community Directors, these University Directors cannot be removed from UMC's Board, except by the University's President. (See id. at § 4.04.)

This arrangement alone is compelling proof that the University controls UMC and that they act as one and the same. It is otherwise difficult to imagine how a public university's president and other officers could simply be conscripted to serve as directors of a non-profit corporation and to establish the non-profit corporation's policies and goals.

B. The Community Directors

The University also appoints the nine Community Directors, but th e Bylaws attempt to give the false appearance that the University does not directly do so. The Bylaws provide that the Community Directors are to be appointed by UMC's Board as a whole, upon the nomination by UMC's four-person Nominating Committee. This method of appointment, in reality, affords the University absolute control over all appointments of Community Directors.

As an initial matter, the current Bylaws misleadingly suggest some level of independence from the University by requiring that Community Directors be appointed by the UMC Board as a whole, rather than by the University directly. On the surface, this arrangement poses a chicken-or-the-egg conundrum because the Community Directors are appointed by a Board that must include Community Directors. Obviously, UMC's first Community Directors did not spontaneously materialize out of thin air. The truth is

that, when UMC's current Bylaws were adopted in January 2008, each and every member Director had already been appointed by the University, including those Directors who then took on the title of "Community Directors."[5]

More importantly, the Bylaws grant the University and its President complete control over any subsequent appointments of Community Directors. This is accomplished in several ways.

First, the University's President is automatically the Chair of UMC's Board of Directors, and he presides over, and establishes the agenda for, all UMC Board meetings. (1/29/08 Bylaws, R. 918, *et seq.*, at §§ 4.02(a), 7.03.) Thus a Community Director can be appointed if, and only if, the University's President calls for such a vote.

Second, the only candidates who may be appointed as Community Directors are people who have been nominated by UMC's Nominating Committee, a four-person committee which the University's President automatically chairs. (Id. at §§ 4.06, 6.03.) Thus, the Nominating Committee can nominate a candidate for Community Director if, and only if, the University's President calls for such a vote.

Third, the University's President has total control over the Nominating Committee. The Nominating Committee consists of the University's President, another University Director and two Community Directors. (Id. at §§ 4.02(a), 6.01(B) & 6.03.) The University's President unilaterally selects the members of the Nominating Committee each year. (Id. at §§ 4.02(a), 6.01(B) & 6.03.) He has the unfettered ability to choose a Nominating Committee that will do exactly what he wants.

[5] In fact, six of those Community Directors who were unilaterally appointed by the University remain on UMC's Board of Directors today. They are Gerald J. Anderson, Phillip Bond, Joan Coleman, Martha Neal Cooke, Charlie Johnson and Linda B. Street. (See UMC's Ans. to Interrog. No. 2, R. 1387-1389.)

Fourth, the University has total control over who the Nominating Committee nominates for appointment as a Community Director. A nomination requires a majority vote of the Nominating Committee. The two Community Directors on the Nominating Committee cannot nominate an individual to be a Community Director without the approval of the President and the other University employee who has been selected by the President and reports to him. Thus, nobody can be nominated as a Community Director unless the University's President and his handpicked University Director appointee say so. The University's President can block any potential nomination or appointment.

Fifth, if the Nominating Committee is unable to make a nomination or if the full Board is unable to appoint a nominee, then the incumbent Community Director continues to serve as a Community Director even after his or her term of office has expired. See KRS 273.211(3) ("Each director shall hold office for the term for which he is elected or appointed *and* until his successor shall have been elected or appointed and qualified.") (emphasis added). For example, if the President wants to keep the Directors who were appointed directly by the University and later labeled "Community Director," all he has to do is veto any other proposal.[6]

By chairing UMC's Board of Directors, by chairing and unilaterally selecting UMC's Nominating Committee, and by maintaining an effective veto over who can be nominated or appointed, the University's President has complete control over any appointments of UMC's Community Directors. Therefore, it is not surprising that every

[6] That is what has happened. Six of the current Community Directors are the Directors appointed directly by the University in 2007. (See UMC's Ans. to Interrog. No. 2, R. 1387-1389.) One of those Directors, Linda Street, was never self-reappointed by the Board; her one and only appointment was directly by the University in 2007. (Id. at Ans. to Interrog. Nos. 2 and 3, R. 1387 – 1390.) Thus, UMC is undeniably a public agency under KRS 61.870(1)(i) because more than half of its Directors have been directly appointed by the University without any later self-reappointment by the full Board.

single person whom the Nominating Committee has nominated has been offered the position by the full Board. (See UMC's Ans. to Interrog. No. 3, R. 1389-1391.)

