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16-ORD-064

March 31, 2016

In re: Lachin Hatemi/Kentucky Medical Services Foundation, Inc.

Summary: Decision relying on 15-ORD-205; Kentucky Medical Services Foundation, Inc. is a public agency within the meaning of KRS 61.870(1)(j). KMSF failed to justify its denial of the subject request with particular and detailed information per KRS 61.880(1) as required to satisfy its burden of proof under 61.880(2)(c).

Open Records Decision

Dr. Lachin Hatemi initiated this appeal challenging the February 2, 2016, denial by the Kentucky Medical Services Foundation, Inc. (KMSF) of his February 1, 2016, request for "[a]ny agreements between KMSF, University of Kentucky and Coldstream Laboratories Inc. between January 2010 and January 2015." KMSF maintained that it was not a "public agency" for purposes of the Kentucky Open Records Act "or otherwise," but professed to be "transparent as to matters where there is a legitimate public interest or a request from a bona fide media outlet." In addition, KMSF advised that it would not provide information "protected by applicable law, information that would not be subjected to the Kentucky Open Records Act if we were a public agency. . . ." KMSF further noted that "it is our policy not to produce information that is more appropriately the subject of discovery in a pending lawsuit in which KMSF is a party or which involves [an] entity to which KMSF provides services."[1]

[1] In *Kentucky Lottery Corporation v. Stewart*, 41 S.W.3d 860, 864 (Ky. App. 2001)(expressly agreeing with decisions of the Attorney General holding that "an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation"), the Court of Appeals rejected this position. Citing *Zink v. Commonwealth*, 902 S.W.2d

On appeal Dr. Hatemi observed that KMSF was deemed a "public agency" within the meaning of KRS 61.870(1) in a recent Open Records Decision and is therefore subject to provisions of the Open Records Act. Dr. Hatemi relied upon 15-ORD-205 (In re: Lachin Hatemi/Kentucky Medical Services Foundation, Inc., rendered November 6, 2015)(holding that KMSF is a "public agency" pursuant to KRS 61.870(1)(j) as it was "established, created, and controlled by a public agency"). Upon receiving notification of Dr. Hatemi's appeal from this office, attorney Harry L. Dadds responded on behalf of KMSF. As in 16-ORD-057, KMSF first argued that until its appeal of that ORD to Fayette Circuit Court has been resolved, its ORA status remains the same as it was prior to 15-ORD-205. Here, as in 16-ORD-057, this office respectfully disagrees and must decline to hold the instant appeal in abeyance pending resolution of the pending lawsuit as requested. "Unless or until an appellate court issues a published opinion that is clearly contrary to our own, we will continue to adhere to the position reflected" in 15-ORD-205. 07-ORD-132, p. 7; 06-ORD-230; 08-ORD-049. Holding otherwise "would result in conflicting open records decisions issuing from this office the outcome of which would be dependent upon the circuit in which a similar dispute arose or might arise, and, within the same circuit, where co-equal divisions of the court reach conflicting conclusions. To hold thus promotes certainty in the application of established legal principle . . . ." 07-ORD-132, p. 7; 11-ORD-204 (conflicting opinions from the same circuit "amply illustrate why this office has taken the approach of continuing to follow existing precedent, . . . until a published opinion by either the Supreme Court or the Court of Appeals to the contrary is rendered"). The analysis contained in 15-ORD-205 remains controlling as to KMSF's first argument. Based upon the following, this office must also conclude that KMSF has failed to satisfy its burden of justifying the denial of Dr. Hatemi's request per KRS 61.880(1) and 61.880(2)(c).

KRS 61.880(1) provides that a "response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." In construing the mandatory

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825, 828 (Ky. App. 1994), the Court reaffirmed the principle that the General Assembly "'clearly intended to grant any member of the public as much right to access to information as the next.'" Quoting from decisions by the Attorney General holding that "[a]lthough there is litigation in the background of the open records request . . ., the requester . . . stands in relationship to the agency under the Open Records Law as any other person. . . ." *Stewart* at 863. See 07-ORD-180.

language of KRS 61.880(1), the Kentucky Court of Appeals observed that the "language of [KRS 61.880(1)] directing agency action is exact. It requires the custodian of records to provide *particular and detailed information* in response to a request for documents. . . . [A] limited and perfunctory response [does not] even remotely compl[y] with the requirements of the Act-much less [amount] to substantial compliance." *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996); 04-ORD-208; 12-ORD-211. "Whereas in most disputes both sides have more-or-less equal access to the relevant facts, so that factual assertions and legal claims can be adversarially tested," the Kentucky Supreme Court has observed, "in ORA cases only the agency knows what is in the records." *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 851 (Ky. 2013). The Court suggested that a public agency "should provide the requesting party and the court with sufficient information about the nature of the withheld record (or the categories of the withheld records) . . . to permit the requester to dispute the claim and the court to assess it." *Id.* at 852. See 14-ORD-039; 15-ORD-003.

