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16-ORD-101

May 19, 2016

In re: Lachin Hatemi/University of Kentucky Healthcare Compensation Planning Committee

*Summary:* The Attorney General has the authority to request additional documents in deciding Open Records or Open Meetings appeals. The record before the Attorney General shows that the University of Kentucky Healthcare Compensation Planning Committee is a public agency and failed to meet its statutorily assigned burden of proving that it conducted an adequate search for requested meeting minutes.

*Open Records Decision*

Lachin Hatemi appeals the University of Kentucky Healthcare Compensation Planning Committee's denial of his January 19, 2016, request for all committee meeting minutes "between January 2010 and December 2015." On January 25, 2016, the University of Kentucky's Official Records Custodian, Bill Swinford, denied Dr. Hatemi's request informing him that "the Office of the Executive Vice President for Health Affairs has advised that there are no documents responsive to [the] request." Upon receipt of the committee's denial, Dr. Hatemi initiated this appeal.

Responding to Dr. Hatemi's appeal through counsel, the committee challenged the Attorney General's authority to proceed further in his legal analysis when a public agency denies the existence of the requested record(s). Anticipating that this office would request additional documentation from the

committee to substantiate the committee's position, counsel argued the Attorney General does not have such authority. Counsel relied on *Cabinet for Health & Family Servs. v. Todd Cty. Standard, Inc.*, 2015 WL 8488911, \*2 (Ky. App. December 11, 2015) (emphasis added) to support its belief that only a court, and not the Attorney General, is authorized to review a denial based on the nonexistence of the requested record. The Attorney General, he maintained, lacks any such authority.

Counsel, however, ignores the facts and the holding in *Todd County Standard, Inc.* That case arose from an appeal to the Attorney General in which the Cabinet for Health and Family Services denied the existence of records relating to a child who was brutally murdered by her adopted brother following an inter-family adoption arranged by the Cabinet and years of abuse at the hands of her adoptive parents. Among the additional documentation we sought from the Cabinet, pursuant to KRS 61.880(2)(c),<sup>1</sup> was a description of "the search method employed by the Cabinet in attempting to locate records responsive to [the reporter's] request." *Id.* at \*5.<sup>2</sup> The court did not question the Attorney General's authority to request additional documentation under KRS 61.880(2)(c) but instead expressed consternation at the Cabinet's "blatant[ ] refus[al] to respond" to this and all other requests for additional documentation. "[If] the Cabinet had responded truthfully to these questions the existence of records relating to [the deceased child] would have been revealed." *Id.* at \*6. Continuing, the court observed:

By refusing to respond to the Attorney General's questions, the Cabinet certainly frustrated the Attorney General's statutory review under KRS 61.880 and also the timely release of records under ORA. . . .

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<sup>1</sup> KRS 61.880(2)(c) states in part:

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.

<sup>2</sup> This is the same request for additional documentation, among other requests, that we presented to the committee.

The Cabinet cannot benefit for intentionally frustrating the Attorney General's review of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General under KRS 61.880(5).

*Id.* The court's holding confirmed the Attorney General's authority to request additional documentation pursuant to KRS 61.880(2)(c).

The operative language from *Todd County Standard, Inc.*, is directly drawn from 11-ORD-074, the open records decision from which the case arose. 11-ORD-074, p. 3-4 (enclosed). "[W]e believe the existence of a statute ... directing the creation of the requested record creates a presumption of the records existence...." The presumption of the existence of committee meeting minutes is, in this case, based on KRS 61.835. That statute provides:

The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body.

Our requests for additional information were aimed at determining not only the adequacy of the search for the minutes but also whether the committee constitutes a public agency for purposes of the Open Records and Open Meetings Acts. If so, we reasoned, the committee was statutorily obligated to generate "an accurate record of votes and actions taken." The minutes would presumptively exist. If not, we reasoned, the committee was not statutorily obligated to generate "an accurate record of votes and actions" and minutes would not presumptively exist.

KRS 61.805(2)(g) and KRS 61.870(1) (j) define the term "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)]<sup>3</sup> of this subsection[.]

With the exceptions noted below, these statutes are identical. Our analysis therefore focused on the existence of legal authority supporting the committee's position that it is not a public agency and therefore not required by KRS 61.835 to create minutes of its meetings or conduct an adequate search for those minutes. We requested additional documentation about the identities of the members of the committee, their titles, how they came to serve, if they were appointed, and by whom; from what source the committee derives its authority and the parameters of that authority; whether the committee has adopted bylaws, or governing policies/procedures for the conduct of its meetings; and whether it is the committee's position that it is "a committee of a hospital medical staff" and therefore excluded from both the Open Records and Open Meetings Act.