Nor is it surprising that UMC's Community Directors are not really independent of the University. UMC's Bylaws prohibit Community Directors from being University employees, officers or trustees. (1/29/08 Bylaws, R. 918, *et seq.*, at § 4.02(a).) Yet, most of the Community Directors have maintained other positions on various University boards and committees. (See UMC's Ans. to Interrog. No. 2, R. 1387-1389.) For example, three of the Community Directors are past or present members of the University's Board of Trustees, the ultimate governing authority over the University pursuant to KRS 164.821. (Id.)

Similarly, six Community Directors were appointed to UMC's Board while they held positions as members of the University's Board of Overseers, and all six continued to hold their positions on the Board of Overseers while serving on UMC's Board. (Id.) The purpose of the Board of Overseers is to spread the University's authority. Article 8 of the Board of Overseers Bylaws encourages the appointment of its members to "other University organizations including University-affiliated corporations." (Bd. of Overseers Bylaws, R. 1414, at Art. 8.) The Board of Overseers is "an integral component of the University," with the purpose and function of providing the University's President "with ongoing assistance in achieving the strategic mission of the University." (Id. at §§ 1.1, 1.3.) Those Community Directors are in no way "independent" of the University, when they are duty-bound to assist the President (who is also the Chair of UMC's Board) in achieving the University's mission.

The University and its President have controlled, and continue to control, UMC through appointment of all of UMC's Directors, including the Community Directors.

V. THE OPEN RECORDS REQUESTS AND ATTORNEY GENERAL APPEALS.

In July and August 2011, WHAS reporter Adam Walser, Courier-Journal reporter Patrick Howington, and the American Civil Liberties Union of Kentucky, Inc. ("ACLU") each sent open records requests to UMC. (See Compl., R. 1, at ¶ 58.) Most of the requested records relate to a proposed merger between University Hospital and other entities. (See, e.g., Howington request, R. 940.)[7] UMC denied the requests, stating that UMC is not a public agency under the Open Records Act. (See, e.g., 8/4/11 ltr, R. 942.)

The Courier-Journal, WHAS and the ACLU each appealed UMC's denials to the Attorney General pursuant to KRS 61.880. On October 6, 2011, the Attorney General rendered a decision on the ACLU's appeal. (See 11-ORD-157, R. 949, *et seq.*)[8] The Attorney General held that UMC is public agency under KRS 61.870(1)(j) because UMC is "established, created, and controlled by a public agency," the University.

The Attorney General found that UMC was established and created specifically as a "vehicle to compete for the opportunity to enter into an affiliation agreement and lease agreement with the University and the State to operate the University of Louisville Hospital." (Id. at p. 4.) The Attorney General relied heavily upon the decision in University of Louisville Foundation, Inc. v. Cape Publications, Inc., 2003 WL 22748265,

[7] The Attorney General later recommended that Governor Beshear reject the proposed merger, in part because it would compromise the University's control over UMC and University Hospital. (See Attorney General report, R. 967, *et seq.*) (included in App'x). The Governor followed the Attorney General's recommendation and rejected the proposed merger.

[8] A copy of the Attorney General's decision 11-ORD-157, is included in the Appendix to this Brief.

2003 Ky. App. Unpub. LEXIS 1370 (Ky. App. 2003).[9] In that case, the Court of Appeals held that the University of Louisville Foundation (a non-profit corporation) is a public agency pursuant to KRS 61.870(1)(j). Like UMC, the Foundation was established and created as a vehicle to receive and hold property on behalf of the University, and its governing corporate documents specified its purpose was to support the University. Id. at *1. Further, the Court of Appeals held that the University controlled the Foundation. Although the University did not directly appoint a majority of the Foundation's board members, the Court of Appeals held that the University necessarily controls the Foundation because the Foundation receives "Bucks for Brains" funding from the State, which it could only legally receive as the University's agent and under the University's control. The Court of Appeals held that the Foundation and the University act "as one and the same," which amounts to "control" under KRS 61.870(1)(j). Id.