On appeal KMSF argued that all documents responsive to Dr. Hatemi's request "are exempt from disclosure under the Act as being subject to the attorney-client privilege, constituting preliminary drafts, and/or containing information that is personal in nature or generally recognized as confidential or proprietary. As such the information is exempt from release under KRS 61.878(1)(c)1; (i) or (l) respectively." KMSF made no attempt to identify the documents with specificity or explain how any of the cited exceptions applied. Instead, KMSF relied upon the affidavit of Dr. Marcus E. Randall, which essentially restated its earlier arguments, generally advising that responsive documents "are agreements entered into with attorneys and/or third party consultants that are subject to the attorney-client privilege, personal in nature, subject to confidentiality provisions similar to trade secrets and/or constitute drafts and preliminary memoranda."

KMSF merely paraphrased the language of KRS 61.878(1)(a), (i), and (j) without sufficiently identifying the documents or portions thereof to which said exceptions applied or providing a detailed explanation of how those statutory exceptions applied to same; likewise, the agency referenced KRS 61.878(1)(l), but failed to cite KRE 503, and made no attempt to describe any of the documents withheld on that basis or establish that all of the necessary elements were present as required to justify invocation of the attorney-client privilege. Bearing in mind that KMSF has the burden of justifying its denial under KRS 61.880(1) and

61.880(2)(c), the Attorney General must conclude that KMSF's initial and supplemental responses "lacked the requisite specificity and thus were both procedurally and substantively deficient." 12-ORD-211, pp. 7-8.

The courts and this office have recognized that public records may be withheld from disclosure under the attorney-client privilege in the context of an Open Records dispute *if*, as in *Hahn v. University of Louisville*, 80 S.W.3d 771 (Ky. App. 2001), all of the elements of the privileges are present. See 10-ORD-177. However, this office has also recognized that a public agency "'cannot withhold every document that relates to a particular matter under KRS 61.878(1)[(l)] and the attorney-client [privilege] simply because it is represented by an attorney in the matter.'" 01-ORD-246, p. 17(citation omitted). The attorney-client privilege "does not apply to all communications between an attorney and a client. Indeed, to fall under the attorney-client privilege, a communication must be confidential, relate to the rendition of legal services, and not fall under certain exceptions." *Cabinet for Health and Family Services v. Scorsone*, 251 S.W.3d 328, 329 (Ky. 2008). KMSF has not established that *any* of the responsive documents in their entirety fall within the parameters of KRE 503(b). In so holding this office is not implying that KMSF cannot successfully build a case for withholding some of the documents on that basis, only that it has failed to provide sufficiently detailed information to substantiate its position thus far. See 11-ORD-108.

With regard to application of KRS 61.878(1)(a), this office refers the parties to pages 3-4 of 16-ORD-057, following *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992) and *Zink v. Com., Dept. of Workers' Claims, Labor Cabinet*, 902 S.W.2d 825, 829 (Ky. App. 1994), for the relevant analysis. Here, as before, "[w]ith no detailed explanation of the privacy interest at issue, we must find that KMSF has not met its burden of proof under KRS 61.880(2)(c) to sustain its invocation of KRS 61.878(1)(a), and therefore the exemption cannot be relied upon." 16-ORD-057, p. 4. Even assuming that portions of the responsive documents may contain personal information, the nondisclosure of which can be justified under these authorities, KMSF is required under KRS 61.878(4) to "separate the excepted and make the nonexcepted material available for examination."

The record also lacks adequate information to justify KMSF's belated invocation of KRS 61.878(1)(i) and implicit reliance on 61.878(1)(j)(Dr. Randall's affidavit). Both the courts and this office have applied the language of KRS 61.878(1)(i) and (j), commonly known as the "preliminary exceptions," in a variety of contexts. *See City of Louisville* v. *Courier-Journal and Louisville Times Company,* 637 S.W.2d 658-660 (Ky. App. 1982); *Kentucky State Bd. of Medical Licensure v. Courier-Journal and Louisville Times Company,* 663 S.W.2d 953 (Ky. App. 1983); *University of Kentucky v. Courier-Journal & Louisville Times Co.,* 830 S.W.2d 373, 378 (Ky. 1992) ("investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action"); *University of Louisville v. Sharp,* 416 S.W.3d 313, 315 (2013). Guided by this evolving body of case law, the Attorney General has long recognized that public records which are preliminary in nature forfeit their exempt status to the extent adopted by the agency as a basis for its final action. See OAGs 83-405 and 89-69; 99-ORD-220; 07-ORD-156; 10-ORD-075; 11-ORD-052. The apparent position of KMSF "fails to recognize that our analysis does not end with a determination that documents are preliminary in character, but instead also requires a determination of whether such documents, or portions thereof, were ultimately adopted as the basis or a part of the agency's final action." 11-ORD-052, p. 3. Assuming that some of the documents qualify as "drafts, notes, or correspondence with private individuals...." or "preliminary recommendations, and preliminary memoranda," which is unclear from the record, particularly given that Dr. Hatemi requested "agreements," those records or portions thereof which formed the basis of the agency's final action, *i.e.*, agreement, etc., whether explicitly or implicitly, forfeited their preliminary characterization and must be separated for disclosure per KRS 61.878(4).

