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16-ORD-197

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In re: Peter Hasselbacher, M.D./University of Louisville

Summary: University of Louisville violated the Open Records Act by not providing non-exempt records related to decision to ban the men's basketball team from post-season play.

Open Records Decision

Dr. Peter Hasselbacher appeals the University of Louisville's denial of his February 10, 2016, request for:

all the documents, reports, and other information President Ramsey had in hand to cause him to [suspend tournament and post season play for the University of Louisville's Men's basketball team] on behalf of the university. If the decision was made or supported by another party such as an administrator or program director in the athletics department, I also request all records used by such a representative to endorse or support the final action by President Ramsey.

The University denied Dr. Hasselbacher's request based on the nonexistence of responsive records. The University did not elaborate on its single sentence response. Several days later, Dr. Hasselbacher initiated this appeal, questioning the University's compliance with the Open Records *and* Open Meetings Act.¹ Dr.

¹ Because Dr. Hasselbacher did not pursue his open meetings questions by the statutorily required means, as described in KRS 61.846(1), this office cannot review those questions in this appeal. 40 KAR 1:030 Section 1.

Hasselbacher argues that such a decision would not be made without the existence of records.

Unable to resolve the open records issue presented on appeal based on the University's response, on March 11, 2016, this office requested "additional documentation from the agency for substantiation" of its denial. KRS 61.880(2)(c).² Specifically, we asked that the University "describe how it conducted its search for records in President Ramsey's custody, and records in the custody of other parties 'such as an administrator or a program director in the athletics department,' that are responsive to Dr. Hasselbacher's request." We reminded the University of the standard for an adequate search recognized in 95-ORD-96 and asked that it "document the efforts that were made to locate responsive records." The University responded as follows:

President Ramsey has confirmed that he had no documents in-hand on February 4, when the decision was made to suspend post-season play for the Men's Basketball team. Additionally, Chuck Smrt, the University's contracted NCAA investigator, has confirmed that he did not provide any documents directly to President Ramsey. Mr. Smrt confirmed he brought a copy of NCAA Bylaw provisions to his meeting with the President, and he maintained that copy following that meeting.

The University reads Dr. Hasselbacher's request as limited to records in possession of Dr. Ramsey or other "administrator[s] or program director[s] in the athletics department." It first argues that records not in Dr. Ramsey's possession at the February 4 meeting are outside the scope of the request. It further argues

² KRS 61.880(2)(c) provides:

On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and *the Attorney General may request additional documentation from the agency for substantiation.* The Attorney General may also request a copy of the records involved but they shall not be disclosed.

(Emphasis added.)

that records outside of all these individual's possession are outside the scope of the request. Before we determine if the University has violated the act, we must first determine the scope of the request.

Clearly, the request encompasses records which Dr. Ramsey used in making his decision that the University men's basketball team would forego 2016 post-season play. In addition, it encompasses records used by "another party *such as* an administrator or program director in the athletics department ... to endorse or support the final action by President Ramsey." (Emphasis added). As it relates to both Dr. Ramsey and athletics department administrators and program directors, the University states that these records do not exist. It states, in its correspondence to both Dr. Hasselbacher and to this office that President Ramsey has never possessed any such records and did not rely on any records in forming his decision. It also states that no athletics department administrator or program director was provided the records requested from investigator Chuck Smrt.

However, the scope of the request is clearly broader than just encompassing records used by Dr. Ramsey and athletics department administrators. Dr. Hasselbacher, by his use of the term "such as," uses "administrator or program director in the athletics department" as an example of University personnel who may be in possession of these records. This example does not limit his request to those individuals. It merely provides an illustrative example for the University to begin its search based on information available to the requestor at the time of the request. Moreover, the use of the term "in hand" does not limit the request to records which were in the possession of Dr. Ramsey or other University personnel at the exact time of the decision. As clearly indicated in the final sentence of his request, Mr. Hasselbacher sought records used to form the basis of that decision. In *Commonwealth v. Chestnut*, Ky., 255 S.W.3d 655, 661 (2008), the Court held that a request is adequately specific if the description would enable "a reasonable person to ascertain the nature and scope of . . . the request." The Court observed that in contrast to KRS 61.872(3)(b)9 "nothing in KRS 61.872(2) contains any sort of particularity requirement." *Id.* at 661. Applying the principle set forth in *Chestnut*, Dr. Hasselbacher's request was not as limited as construed by the University.

The University acknowledged that records related to the allegations of the men's basketball team exist. Its correspondence with this office implies that the

University's contracted investigator Chuck Smrt is in possession of these records. Thus, the question is whether or not the records in Mr. Smrt's possession are encompassed by, and thus responsive, to the request. After careful review, we find that they are.