From the committee's limited response,<sup>4</sup> we learned that the "Dean of the College of Medicine - not the Board of Trustees or the President or the Provost - established" the committee, and that the committee's "membership consists of the eighteen clinical department chairs as well as a certain number of other members selected by the Kentucky Medical Services Foundation."<sup>5</sup> In addition, we learned that the committee "provides advice to the Dean concerning the compensation for clinical faculty, but has no policy-making or decision-making authority."<sup>6</sup> The committee likened itself to the "three person advisory group

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<sup>3</sup> References to (g), (i), and (k) appear only in KRS 61.870(1)(j) and not in KRS 61.805(2)(g). KRS 61.805(2)(g) also excludes from the term "public agency" "a committee formed for the purpose of evaluating the qualifications of public agency employees," but is, in all other material respects, identical to KRS 61.870(1)(j).

<sup>4</sup> The committee declined our request for records and information relating to its establishment, membership, and role, trusting that its "explanation is sufficient."

<sup>5</sup> The committee characterizes KMSF as "a private entity that bills on behalf of the University's clinical facility." This characterization is at odds with 15-ORD-205, concluding that KMSF is a "public agency" pursuant to KRS 61.870(1)(j).

<sup>6</sup> In supplemental correspondence, Dr. Hatemi highlighted a portion of the minutes of the June 9, 2014, Board of Trustees Healthcare Committee Retreat in which a representative of the committee explained that the committee "seeks to provide fair and equitable compensation for professional activities of the physician faculty by incentivizing productivity through 1) the use of objective measures to reward performance, 2) uncoupling bonuses from departmental fund balances

that made recommendation" and that was deemed not to be a "public agency" in *Taylor v. Bowling Green Municipal Utilities*, 2012 WL 5371994 at \*2-3 (Ky. App. 2012).<sup>7</sup>

*Taylor* is inapposite. In that case the Kentucky Court of Appeals clearly distinguished between "a group of individuals appointed by formal action of [a public agency] as an advisory committee," such as the Presidential Search Committee, deemed to be a "public agency" in *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884 (Ky. 1987), and the two employees asked by the general manager of the municipal utilities to help him sort through "Insurance Agency/Agent Selection" proposals, which the court deemed not to be a "public agency." "An informal group of individual employees is not," the court opined, "akin to a committee created by formal action" of a public agency. *Taylor*, 2012 WL 5371994 at \*3. As a committee established by the Dean of the College of Medicine to advise on faculty compensation, a majority of whose members are clinical department chairs appointed by the Dean,<sup>8</sup> and expressly charged with the duty to advise the Dean on faculty compensation, we find no parallel between the employees in *Taylor* and the committee established by the Dean. Accord 15-ORD-155 (distinguishing *Taylor* and holding that a committee established by the Kentucky Board of Education to "narrow[ ] the search for a firm to assist the Board in finding a new commissioner of education" is a public agency pursuant to KRS 61.805(2)(g)).

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linking instead to overall financials, and 3) standardizing DOE reporting." The representative emphasized the committee's "substantial progress" in "add[ing] definition, consistency, and transparency to faculty efforts and compensation."

<sup>7</sup> *Taylor* is an unpublished opinion rendered after January 1, 2003, that, pursuant to KRS 76.28(4)(c), may be cited for consideration if there is no published opinion that sufficiently addresses the issue.

<sup>8</sup> Here, we are "frustrated in our statutory review" by the committee's refusal to directly answer our requests for additional documentation as to who makes appointments, the total number of members, and how many appointments are made by KMSF. The committee bears the burden of proving that the committee is or is not a public agency and its failure to do so militates against resolution of the issues in its favor. It "cannot benefit for intentionally frustrating the Attorney General's review." *Todd County Standard*, 2015 WL8488911 at \*6.

KRS 61.870(1)(j) does not state that the Board of Trustees, the President, or Provost are the only "public agencies" authorized to establish, create, and control a committee. Clearly, the College of Medicine is a public agency, and, acting through its dean, was authorized to establish, create, and control the Healthcare Compensation Planning Committee. Were the statutes intended to be construed in the narrow fashion the University suggests, only the highest ranking officials or governing bodies of a public agency could appoint a committee that is subject to the Open Records and/or Open Meetings Acts and only a decision- or policy-making committee would fall within its reach. Such an interpretation flies in the face of KRS 61.805(2)(g) and KRS 61.870(1)(j), both aimed at ensuring accountability of "committees, subcommittees, *ad hoc* committees, [and] *advisory* committees" of public agencies and at preventing government by secret committee. Our analysis is not altered by the fact that the committee acts in an advisory and not a decision making role. The express language of KRS 61.805(2)(g) and KRS 61.870(1)(j) resolve this question against the committee's narrow interpretation.

