NO. 16CI-4800

JEFFERSON CIRCUIT COURT
DIVISION ONE (1)

UNIVERSITY OF LOUISVILLE

PETITIONER

v.

ORDER DENYING THE UNIVERSITY OF LOUISVILLE'S PETITION FOR DECLARATION OF RIGHTS

PETER HASSELBACHER, M.D.

RESPONDENT

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This is an action for a declaration of rights in which the University of Louisville (the "University") seeks a declaration of rights with respect to an opinion issued by the Attorney General that found that the University violated Kentucky's Open Records Act by failing to provide and adequately search for records requested by Dr. Peter Hasselbacher. The Court heard oral arguments regarding the matter on April 14, 2018. A video recording of that proceeding was reported under digital recording no. 30-01-18-DR-067. Both parties have filed detailed briefs outlining their respective positions on the issues raised by the petition. The Court now considers the matter to be ripe for a decision.

Factual Background

On February 5, 2016, the University's then president, Dr. James Ramsey, publicly suspended postseason and NCAA tournament play for the University's Division One men's basketball team. Five days later, on February 10, 2016, Dr. Peter Hasselbacher sent an open records request to the University via electronic mail. Specifically, Dr. Hasselbacher requested that the University release to him "all the documents, reports and other information [P]resident Ramsey had in hand to cause him to [suspend tournament and post-season play for the

University's men's basketball team] on behalf of the University." In addition, Dr. Hasselbacher stated that "if the decision was made or supported by another party such as an administrator or program director in the athletics department, I also request all records used by such a representative to endorse or support the final action by [P]resident Ramsey."

Three days after Dr. Hasselbacher submitted his request, the University's official records custodian, Sherrie Pawson, sent a one-sentence letter to him stating that the University "had no records responsive to [his] request." Ms. Pawson did not elaborate on how the University had interpreted Dr. Hasselbacher's request or why it lacked records that were responsive to his request. Ms. Pawson also made no attempt to deny that President Ramsey had information available to him in making the decision to suspend the men's basketball team from competing in postseason and NCAA tournament play.

On February 27, 2016, Dr. Hasselbacher appealed the University's response to his open records request to the Attorney General pursuant to KRS 61.880(2)(a).[1] Dr. Hasselbacher argued that the University would not have taken "such a serious action" as suspending the men's basketball team from postseason and NCAA tournament play "without any documentation" and that, as a result, it violated the Open Records Act by withholding documents that were relevant to President Ramsey's decision to do so. On March 8, 2016, the University responded to Dr. Hasselbacher's appeal in a letter to the Attorney General. The University once again denied that it had any documents that were responsive to Dr. Hasselbacher's request in its possession, custody, or control.

During the course of the appeal, the Attorney General sought additional information from the University related to the methods it used to search for "records in President Ramsey's

1 KRS 61.880 gives a complaining party the right to appeal a public agency's denial of a request to inspect a public record to the Attorney General. *See* KRS 61.880(2)(a).

custody . . . and records in the custody of other parties" that were responsive to Dr. Hasselbacher's request. The University responded to the Attorney General's request on March 22, 2016 by stating that President Ramsey had confirmed that he "had no documents in hand" that caused him to make the decision to suspend the men's basketball team from postseason and NCAA tournament play. The University also *avers* that it conferred with Chuck Smrt, a private investigator whom it hired to investigate allegations of misconduct concerning the men's basketball team, and that Mr. Smrt confirmed that President Ramsey did not have any documents, other than a copy of the NCAA's bylaws, at the time that he made the decision to suspend the men's basketball team from postseason and NCAA tournament play.[2]

On June 15, 2016, the Attorney General sent a second request to the University for additional information. The Attorney General stated that the University's response was "based upon an erroneous belief that Dr. Hasselbacher's request was confined to 'documents, reports, and other information' that [P]resident Ramsey had 'in hand' on February 4 when the decision [to suspend the men's basketball team from postseason and NCAA tournament play] was made." The Attorney General demanded *in camera* inspection of "any records . . . relating to the NCAA's investigation into the widely reported allegations concerning the men's basketball team and Mr. Andre McGee, former director of basketball operations, which led to the decision to forgo post-season play."[3] The Attorney General also reiterated its initial request for additional information regarding the method the University used to locate documents that were responsive to Dr. Hasselbacher's request.

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2 Dr. Hasselbacher denies any knowledge as to the truth of the University's averments concerning the contents of its response to the Attorney General's request for additional information or of its communications with President Ramsey and Mr. Smrt.

3 Importantly, in making that request, the Attorney General was seeking information related to two different appeals, both of which related to open records requests pertaining to the scandal involving the men's basketball team. The Attorney General indicated as much in the very first sentence of the letter that it sent to the University on June 15, 2016.

The University responded to the Attorney General's second request for additional information on July 8, 2016. In its response, the University denied that it was taking a narrower view of Dr. Hasselbacher's open records request than its language deserved. The University also declined to provide the documents requested by the Attorney General for *in camera* inspection on the ground that it was seeking information that went beyond the specific language of Dr. Hasselbacher's request. The University asserted that because Dr. Hasselbacher's request was not broad enough to encompass "all documents relating to the NCAA's investigation into the allegations concerning the men's basketball team," the Attorney General had no power to review them under the Open Records Act. With respect to the Attorney General's repeated request for additional information related to the methods it used to search for responsive documents, the University again stated that it had spoken with President Ramsey and Mr. Smrt in an effort to locate documents that were responsive to Dr. Hasselbacher's request and that both of them confirmed that President Ramsey did not have any documents "in hand" that caused him to suspend the men's basketball team from postseason and NCAA tournament play.