Here, the Attorney General found that the causal connection between UMC's creation and its operation of University Hospital "is as clear and direct as the causal relationship between the University of Louisville Foundation and the University of Louisville recognized in *University of Louisville Foundation, Inc. v. Cape Publications, Inc.*, above." (11-ORD-157, p. 4.) The Attorney General held that the University controls UMC by virtue of its strong presence on, and effective ability to determine membership in, UMC's Board of Directors. (Id. at 5.) The Attorney General also held that the University controls UMC through numerous obligations under the Affiliation Agreement. (Id. at 5-6.)

[9] Pursuant to CR 76.28(4)(c), a copy of this unpublished decision is included in the Appendix.

Specifically, the Attorney General emphasized that UMC's obligation to remit all surplus cash to the University imports an agency relationship analogous to that identified in University of Louisville Foundation where the Court of Appeals recognized that the Foundation could not legally receive "Bucks for Brains" funds from the State if it were not under the control of, or acting as "one and the same" with, the University. The Attorney General held that UMC's financial obligation to the University would be unlawful under non-profit corporation law "unless the University is part of UMC." (11-ORD-157, p. 7.) The Attorney General cited KRS 273.237, which prohibits a non-profit corporation from paying any part of its income or profit to its members and only allows benefits to be conferred upon a member in conformity with the corporation's charitable purposes. "Just as the University of Louisville Foundation could not receive 'Bucks for Brains' money and contributions unless it was acting 'as one and the same' with the University, so UMC cannot distribute surplus cash flow to the University unless it acts 'as one and the same' with the University." (11-ORD-157, p. 7) (emphasis added).[10]

Having found in the ACLU's appeal that UMC is a public agency under KRS 61.870(1)(j), the Attorney General incorporated that holding in its October 6, 2011 decision on WHAS's appeal (11-ORD-158) and its October 7, 2011 decision on the Courier-Journal's appeal (11-ORD-159).

[10] The Attorney General's finding is also consistent with KRS 273.161(4), which defines a "Nonprofit corporation" as "a corporation no part of the income or profit of which is distributable to its members, directors or officers." Here, however, all of UMC's surplus cash is required to be given to its sole member, the University.

VI. THE JEFFERSON CIRCUIT COURT'S DECISION.

UMC appealed all four Attorney General decisions in a single suit in Jefferson Circuit Court. (See Compl., R. 1, *et seq.*)[11] On the parties' cross-motions for summary judgment, the Circuit Court rejected the Attorney General's finding that UMC is a public agency under KRS 61.870(1)(j). The Circuit Court believed the University did not "establish" or "create" UMC because UMC's Articles of Incorporation were filed by the presidents of Jewish and Norton. (11/21/12 Order, R. 1867, *et seq.*, at p. 6, ¶ 8.)

However, the Circuit Court held that UMC is a public agency pursuant to KRS 61.870(1)(i), because the University appoints all of UMC's Directors by directly appointing the University Directors and by having complete control over all appointments of Community Directors. (Id. at ¶¶ 11-15.)

The Circuit Court did not rule on the issue of whether, or to what extent, the records requested of UMC are exempt from disclosure. Instead, on February 5, 2013, the Circuit Court made the November 2012 Order final and appealable and reserved ruling on any exceptions to disclosure until the conclusion of all appeals as to UMC's status as a public agency. (2/5/13 Order, R. 1913.)

ARGUMENT

The Court should affirm the Jefferson Circuit Court's judgment that UMC is a public agency under the Open Records Act. UMC is a public agency under both KRS 61.870(1)(i) and (j).