KMSF also referenced KRS 61.878(1)(c)1. on appeal, which excludes from application of the Open Records Act "records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records[.]" To successfully invoke this exception, a public agency must establish that the public records in dispute satisfy all three of the required elements. 03-ORD-064, p. 5; 10-ORD-150. See KRS 61.880(1) and 61.880(2)(c). In the absence of *any* proof that certain records in dispute were confidentially disclosed to KMSF or required

to be disclosed to it, are generally recognized as confidential or proprietary, *and* are of such a character that disclosure would provide an unfair commercial advantage to competitors of the private corporation, this office must conclude that KMSF has failed to substantiate its position. See 11-ORD-076 (copy enclosed), following *Marina Management Service, Inc. v. Commonwealth of Kentucky, Cabinet for Tourism*, 906 S.W.2d 318 (Ky. 1995) and *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995).

Finally, as in 16-ORD-057, this office finds that KMSF has not presented "clear and convincing evidence" that Dr. Hatemi's request is unreasonably burdensome or made "for purposes of harassment," *i.e.*, intended to disrupt other essential functions of KMSF, as required to justify its denial on the basis of KRS 61.872(6), which it also invoked for the first time on appeal. See 16-ORD-057, pp. 4-5. The subject request for specified agreements between the identified parties from a certain time period is not so burdensome in scope as to alter the result here; the only additional fact offered in support of this argument by KMSF is that Dr. Hatemi has made "several requests" following issuance of 15-ORD-205, "each of which requires KMSF to devote significant resources to research and respond." However, "the obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." *Commonwealth v. Chestnut*, 250 S.W.3d 655, 665 (Ky. 2008). KMSF improperly relied on KRS 61.872(6) in denying the request.

Either party may appeal this decision by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should 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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16-ORD-057

March 30, 2016

In re: Lachin Hatemi/Kentucky Medical Services Foundation, Inc.

Summary: Decision adopting 15-ORD-205; Kentucky Medical Services Foundation, Inc., is a public agency subject to the Open Records Act, but failed to establish that it was subject to FERPA or to explain privacy interest implicated by disclosing names of Dean's Fund Scholarship recipients under KRS 61.878(1)(a); nor was there clear and convincing evidence of unreasonable burden or an intent to disrupt essential functions under KRS 61.872(6).

Open Records Decision

The question presented in this appeal is whether Kentucky Medical Services Foundation, Inc. ("KMSF"), violated the Open Records Act in the disposition of Dr. Lachin Hatemi's November 29, 2015, request for a "[l]ist of all recipients of Dean's Fund Scholarship in 2009, 2010, 2011, 2012, 2013, 2014 and 2015."[1] For the reasons stated below, we find that the records were improperly denied.

KMSF's response to the request, issued on December 1, 2015, stated: "The records that you requested ... are student protected [*sic*] by FERPA, 20 USC 1232g and exempt from disclosure under the Open Records Act, KRS 68.878(1)(k) [*sic*] and KRS 61.878(1)(a). Accordingly, we are not providing them to you." Dr. Hatemi appealed to this office the following day, arguing: "When individuals

[1] Other items included in the request do not appear to be at issue in this appeal.

apply for scholarships which are funded by public funds, they forfeit their right to privacy about their scholarship status. Since public funds had been disbursed as scholarships to unknown individuals based on an unknown criteria [*sic*], general public should have a right to know the identity of recipients of these scholarships."

On December 11, 2015, attorney Harry L. Dadds responded to the appeal on behalf of KMSF, making three arguments:

- First, KMSF argues that it is not subject to the Open Records Act. That argument was rejected by our recent ruling in 15-ORD-205, which we find controlling on that issue.
- Second, KMSF argues that the information sought is "student names protected by the Family Educational Rights and Privacy Act" and by KRS 61.878(1)(a).
- Third, KMSF argues that Dr. Hatemi "is attempting to disrupt KMSF operation in an attempt to harass and intimidate KMSF employees and officers," within the meaning of KRS 61.872(6), based on the fact that he has previously made a "massive" request for records as documented in 15-ORD-205.

Since 15-ORD-205 is controlling as to KMSF's first argument, we attach a copy of that decision and adopt its reasoning in this appeal to the effect that KMSF is a public agency established, created, and controlled by the University of Kentucky and its College of Medicine. We therefore begin by analyzing KMSF's second argument.

The Family Educational and Privacy Rights Act ("FERPA"), 20 U.S.C. § 1232g, provides at subsection (b)(1):

> No funds shall be made available under any applicable program to any *educational agency or institution* which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein *other than directory information, as defined in paragraph (5) of subsection (a) of this section)* of students without the written consent of their parents to any

> individual, agency, or organization, other than [certain limited exceptions.]

(Emphasis added.) Subsection (a)(5)(A) of the same statute defines "'directory information' relating to a student" as including:

> *the student's name,* address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and *awards received,* and the most recent previous educational agency or institution attended by the student.

