

## 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.,”<sup>1</sup> 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.<sup>2</sup> The records to which he requested access can be generally described as:

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

- 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.<sup>3</sup> 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

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.

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<sup>3</sup> 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.

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."<sup>4</sup>

We respond with a quotation from 11-ORD-157<sup>5</sup> 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 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*

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<sup>4</sup> University's first supplemental response to Dr. Hatemi's open records appeal dated August 7, 2015.

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

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.<sup>6</sup> 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<sup>7</sup> 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 . . . .

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

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<sup>6</sup> 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[.]

<sup>7</sup> See note 5, above.

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<sup>8</sup> 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.*

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<sup>8</sup> KRS 61.880(2)(c) assigns the burden of proof to the public agency to “sustain the action” taken.

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.<sup>9</sup> 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,<sup>10</sup> John Kasonic of Seattle, Washington, to advise us about the establishment of a faculty practice plan. I served on that committee.
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.

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The University Board of Trustee’s resolution “establish[ing] a geographic full-time medical services plan for the University College of Medicine” was adopted

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<sup>9</sup> 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.”

<sup>10</sup> 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.

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).<sup>11</sup> 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 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[.]

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<sup>11</sup> This case became final on September 16, 2015.

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,<sup>12</sup> a nonaffiliated corporation,<sup>13</sup> or “a blended component”<sup>14</sup> 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.

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:

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<sup>12</sup> University of Kentucky 2005 Consolidated Financial Statements, Notes to Consolidated Financial Statement, p. 16.

<sup>13</sup> Foundation’s July 15, 2015, response to Dr. Hatemi’s July 12, 2015, open records request.

<sup>14</sup> University of Kentucky 2014 Financial Statement, p. 1.

- 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.<sup>15</sup> 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.

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

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<sup>15</sup> 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)).

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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