The fundamental policy of the Open Records Act is a proper guide for the application of the definition of "public agency" in this case. Specifically, KRS 61.871

[11] The appeal also involved 11-ORD-160, which decided an appeal by Keith Smith of UMC's denial of an open records request. Smith made no appearance in this case.

declares that "the basic policy" of the Open Records Act "is that free and open examination of public records is in the public interest" and that exceptions to the Act's application "shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." The Supreme Court's analysis of the University's Foundation in Cape Pub'ns, Inc. v. Univ. of Louisville Foundation, 260 S.W.3d 818 (Ky. 2008), applies with equal force to UMC:

> As a public institution that receives taxpayer dollars, the public certainly has an interest in the operation and administration of the University. KRS 164.810 et seq. See also Courier-Journal & Louisville Times Co. v. Peers, 747 S.W.2d 125, 130 (Ky. 1988) (disclosure of requested documents was required primarily because the information concerned "the expenditure of public funds"). The Foundation's stated goal is to advance the charitable and educational purposes of the University of Louisville. To this end, it solicits, receives, and spends money and other assets on behalf of the University. The public's legitimate interest in the University's operations then logically extends to the operations of the Foundation.

Id. at 822-823.

The General Assembly intended to provide the public with an avenue to hold public universities accountable for their operations and for their stewardship of public resources. University Hospital is precisely such a public resource. The fact that the University operates it through UMC, which is structured as a non-profit corporation, does not diminish the public's significant interest under the Open Records Act in monitoring its operations. UMC is public agency under the Open Records Act.

I. UMC IS A PUBLIC AGENCY UNDER KRS 61.870(1)(i) BECAUSE THE UNIVERSITY AND ITS PRESIDENT APPOINT A MAJORITY OF UMC'S GOVERNING BODY.

The Circuit Court correctly held that UMC is a public agency pursuant to KRS 61.870(1)(i), which defines "public agency" to include:

> Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof.

There is no question that the University is a "public agency." See, e.g., KRS 61.870(1)(f) ("Every state or local government agency"); KRS 61.870(1)(g) ("Any body created by state or local authority in any branch of government"). Therefore, the Jefferson Circuit Court correctly held that UMC is a public agency because a majority of its governing body is appointed by the University and the University's President. In fact, the University and its President appoint all of the members of UMC's Board of Directors.

UMC acknowledges that, under its current Bylaws, the University appoints all of the "University Directors," which constitute 8 of the 17 Directors. However, UMC claims that the remaining 9 Community Directors are not appointed by the University or its President because the Bylaws require a majority of the UMC Board of Directors as a whole to appoint the Community Directors. That argument is incorrect.

Initially, UMC's current Bylaws, with the labels of "University Directors" and "Community Directors" cannot be viewed in the vacuum that UMC urges. UMC claims that the Community Directors are "self-perpetuating" under the Bylaws. (UMC Brf., p. 16.) That claim is not only incorrect, but it also wrongly presupposes that the Community Directors somehow materialized without being appointed by anyone in the first place. The truth is that the University directly appointed all of the UMC Directors in the fall of 2007. The UMC Bylaws that the University put in place at that time gave the University the absolute power to appoint and to remove all of UMC's Directors. (Am. &

Rest. Bylaws, R. 856, *et seq.*, at §§ 3.02, 3.04, 3.06.)[12] When the University changed those Bylaws in January 2008, every member of UMC's Board of Directors had already been directly appointed by the University, and UMC was clearly a "public agency" under KRS 61.870(1)(i). Labeling some of UMC's Directors as "Community Directors" cannot insulate UMC from the Open Records Act. The label does not change the reality that the University appointed them. UMC is therefore a public agency under KRS 61.870(1)(i).[13]

Moreover, as the Jefferson Circuit Court correctly held, the University and its President continue to have absolute power over all appointments of Community Directors under the new Bylaws. The University's President (1) handpicks the Nominating Committee each year; (2) can veto any nomination; (3) controls whether there is any vote by the Nominating Committee; and (4) controls whether there is any vote by the Board upon any nomination. The University's President controls the process of nominations and appointments of all Community Directors at every level. No one can be appointed as a Community Director unless the University's President says so.

UMC attempts to minimize the importance of the President's handpicked Nominating Committee by arguing that it can only "recommend" who the full Board should appoint as a Community Director. (UMC Brf., p. 17.) Yet, the full Board has only the power to appoint the person nominated by the Nominating Committee; the Board cannot appoint anyone else. (1/29/08 Bylaws, R. 918, *et seq.*, at §§ 4.02(a), 4.06, 6.03.) If the full Board does not appoint the Nominating Committee's nominee (which has

[12] The Bylaws also provided that the University, as UMC's sole member, had the right to amend the Bylaws. (Id. at § 2.03.B.)