The committee relies on 13-OMD-187,<sup>9</sup> 13-OMD-177,<sup>10</sup> 13-OMD-176<sup>11</sup> for the proposition that committees of the University of Louisville, and, by extension, committees of the University of Kentucky, are not public agencies within the meaning of KRS 61.805(2)(g) and KRS 61.870(1)(j). The analysis in those open meetings decisions turned on the application of a 1994 opinion addressing the extent to which the Open Meetings Act "reaches down through layers of administrative organization to affect the day-to-day administrative work" of universities. OAG 94-25 was an advisory opinion issued under authority of KRS 15.025. It supports the conclusion that the committee is a public agency.<sup>12</sup> OAG 94-25 presumes a case-by-case application of *general* principles to

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<sup>9</sup> 13-OMD-187 determined that a faculty group tasked with reviewing and evaluating student written examinations, characterized as an administrative function, was not a "public agency."

<sup>10</sup> 13-OMD-177 determined that the work of a department "Ph.D. Program Faculty" was "too remote from the decision making process" to qualify as a "public agency."

<sup>11</sup> 13-OMD-176 determined that the same department's faculty performed administrative work and was not, therefore, a "public agency."

<sup>12</sup> The committee easily satisfies each of the factors identified in the OAG 94-25 supporting a finding that it *is* a "public agency." Specifically,

*individual* committees. None of the entities with which this office dealt in 13-OMD-187, 13-OMD-177, or 13-OMD-176 bore the indicia of "advisory committee" status, and thus "public agency" status, that the Healthcare Compensation Planning Committee bears. Moreover, in a number of other open meetings decisions, including 13-OMD-012, 13-OMD-037, 13-OMD-040, and 13-OMD-090, *inter alia* the Attorney General concluded that committees of the University of Louisville were, in fact, public agencies within the meaning of KRS 61.805(2)(f) and KRS 61.805(2)(g), although they were not policy- or decision-making bodies and their members were not appointed by the President, Provost, or Board of Trustees. See also 15-OMD-155 (and authorities cited at p. 6).

Our review of the limited information provided to us in response to our KRS 61.880(2)(c) requests supports the conclusion that, as an advisory committee established, created, and controlled by the College of Medicine through its Dean, a majority of whose members are appointed by the Dean, and charged by the Dean with advising him on faculty compensation, the Healthcare Compensation Planning Committee is a "public agency" within the meaning of KRS 61.805(2)(f) and KRS 61.805(2)(g) as well as KRS 61.870(1)(i) and (j). Accordingly, KRS 61.835 establishes a presumption that minutes of its meetings exist and must be maintained on a permanent basis pursuant to Record Series U0104, State University Model Retention Schedule, incorporated by reference into regulation at 725 KAR 1:061 Section (2)(w). Upon receipt of Dr. Hatemi's request, the committee was legally obligated to conduct an adequate search, as defined in 95-ORD-96,<sup>13</sup> for the minutes. University counsel described the scope of the search for minutes as follows: "[the] Director of Open Records contacted the Office of Executive Vice President for Health Affairs and asked whether the

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- its members act as a unit in advising the Dean on faculty compensation matters;
  - authority to advise on faculty compensation has been officially delegated to it by the Dean;
  - its responsibility is to consider, investigate, and report to the Dean; and
  - specific matters, namely advising the Dean on equitable compensation for physician faculty, are entrusted to it.

OAG 94-25.

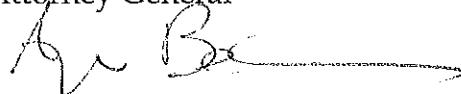
<sup>13</sup> In 95-ORD-96, the Attorney General stated that public agencies must "make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested."

administrative body kept minutes." He described no effort on the part of *any* employee or committee member to conduct an actual search for meeting minutes and refused to describe any details of a search. The Committee has not met its burden of proof in rebutting the presumption that the records in question exist.

Having determined that the Healthcare Compensation Planning Committee is a public agency, that minutes of its meetings presumptively exist, and that the presumption was *not* rebutted, we find that the committee violated KRS 61.880(1) by impeding the timely release of committee meeting minutes when it failed to conduct an adequate search for the minutes.<sup>14</sup>

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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Distributed to:

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<sup>14</sup> This office cannot address the committee's apparent past failure to create and maintain minutes, since this violation arises under the Open Meetings Act and was not properly presented to the Attorney General. We trust, however, that the committee will be guided by this open records decision in responding to open records requests and conducting future business. See KRS 61.846(2) and 40 KAR 1:030 Section (1).