(Emphasis added.) A threshold question is whether KMSF is an "educational agency or institution" within the meaning of 20 U.S.C. § 1232g(b)(1).

The term "educational agency or institution" does not appear to be defined for purposes of the chapter containing FERPA.[2] In KMSF's arguments presented in 15-ORD-205, which it incorporates into its response to the present appeal, KMSF represents that it was established as "a not for profit corporation that would bill and collect for services of medical faculty members, manage their practices and arrange for improved salaries and benefits." There is no indication of any educational mission, or any receipt of federal funds under an education program, that would qualify KMSF as an "educational agency or institution" subject to FERPA. Therefore, we conclude that KMSF has not made an adequate showing of the applicability of FERPA to records in its possession.[3]

We next address KMSF's argument that the names of Dean's Fund Scholarship recipients are subject to KRS 61.878(1)(a), which exempts from disclosure "records containing information of a personal nature where the public disclosure would constitute a clearly unwarranted invasion of personal privacy."

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[2] In Kentucky's equivalent of FERPA, however, KRS 160.700(2) does contain a definition of "educational institution" as "any public school providing an elementary and secondary education, including vocational."

[3] Furthermore, even if FERPA applied, the names of students and "awards received" would constitute "directory information" under the definition quoted above.

The language of the exemption "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny," while the Open Records Act as a whole "exhibits a general bias favoring disclosure" and places the burden of establishing an exemption on the public agency. *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992). This necessitates a "comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. [T]he question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 327-28.

The public interest in open records has been analyzed as follows by the Kentucky Court of Appeals: "At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing." *Zink v. Com., Dept. of Workers' Claims, Labor Cabinet,* 902 S.W.2d 825, 829 (Ky. App. 1994). On the other hand, the specific privacy interest in this case has not been in any way articulated by KMSF,[4] which has merely added a perfunctory reference to KRS 61.878(1)(a) with its citation of FERPA.

KRS 61.880(1) requires that "[a]n agency response denying ... inspection of any record shall include ... a brief explanation of how the exception applies to the record withheld." This explanation must not be "perfunctory," but must "provide particular and detailed information." *Edmondson v. Alig,* 926 S.W.2d 856, 858 (Ky. App. 1996). With no detailed explanation of the privacy interest at issue, we must find that KMSF has not met its burden of proof under KRS 61.880(2)(c) to sustain its invocation of KRS 61.878(1)(a), and therefore the exemption cannot be relied upon.

Lastly, KMSF argues under KRS 61.872(6) that "the application places an unreasonable burden in producing public records or of the custodian has reason to believe that repeated requests are intended to disrupt other essential functions

[4] KMSF has not stated whether Dean's Fund Scholarships are based on merit, financial need, or other factors. Indeed, part of Dr. Hatemi's complaint is that the scholarship is based upon "unknown criteria."

of the public agency." The statute provides that "refusal under this section shall be sustained by clear and convincing evidence." The present application, for a list of names of scholarship recipients over seven years, is certainly not burdensome in itself. Furthermore, in 15-ORD-205, we found that Dr. Hatemi's previous request for records from KMSF, though broad in scope, was not unreasonably burdensome. The addition of the negligible burden posed by the present application does not change that result; nor does it present clear and convincing evidence of an intent to disrupt essential functions of KMSF. Therefore, we find that KMSF has not sustained its refusal under KRS 61.872.

A party aggrieved by this decision may appeal it 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 should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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15-ORD-205

November 6, 2015

In re: Lachin Hatemi/Kentucky Medical Services Foundation, Inc.

Summary: Because discussions between the "Office [of the President of the University of Kentucky] and the administration of the College of Medicine [relating to the implementation of the 1978 University Board of Trustees' approval of 'a geographic full-time medical service plan'] resulted in the formation and incorporation of the Kentucky Medical Services Foundation, Inc.,"[1] the Foundation was "established [and] created" by the University and its College of Medicine, both public agencies. Evidence that the University and College of Medicine exercise extensive ongoing "control" of the Foundation through their annual agreements with the Foundation, under the terms of which the University's and/or College of Medicine's approval is required before the Foundation can carry out its business and affairs, supports the conclusion that the Foundation is a public agency for open records purposes pursuant to KRS 61.870(1)(j).

Open Records Decision

Dr. Lachin Hatemi appeals the partial denial of an open records request he submitted to Kentucky Medical Services Foundation, Inc., on July 12, 2015.[2] The records to which he requested access can be generally described as:

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[1] February 21, 1979, letter from President Otis Singletary to the Internal Revenue Service quoted by the Foundation in its September 11 supplemental response to Dr. Hatemi's appeal.

[2] Dr. Hatemi submitted an identical request to the University of Kentucky on July 11, 2015. In response to his request for audits, the University provided him with copies of "PDF documents from the University's Office of the Treasurer." The University denied his remaining requests because it possessed no responsive records.

1) records documenting the sources of Foundation income between January 2010 and January 2015;

2) Foundation audits for the same period;

3) Foundation financial statements for the same period;

4) records identifying the Foundation's *current* employees and their salaries;

5) records reflecting every expense or payment made by the Foundation for the same period; and

6) records of all donations made by the Foundation to "Child Development Center of the Bluegrass."