[13] UMC admits that the University directly appointed a majority of UMC's current Directors, which, at a minimum, includes all eight University Directors and Ms. Street, who was appointed by the University in 2007 and has never been self-reappointed by the full Board under the new Bylaws. (See UMC Ans. to Interrog. Nos. 2 & 3, R. 1389-1390.)

never happened), or if the President refuses to call for a vote of the Nominating Committee or the full Board, then the incumbent Community Directors who were appointed by the University continue to serve as a Community Directors even after their term of office expires. See KRS 273.211(3) ("Each director shall hold office for the term for which he is elected or appointed *and* until his successor shall have been elected or appointed and qualified.") (emphasis added). If the President wants to keep a Community Director on the Board, the Community Director will stay on UMC's Board until the President decides otherwise.

Further, as the Circuit Court held, if a catastrophe eliminates the Directors, then the University can unilaterally appoint the University Directors, who would then be able to appoint all of the Community Directors. See KRS 273.213 (vacancies may be filled by affirmative vote of a majority of remaining directors, even if less than a quorum).

The University and its President have controlled, and continue to control, UMC through the appointment of all of UMC's Directors, including the Community Directors. In fact, there is no scenario (hypothetical or real) under which the University and its President lack control over the appointment of all UMC Directors, including the Community Directors. The Circuit Court was correct to hold that UMC is a public agency under KRS 61.870(1)(i).

UMC argues that KRS 61.870(1)(i) does not apply because its Community Directors are "elected" rather than "appointed." (UMC Brf., pp. 18, *et seq.*) That is a distinction without a difference. The reality must govern this case, and the reality is that the University and its President dictate who can be a Community Director, regardless of what labels are placed on the process.

UMC also contends that it does not perform a "government function" and should therefore not be considered a public agency under KRS 61.870(1)(i). (UMC Brf., pp. 22, *et seq.*) That argument is wrong for several reasons.

First, UMC does perform a "governmental function." UMC exists for the sole purpose of operating University Hospital, a State-owned facility that is an essential institution of the University and its School of Medicine. The Kentucky Supreme Court has conclusively held that the operation of a hospital affiliated with a State medical school is an essential government function. Withers v. University of Kentucky, 939 S.W.2d 340, 343 (Ky. 1997). The issue in Withers was whether the University of Kentucky Medical Center was entitled to the defense of sovereign immunity in a medical malpractice claim. See id. The plaintiff argued that "the University of Kentucky Medical Center is nothing more than a hospital which is in full competition with and performs the same function as private hospitals." Id. at 343. Rejecting that argument, the Supreme Court held,

> The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school. Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible. Medical students and those in allied health sciences must have access to a sufficient number of patients in a variety of settings to insure proper training in all areas of medicine. Such is essential to the mandate of KRS 164.125(1)(c).[14]

Id. at 343 (emphasis added). The Supreme Court's analysis in Withers applies with equal force to University Hospital. Just as the operation of the University of Kentucky Medical

[14] KRS 164.125(1)(c) requires the University of Kentucky to provide " ... professional instruction including law, medicine, dentistry, education, architecture, engineering, and social professions." In nearly identical fashion, KRS 164.815(1)(c) requires the University of Louisville to provide "professional degree programs including medicine, dentistry, law, engineering, and social professions."

Center is a government function essential to the University of Kentucky Medical School, so too is the operation of University Hospital essential to the University of Louisville.

Second, nothing in the definition at KRS 61.870(1)(i) requires the agency to perform a "government function" or delineates what would constitute such a "government function." UMC cites Kentucky Central Life Insurance Company v. Park Broadcasting of Ky., 913 S.W.2d 330 (Ky. App. 1996), for the proposition that the definition at KRS 61.870(1)(i) is limited to entities that perform "governmental functions." (UMC Brf., pp. 22-23.) That is simply not the law. In Kentucky Central, the Court held that a court-appointed rehabilitator of a private insurance company was not a public agency by virtue of his court appointment, just as a court-appointed personal representative of a probate estate is not a public agency. In evaluating the language of KRS 61.870(1)(i), the Court of Appeals focused on the language "any entity where the majority of its governing body is appointed by a public agency," and held that an individual rehabilitator does not fit the definition of a "governing body." Id. at 334-335 (emphasis added). Nothing in the decision purported to judicially re-write the language of the Open Records Act.