Mr. Smrt is the investigator hired by the University to conduct an internal investigation of the widely reported allegations surrounding the men's basketball team. As such, he is an agent of the University.³ The University acknowledges that he is in possession of records related to this investigation. The University states that Mr. Smrt was present when Dr. Ramsey determined to ban the men's basketball team from 2016 post-season play and provided only a copy of the NCAA Bylaws. Mr. Smrt, according to the University, provided no additional records during that meeting. Regardless, his knowledge of the investigation (and the records collected and created as part of that investigation) were used, at least in part, to form the basis for the decision. The records Mr. Smrt has gathered pursuant to his investigation are public records.

The University cannot avoid the provisions of the open records act by housing public records with its investigator. In 12-ORD-120 this office found that the Barren County Fiscal Court violated the open records act by denying a request for records on the basis that the records were in the possession of its private investigator and not the Fiscal Court. *Id.*, at 6. In that case, the private investigator appeared before the Fiscal Court and gave a summary report and oral testimony regarding his findings related to an investigation of misconduct at the Barren County Detention Center. *Id.*, at 2. He, however, did not turn over his full report and the Fiscal Court did not ask for it. *Id.* In finding that the entire report should have been released, we stated "numerous decisions of this office support the view that public records in the custody of a private agent are subject to public inspection unless properly excluded under one or more of the exceptions...." *Id.*, at 5.⁴

³ Under basic agency principles, an agent acts on the principal's behalf and is subject to the principal's control. See Restatement (Third) Of Agency § 1.01 (2006). *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 694 (Ky. 2010).

⁴ See e.g. 95-ORD-114 (hospital could not deny access to records because they were in the possession of its attorney); 99-ORD-194 (water district withheld records in possession of its attorney); 00-ORD-93 (fire department withheld records in possession of its attorney).

The University records in Mr. Smrt's possession are clearly contemplated by Dr. Hasselbacher's request. They were used by Mr. Smrt to assist Dr. Ramsey in making his final determination. We must note that to assist us in this analysis, we requested to review these records *in camera*. However, the University refused this request, arguing that it was beyond the scope of the initial open records request.⁵ While the University's failure to provide this office with these records for *in camera* review hampers our ability to substantiate the existence of various records, the clear implication from the University's correspondence with this office is that Mr. Smrt was in possession of records on February 4, 2016 that formed the basis of the University's decision to ban the men's basketball team from post-season play.⁶

Therefore, the University violated the Open Records Act by not providing Dr. Hasselbacher with non-exempt records in the possession of its investigator.⁷ The University also gives no indication that it questioned other "parties" about the existence of records *in their custody* endorsing or supporting the action. Clearly, the University did not conduct a search directed at all places which

⁵ The University argues that our request for additional documentation is beyond the scope of the initial open records request and thus we are prohibited from reviewing these records *in camera*. However, as we observed at page 2 of 12-ORD-220, "when denied the opportunity to review the [disputed] records [or documentation necessary 'for substantiation'] 'the Attorney General's ability to render a reasoned open records decision [is] severely impaired.'" Citing 96-ORD-106, p. 5 and 10-ORD-079, p. 5. Similarly, the courts have rejected the University's application of KRS 61.880(2)(c) thereby restricting, *inter alia*, our ability to request additional documentation for substantiation, especially where the courts have clearly recognized that authority and criticized an agency that refused to honor such requests. *Cabinet for Health and Family Services v. Todd County Standard, Inc.*, 2015 WL 8488991 (Ky. App. December 11, 2015) (admonishing an uncooperative agency for its unwillingness to respond to inquiries and share documentation so as to "frustrate[] the Attorney General's statutory review under KRS 61.880." *Todd County Standard* at 6.

⁶ Whether or not Mr. Smrt brought those records to the February 4 meeting with Dr. Ramsey is not important to the analysis. See 12-ORD-120. The question is whether or not the agency has the records in its possession. This office has, on more than one occasion, declared that public records in the custody of a private agent, or that are otherwise secreted away on private premises, are subject to public inspection unless otherwise exempt. 00-ORD-207, p. 5-6.

⁷ The University did not cite any exemption for the records in possession of Mr. Smrt - only arguing that they were not within the scope of the initial request. The Kentucky Supreme Court has already determined that internal University investigations into NCAA related matters are not exempt under KRS 61.878(1)(l), the law enforcement exemption. *University of Kentucky v. Courier-Journal & Louisville Times Company*, 830 S.W.2d 373 (Ky. 1992).

could reasonably be expected to produce the records Dr. Hasselbacher requested. It can best be described as a cursory search. We find that its search was inadequate. The University should conduct a more comprehensive search aimed at locating the records identified in Dr. Hasselbacher's request and not just the primary players in this event. Until it has done so, its duties under the Open Records Act will not be fully discharged.

Either party may appeal this decision by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General must be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

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Distributed to:

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