Relying on OAG 82-216, in which the Office of the Attorney General opined that the Foundation was not a public agency for open records purposes under that part of the Open Records Act now codified at KRS 61.870(1)(h), the Foundation denied that it was subject to the Act in its July 15, 2015, response. The Foundation distinguished 11-ORD-054 and 11-ORD-055, upon which Dr. Hatemi relied, asserting that it "is not an affiliated corporation of the University of Kentucky and is organized and operates quite differently than the two University of Louisville organizations that were the subject" of those open records decisions.[3] The Foundation nevertheless agreed to provide Dr. Hatemi with copies of requested information that is "furnished to the University of Kentucky under [its] contract with the University" upon payment of copying costs. However, the Foundation made clear that it would disclose only "legally permissible records" that are "not privileged or subject to confidentiality restrictions." Shortly thereafter, Dr. Hatemi initiated this appeal.

I. COLLATERAL ARGUMENTS

[3] Neither 11-ORD-054 nor 11-ORD-055 was appealed to the circuit court pursuant to KRS 61.880(5)(a). Those open records decisions "have the force and effect of law" as to the University of Louisville Medical School Practice Association, Inc., and University of Louisville Physicians, Inc. KRS 61.880(5)(b). They provide useful guidance here inasmuch as those public agencies closely resemble the Foundation.

Before proceeding to our review of the propriety of the Foundation's partial denial of Dr. Hatemi's request, we address three collateral arguments it advances.

A. Attorney General's jurisdiction and mootness

On behalf of the Foundation, the University of Kentucky contests this agency's authority to review the issues Dr. Hatemi's appeal raises, asserting that his appeal is a thinly disguised request for a declaratory judgment "regarding the legal status of [the Foundation]." The University focuses on the absence of any claim that the Foundation denied Dr. Hatemi access to records, declaring that a KRS 61.880(2) open records appeal to the Office of the Attorney General "is not the proper process to pursue a declaratory judgment action."[4]

We respond with a quotation from 11-ORD-157[5] in which a nearly identical argument was made:

> This contention ignores the plain language of KRS 61.880(2)(a), which mandates that the Attorney General shall review the complaining party's "written request and copy of the written response denying inspection" and issue "a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884." Since the earliest days of the Open Records Act, our review has included resolution of the threshold issue of public or non-public agency status. [Citing OAG 76-648 and OAG 76-663.] The Attorney General clearly has the authority to review any denial regardless of the grounds for denial, and pursuant to KRS 61.880(5)(b), his decisions have the force and effect of law if not timely appealed. [Footnote omitted.]

The Foundation denied Dr. Hatemi's request to the extent it agreed to release only "legally permissible" records that are "not privileged or subject to confidentiality restrictions." The issue he presents on appeal is appropriate for review by this office. 12-ORD-046, n. 1 ("This office has often recognized that an

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[4] University's first supplemental response to Dr. Hatemi's open records appeal dated August 7, 2015.

[5] Reversed on other grounds. *University Medical Center, Inc., v. American Civil Liberties Union of Kentucky, et al.* ---SW3d---(Ky. App. 2014) 2014 WL 53693240.

open records appeal is not mooted by partial disclosure of the records identified in the underlying request"); see also 11-ORD-198 (because requester received "only a portion of the requested documents, . . . the issue on appeal was not mooted by partial disclosure").

B. Existence of an ostensibly conflicting Attorney General's opinion

The Foundation places heavy reliance on OAG 82-216, an advisory opinion issued by this office under authority of KRS 15.025 that focused exclusively on the Foundation's status under the definitional section of the Act now codified at KRS 61.870(1)(h) that defines the term "public agency" to include entities that received 25% or more of their funding from state or local authority.[6] Based on the facts and figures presented in 1982, we concluded that the Foundation did not receive state or local funding equal to or greater than 25% of its total funding and that it was not, therefore, a public agency under that narrow definitional section. We did not address the application of any other part of KRS 61.870(1), defining the term "public agency."

In 11-ORD-157[7] we rejected a similar argument, noting that an earlier open records decision examined:

> whether [the entity] was a public agency under KRS 61.870(1)(h) [footnote omitted], an inquiry that focused on whether [the entity] derived at least twenty-five percent of the funds expended by it in the Commonwealth from state or local authority funds. The decision did not, however, analyze whether [the entity] was a public agency under KRS 61.870(1)(j) [footnote omitted], which clarifies that an entity [established, created, and] controlled by a public agency is itself a public agency. It is this issue we resolve today . . . .

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[6] KRS 61.870(1)(h) establishes the "25% rule" but has been amended over time. It currently provides:

> Any body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, any funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a public agency under this subsection[.]

[7] See note 5, above.