The fact that the University has decided to use UMC as its vehicle to operate University Hospital does not change the analysis. The Affiliation Agreement and UMC's Bylaws repeatedly emphasize that UMC is required to operate University Hospital for the benefit of the School of Medicine and related programs and under the University's control. Among other things, the Affiliation Agreement requires UMC to obtain the University's consent to add, subtract or change any programs, and it requires UMC to appoint University faculty to University Hospital's medical and professional staffs. The

operation of University Hospital is clearly a government function, and it is a function that should not be removed from public accountability under the Open Records Act simply because the University has attempted, through its paperwork, to give the appearance that it has been delegated to UMC.

UMC also relies on Mitchell v. Univ. Med. Ctr., Inc., 2010 U.S. Dist. LEXIS 80194 (W.D. Ky. 2010), an unpublished case which UMC cites for the proposition that it does not perform a governmental function. That decision is irrelevant to the question before this Court. The court in Mitchell did not address the issue of whether UMC is a public agency under the Open Records Act. Rather, the Mitchell decision addressed the question of whether UMC was a "state actor" for purposes of a federal civil rights claim brought *pro se* by a former UMC employee. Id. The court in Mitchell gave a cursory review of that question, finding that the plaintiff failed to provide sufficient evidence to attribute UMC's actions to the State in that case. Id. at *27-29. Nothing in Mitchell purports to alter the Kentucky Supreme Court's holding in Withers, *supra*, that the operation of a state university hospital is a government function.

UMC's operation of University Hospital on behalf of the University is an important and vital government function, and the reality is that the University maintains (as it must) control over University Hospital, including control over all appointments of UMC's Directors. Neither the University nor UMC should be permitted to avoid accountability to the public by using a corporate façade to operate University Hospital. The Court should affirm the Circuit Court's ruling that UMC is a public agency.

II. UMC IS A PUBLIC AGENCY UNDER KRS 61.870(1)(j) BECAUSE IT IS CREATED, ESTABLISHED AND CONTROLLED BY THE UNIVERSITY.

UMC is also a public agency under KRS 61.870(1)(j), which defines "public agency" to include,

> Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency....

The Attorney General correctly held that UMC is established, created and controlled by the University. See 11-ORD-157. However, the Circuit Court applied an erroneously narrow interpretation that UMC was not "established" or "created" by the University merely because the University did not file UMC's Articles of Incorporation in 1995.

A. The University Established and Created UMC.

The University "established" and "created" UMC for purposes of KRS 61.870(1)(j). The only reason UMC was formed was to manage and operate University Hospital, a public institution, at the University's request. Focusing solely on who signed UMC's Articles of Incorporation improperly elevates form over substance and does not comport with the fundamental purpose of the Open Records Act. Under UMC's argument, any government agency could avoid its obligations under the Open Records Act by directing a third party to file articles of incorporation for an entity to perform essential government tasks and then to cede control of the entity back to the public agency. That is clearly not what the General Assembly intended in the Open Records Act.

Further, KRS 61.870(1)(j) does not focus on the filing of corporate paperwork; it focuses on actual creation, establishment and control. The non-profit corporation statutes

do not specify that the incorporator is the sole person responsible for the creation or the establishment of the corporation. For example, KRS 273.2531(1) recognizes that a non-profit corporation's "existence" may be delayed beyond the filing of its articles of incorporation Here, UMC's Articles of Incorporation specify that its purpose is to operate University Hospital, but that was wholly contingent upon the University agreeing to join in UMC's actual creation and establishment. Similarly, UMC lacked the legally-required bylaws for the "regulation or management of [its] affairs" until Bylaws were adopted and approved by the University in February 1996. See, e.g., KRS 273.191 (requiring initial bylaws for non-profit corporations); KRS 273.161(6) (defining "bylaws"). UMC was a corporate shell until the University created and established it.

In finding that the University established and created UMC, the Attorney General relied on the Court of Appeals decision in University of Louisville Foundation, 2003 Ky. App. Unpub. LEXIS 1370. In that case, the Foundation argued that it was not "created" or "established" by a public agency because it was incorporated prior to the time that the University became a state agency. Id. at *16-17. The Court of Appeals rejected the argument, relying instead on the fact that the Foundation was created "in anticipation of the University joining the state system." Id. at *2. Here, the Attorney General emphasized the importance of this Court's holding in University of Louisville Foundation to this point, noting that UMC was "established and created 'in anticipation' of the University's issuance of a Request for Proposals for the operation and management of University Hospital and the renegotiation of its management contract." (11-ORD-157, p. 4). The Attorney General correctly found that "the causal connection between the filing of UMC's Articles of Incorporation in June 1995 and the execution of the management

contract between UMC and the University of Louisville in October 1995 is as clear and direct as the causal relationship between the University of Louisville Foundation and the University of Louisville recognized in *University of Louisville Foundation, Inc. v. Cape Publications, Inc.*, above." (Id. at 4)(internal quotation marks omitted).

Further, in 2007 the University again "created" and "established" UMC when Jewish and Norton withdrew.[15] At that point, the University became UMC's sole member, had exclusive dominion over UMC's Board of Directors, and had sole authority to amend UMC's Articles or Bylaws. It was just as if the University bought, or was given, a corporation. The University could have dissolved UMC and incorporated a new non-profit corporation, but instead the University re-created UMC by adopting all new Bylaws to govern UMC, by appointing the entire UMC Board of Directors, and by executing a new Affiliation Agreement dictating UMC's obligations to the University.

Both in 1995 and in 2007, the University was clearly responsible for the creation and establishment of UMC. The Attorney General correctly held that UMC is a public agency under KRS 61.870(1)(j). The Court should hold that UMC is a public agency pursuant to that definition.

B. The University Controls UMC.

The Attorney General also correctly held that UMC is "controlled by" the University as provided in KRS 61.870(1)(j). The University's control over UMC pervades every aspect of the organization. As the Attorney General held, "UMC's Articles of Incorporation and bylaws assign *operation* of the hospital to UMC, but

[15] The Withdrawal Agreements acknowledged the University's role in "the formation and corporate membership of UMC." (7/1/07 Withdrawal of Membership Agreements, Courier-Journal Summ. J. Mem., R. 634, *et seq.*, at Exh 5 & 6, p. 1, ¶ B) (emphasis added).

control of the hospital remains in the University's hands by virtue of its strong presence on UMC's Board of Directors and the powers reserved to it under its Affiliation Agreement with UMC as amended in July 2007." (11-ORD-157, p. 5) (Attorney General's emphasis).

The University controls UMC. The University retains the sole power to amend UMC's Articles of Incorporation and Bylaws. The University exercises power over all appointments to UMC's Directors. The University's President is automatically the Chair of UMC's Board, sets the agenda for all Board meetings, and has the power to formulate and develop UMC's policies and goals. The University exercises immense control over virtually all aspects of UMC's operations through hundreds of contracts, including the lengthy Affiliation Agreement, under which UMC is required to obtain University approval for all significant decisions and must pay all surplus cash to the University.

Because the University exercises virtually absolute control over UMC, the Court should hold that that UMC is a public agency under KRS 61.870(1)(j).

CONCLUSION

For all the reasons set forth herein, the Court should affirm the Circuit Court's decision that UMC is a public agency for purposes of the Open Records Act. UMC is a public agency under KRS 61.870(1)(i) because a majority of its Board of Directors is appointed by the University and the University's President. UMC is a public agency under KRS 61.870(1)(j) because it was created, established and is controlled by the University for the sole purpose of operating the public asset that is University Hospital.

Respectfully submitted,

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APPENDIX

1. Affiliation Agreement
2. Bylaws
3. Interrogatory Answers
4. January 2008 Bylaws
5. Attorney General Report
6. Attorney General's Decision 11-ORD-157
7. Unpublished Decision - University of Louisville Foundation, Inc. v. Cape Publications, Inc.