The existence of the earlier *open records decision* presented no impediment to our review of the new issues. We decline the Foundation's request that we treat an opinion, issued when the Open Records Act was in its infancy, and confined to a single inquiry, as controlling on all appeals involving the Foundation. Although recipients of advisory opinions, issued by the Attorney General under authority of KRS 15.025 "are expected to abide by the opinion until a court decrees otherwise or the legislature changes the law," such an opinion is "not binding on the recipient." *York v. Commonwealth,* 815 S.W.2d 415 (Ky. App. 1991) citing 7 Am.Jur.2d Attorney General §11 (1980). Nor does it represent *stare decisis* when the question of an ostensibly private entity's status is reviewed under a different statute.

C. *Constitutional arguments*

The Foundation and the University, on the Foundation's behalf, advance two arguments militating against a finding that the Foundation is a public agency. These arguments are premised on the constitutional right of free association and the constitutional prohibition on the taking of private property for public use without just compensation. Because the Attorney General's review under KRS 61.880(2)(a) is restricted to deciding, "whether the agency violated provisions of KRS 61.870 to 61.884," we respectfully decline to review these constitutional issues. 01-ORD-129 (declaring that an "open records appeal to the Attorney General is not an appropriate forum in which to challenge the constitutionality of a statute"); see also 08-ORD-149 (concluding that "the Office of the Attorney General is not the appropriate forum for resolution of non-open records related issues").

II. ANALYSIS

Having addressed in Part I the collateral arguments raised by the University and the Foundation, we turn to the question whether the Foundation is a public agency as defined in KRS 61.870(1)(j). Because the Foundation was established and created by the University and its College of Medicine, and because these public agencies exert continuing control over the Foundation, the answer to this question is "yes." A detailed analysis follows.

In addition, we address the question whether the Foundation properly relied on KRS 61.872(6) and "confidentiality restrictions" in denying, in whole or in part, Dr. Hatemi's request. Because the Foundation failed to meet its

statutorily assigned burden of proof[8] in denying Dr. Hatemi's request, in whole or in part, the answer to this question is "no." Our analysis is based on a careful review of the voluminous record submitted by Dr. Hatemi, the Foundation, and the University on appeal. That record is not recited here in the interest of brevity.

A. *The Foundation is a public agency under KRS 61.870(1)(j) of the Open Records Act.*

The Foundation is a Kentucky nonstock, nonprofit corporation. At its inception its purpose "was to bill and collect for services of medical faculty members, manage their practices, and arrange for improved salaries and benefits." Foundation's First Supplemental Response, p. 1. In its Second Supplemental Response, counsel explained that the Foundation "assists the University of Kentucky from time to time in other ways that are consistent with this purpose." Foundation's Second Supplemental Response, p. 6.[9] In an affidavit attached to the Foundation's first supplemental response to Dr. Hatemi's appeal, Dr. Emery A. Wilson described the Foundation's genesis:

. . .

2. [In 1976], UKCOM [College of Medicine] was having a great deal of trouble attracting and retaining quality faculty members. This was so because the compensation and benefits were not competitive with outside practices or many other academic medical centers.

3. By 1978, faculty leadership at the UKCOM sought to improve this situation. To that end, we appointed a committee and hired a consultant,[10] John Kasonic of Seattle, Washington, to advise us about the establishment of a faculty practice plan. I served on that committee.

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[8] KRS 61.880(2)(c) assigns the burden of proof to the public agency to "sustain the action" taken.

[9] Among the many documents submitted to this office by the parties, UHCCRI describes the faculty practice plan, which the Foundation implements, as "a means to account for, manage, and distribute funds generated by faculty from patient care and other activities that generate funds from third parties."

[10] Dr. Hatemi alleges, and the Foundation does not dispute, that the University allocated $25,000.00 to the College of Medicine to retain a consultant's services and defray the cost of salaries and operating expenses.

> 4. After discussing this matter with the consultant, the committee and then dean, D. Kay Clawson, M.D., decided to approach the University about recognizing a practice plan for faculty of UKCOM in which a not for profit corporation conducted billing, collection and practice management functions for UKCOM faculty. The University approved the concept.
>
> . . .

The University Board of Trustee's resolution "establish[ing] a geographic full-time medical services plan for the University College of Medicine" was adopted on June 19, 1978. The Foundation's original Articles of Incorporation were filed with the Secretary of State on the same date and identify five staff physicians, including then Dean of the College of Medicine, as its directors.

In a separate affidavit submitted to this office, Dr. Marcus E. Randall stated that the Foundation's current board "has a director from each of the eighteen clinical departments." This includes Dr. Randall who is chair of the College of Medicine's Department of Radiation Medicine and current president of the Foundation. The board also includes six directors "elected at large from a defined constituency." Foundation's First Supplemental Response, p 2. Dr. Randall did not elaborate on the meaning of "defined constituency," but maintained that the board "determine[s] its own composition." The University, he emphasized, "has no authority to appoint, approve, deny appointment, revoke appointment, recommend or otherwise influence the Board of Director composition."

Our analysis of the Foundation's status as a public agency is based on a comparison of the Foundation to the ostensibly private entity that was the subject of the court's analysis in *University Medical Center, Inc. v. American Civil Liberties Union of Kentucky, Inc.; The Courier Journal, Inc.; Patrick Howington, Belo Kentucky, Inc. D/B/A WHAS-TV; Adam Walser; and John Keith Smith*, -- SW3d --, 2014 WL 53693240, (Ky. App. 2014).[11] In that case, the Kentucky Court of Appeals held that UMC, "the operator of University of Louisville Hospital and related facilities," is a public agency under the Open Records Act. Adopting the circuit court's analysis, the appellate court reasoned that UMC qualified as a public agency under KRS 61.870(1)(i), defining a public agency as "[a]ny entity where

[11] This case became final on September 16, 2015.

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" rather than KRS 61.870(1)(j). The latter statute defines "public agency" as:

> 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 as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection[.]

Focusing on the "causal connection" between UMC's "establishment and creation" and the University's issuance of request for proposals for the operation and management of the U of L Hospital, in 11-ORD-157 we concluded that UMC was established and created by U of L. We also determined that the University "controlled" UMC's officers and directors, all physician administrators or U of L School of Medicine professors, through staff appointments.

Based on the fact that the presidents of Jewish Hospital Health Care Services and Alliant Health System, Inc., (subsequently known as Norton Healthcare), two private healthcare providers, created UMC, albeit in response to U of L's RFP, the court rejected our position, opining:

> While it is obvious U of L was instrumental in UMC's creation, its role was only as an instigator and beneficiary, neither of which makes UMC a public agency.

University Medical Center, Inc., 2014 WL 5369340 at p. 6. Further, the court did not agree that the University of Louisville controlled UMC through staff appointments. The court maintained that "[t]he key inquiry . . . in this hurdle is the nature and character of the creators, and in UMC's case, it was two private citizens overseeing two private healthcare providers – Jewish and Norton; it was not U of L, a public agency." *Id.*, at 7. The court agreed that "U of L controls [University of Louisville] Hospital," but emphasized that UMC "operates and manages [the hospital]." *Id.* The court concluded that UMC was a public agency pursuant to KRS 61.870(1)(i) because "the majority of its governing body is appointed by a public agency" through the University president's control of the nominating committee for its community directors.

Here, we clear the first "hurdle" erected by the court. Unlike UMC, the Foundation's "creators" were the University of Kentucky's Board of Trustees and the University's College of Medicine, both public agencies. Its Articles of Incorporation were filed with the Secretary of State on the same day the Board of Trustees adopted the resolution establishing a "full-time medical services plan for the University College of Medicine," by, *inter alia*, five College of Medicine physicians, including the dean, and not private actors. These public agencies were much more than instigators for, and beneficiaries of, the Foundation. They established and created the Foundation.

Compelling evidence of the public agencies' roles in the Foundation's establishment and creation is found in President Otis Singletary's February 21, 1979, letter to the Internal Revenue Service. In it, he states that discussions "between [his] office and the administration of the College [of Medicine] resulted in the formation and incorporation of the Kentucky Medical Services Foundation, Inc.," and that "[t]he Corporation has been organized to meet...criteria enumerated by the Board [of Trustees]." Quoted text appearing in the Foundation's Second Supplemental Response at p. 2, 3. We focus not on the characterization of the Foundation as an affiliated corporation,[12] a nonaffiliated corporation,[13] or "a blended component"[14] of the University, or on the repeated characterization of its relationship with the University as "contractual," but on the University's own words in describing how the Foundation was established and created. Thus, we clear the hurdle, postulated by the court in *University of Medical Center, Inc.*, above, as to the public nature and character of the Foundation's creators.

Similarly, we clear the hurdle erected by the court as it relates to "control" of the Foundation. The court was not satisfied that the University of Louisville controlled UMC through its ability to appoint the dean and medical school department chairs, all of whom served on UMC's governing board by virtue of their appointments. The court found no evidence that the University controlled UMC. Instead, the court concluded that UMC is a public agency pursuant to KRS 61.870(1)(i) because the University is empowered to appoint a majority of UMC's Board of Directors through the President's control of its nominating committee.

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[12] University of Kentucky 2005 Consolidated Financial Statements, Notes to Consolidated Financial Statement, p. 16.

[13] Foundation's July 15, 2015, response to Dr. Hatemi's July 12, 2015, open records request.

[14] University of Kentucky 2014 Financial Statement, p. 1.

Documents submitted to this office in the course of Dr. Hatemi's appeal confirm that the University of Kentucky and the College of Medicine exercise extensive and continuing control of the Foundation. First and foremost, the Foundation is required to obtain the University's written consent before altering or amending its Articles of Incorporation or adopting "any by-law or other operating practice which would effectively alter the character of said foundation." July 1, 2015, Agreement between the Board of Trustees of the University of Kentucky and Kentucky Medical Services Foundation, Inc. ("Agreement"), Section 9, Particular Covenants of the Foundation, Part A. Since the by-laws specifically fix the composition of the Foundation's Board of Directors, this would include any alteration in the membership of the board. We note other significant examples of University control of the Foundation:

- Agreement Section 9. Part B. prohibits the Foundation from soliciting, administering, performing, or accepting any gift, grant, devise, or bequest without written University consent;
- Agreement Section 11. Personnel, requires the Foundation to adhere to the plan adopted by the University's Board of Trustees on June 20, 1978, "as amended on March 3, 1980, September 15, 1981, June 19, 1984, and June 13, 1995," in its personnel and staffing decisions;
- Agreement Section 9. Part C. restricts the Foundation from conveying assets upon dissolution except under the terms required by the University in the agreement and from merging with another corporation without the University's written consent;
- Agreement Section 14. Part B. requires the Foundation to submit to "an audit of [its] operations and accounts" by the University's internal auditors and furnish the University with annual audited financial statements and quarterly financial statements if requested by the University's treasurer;
- Agreement Section 9. Part B. prohibits the Foundation from soliciting, administering, receiving, performing, or accepting any gift, grant, devise, or bequest with or from any governmental unit, person, corporation, or "other entity whatsoever," without the University's written consent;
- Agreement Section 10. Part C. prohibits the Foundation from billing for, collecting, or administering any item of income for non-plan members without the University's written consent;
- Agreement Section 23. Additional Activities, requires the University's prior written approval before the Foundation engages in business

activities "of any and/or all types" to "individuals and entities within and/or outside the Plan";

- Agreement Section 10. Part F. requires the Foundation to "report promptly to the University" any individual who fails or refuses to abide with its Practice Agreements and Assignments and to join with the University in any legal action necessary to secure compliance with the practice agreements.

Each of these requirements divests the Foundation of the general powers conferred on a nonprofit corporation by KRS 273.171 and suggests a less than arms-length contractual relationship between the Foundation and the University. These requirements and prohibitions confirm the University's extensive and continuing control of the Foundation.[15] Our analysis can yield a single result: the Kentucky Medical Services Foundation, Inc., was established and created by the University of Kentucky and its College of Medicine, and the University and the College of Medicine control the Foundation. The Foundation is, therefore, a public agency as defined in KRS 61.870(1)(j).

B. The Foundation failed to meet its burden of proof in denying all or part of Dr. Hatemi's request on the basis of burden or the existence of "confidentiality restrictions."

If the Office of the Attorney General concluded that it is a public agency, the Foundation argued that it was justified in denying all or part of Dr. Hatemi's request because the request was unreasonably burdensome. KRS 61.872(6) creates an exception to the general rule of openness by recognizing:

> If the [records] application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

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[15] We do not analyze the membership of the Foundation's Board of Directors, and how those members are selected, since "the selection of the directors in itself does not amount to control." *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51 (Ky. 2003) cited in *University of Louisville Foundation, Inc. v. Cape Publications, Inc., d/b/a The Courier Journal*, 2003 WL 22748265 (unpublished) (recognizing that Foundation is a public agency for open records purposes pursuant to KRS 61.870(1)(j)).

In construing this provision, the Kentucky Supreme Court has declared that "a public agency refusing to comply with an open records request on this unreasonable burden basis faces a high proof threshold since the agency must show the existence of the unreasonable burden by 'clear and convincing evidence.'" *Commonwealth v. Chestnut*, 250 S.W.3d 655, 664 (Ky. 2008). Continuing, the Court observed, "the obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden." 250 S.W.3d at 665.

In responses and attached affidavits submitted prior to September 10, 2015, the Foundation described the burden it envisioned in fulfilling Dr. Hatemi's request. However, on September 10 the Foundation provided Dr. Hatemi with a spreadsheet created from the nonexempt portions of documents responsive to his request. The Foundation's ability to do so undermined its argument that fulfillment of the request was unreasonably burdensome. While we have no doubt that fulfillment of the request consumed a great deal of time and manpower, we are unable to affirm the Foundation's denial of the request under KRS 61.872(6) in the face of its successful completion of the task.

Nor are we able to extend protection to portions of the records identified in Dr. Hatemi's request based on "confidentiality restriction." These restrictions were belatedly identified as HIPAA (45 C.F.R. 164.512), FERPA (20 USC 1232g), and "legitimate confidentiality claims for trade secrets and similar matters." KRS 61.880(1) requires a public agency that denies all or part of an open records request to "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." In *Edmondson v. Alig*, 926 S.W.2d 856, 858 (Ky. App. 1996), the Court of Appeals construed this provision to require the agency "to provide particular and detailed information in response to a request for documents," admonishing the public agency for its "limited and perfunctory response." In 2013, the Supreme Court reaffirmed this view declaring that an agency's denial must be "detailed enough to permit [the reviewer] to access its claim and the opposing party to challenge it." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 82 (Ky. 2013). The Foundation's partial denial, which references federal law and "legitimate confidentiality claims" but does not identify categories of records, or parts of records, withheld under these provisions, was deficient under KRS 61.880(1), standing alone, and as construed by the courts. We therefore find that the Kentucky Medical Services Foundation, Inc., a public

agency under KRS 61.870(1)(j), did not meet its statutorily assigned burden of proof in partially denying Dr. Hatemi's open records request.

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 should 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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