On September 1, 2016, the Attorney General issued an opinion finding that the University had violated Kentucky's Open Records Act by failing to provide and adequately search for records that were responsive to Dr. Hasselbacher's open records request. The Attorney General stated that it had interpreted Dr. Hasselbacher's request to encompass any records "used to form the basis of th[e] decision" to suspend the men's basketball team.[4] The Attorney General

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4 The Attorney General sets out the reasons behind its more expansive interpretation of Dr. Hasselbacher's record request in the following paragraphs from its opinion:

> The University reads Dr. Hasselbacher's request as limited to records in possession of Dr. Ramsey or other "administrator[s] or program director[s] in the athletics department." It first argues that records not in Dr. Ramsey's possession at the February 4 meeting are outside the scope of the request. It further argues that records outside of all these individual's (sic.) possession are outside the scope of the request. Before we determine if the University has violated the act, we

further found that the University had no excuse for denying Dr. Hasselbacher's request after it had acknowledged that Mr. Smrt was in possession of records that were related to the NCAA's investigation into the allegations concerning the men's basketball team.[5] The Attorney General also advised that the University should make "a more comprehensive search aimed at locating the records identified in Dr. Hasselbacher's request and not just the primary players in th[e] event" and that, until it had done so, it would not have fully discharged its duties under the Open Records Act.

On September 30, 2016, the University filed this action pursuant to KRS 61.880 and KRS

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must first determine the scope of the request.

> Clearly, the request encompasses records which Dr. Ramsey used in making his decision that the University men's basketball team would forego 2016 post-season play. In addition, it encompasses records used by "another party ***such as*** an administrator or program director in the athletics department ... to endorse or support the final action by President Ramsey." (Emphasis added). As it relates to both Dr. Ramsey and athletics department administrators and program directors, the University states that these records do not exist. It states, in its correspondence to both Dr. Hasselbacher and to this office that President Ramsey has never possessed any such records and did not rely on any records in forming his decision. It also states that no athletics department administrator or program director was provided the records requested from investigator Chuck Smrt.
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> *However, the scope of the request is clearly broader than just encompassing records used by Dr. Ramsey and athletics department administrators.* Dr. Hasselbacher, by his use of the term "such as," uses "administrator or program director in the athletics department" as an example of University personnel who may be in possession of these records. This example does not limit his request to those individuals. It merely provides an illustrative example for the University to begin its search based on information available to the requestor at the time of the request. Moreover, the use of the term "in hand" does not limit the request to records which were in the possession of Dr. Ramsey or other University personnel at the exact time of the decision. *As clearly indicated in the final sentence of his request, Mr. Hasselbacher sought records used to form the basis of that decision.* In *Commonwealth v. Chestnut*, Ky., 255 S.W.3d 655, 661 (2008), the Court held that a request is adequately specific if the description would enable "a reasonable person to ascertain the nature and scope of . . . the request." The Court observed that in contrast to KRS 61.872(30(b)9 "nothing in KRS 61.872(2) contains any sort of particularity requirement." *Id.* at 661. *Applying the principle set forth in* Chestnut, *Dr. Hasselbacher's request was not as limited as construed by the University.*
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> . . . .

16-ORD-197 at 2-3 (Italics added).

5 The University fervently denies that it ever acknowledged that Mr. Smrt was in possession of documents that were related to the NCAA's investigation into the allegations concerning the men's basketball team.

61.882.[6] The University seeks a declaration from the Court that (1) the University has fully complied with its obligations under Kentucky's Open Records Act, both in responding to Dr. Hasselbacher's open records request and in responding to the Attorney General's requests for additional information regarding the search methods that it used to locate responsive documents; (2) Chuck Smrt, as an independent, outside consultant, is not subject to the Open Records Act; and (3) the Attorney General's opinion, finding the University in violation of the Open Records Act, is incorrect. Dr. Hasselbacher filed an answer to the University's petition on November 4, 2016. He asks the Court to find that the documents forming the basis of this action are subject to disclosure as non-exempt public records and to declare that the University willfully violated the Open Records Act by refusing to release them. Both parties seek to recover their costs and reasonable attorney's fees.

In his response and appellate brief, Dr. Hasselbacher urges the Court to uphold the Attorney General's findings on the following issues: (1) that his open records request was adequately specific and met the requirements of the Open Records Act; (2) that the University violated the Open Records Act by repeatedly ignoring his complete request for records, limiting its responses to an overly narrow and incorrect interpretation of his request, and neglecting to conduct a comprehensive search for records that were responsive to his request; and (3) that any records in Chuck Smrt's possession falling within the scope of his request are subject to disclosure under the Open Records Act. Based on those findings, Dr. Hasselbacher asks the Court to affirm the Attorney General's opinion and deny the University's requests for declaratory relief. In contrast, in its reply brief, the University argues that it is entitled to

6 Despite requesting in its petition "[a]n expedited hearing on this matter at the earliest practicable date," the University permitted this case to sit dormant on the Court's docket for more than a year without taking any action whatsoever to prosecute it.

declaratory relief because the record shows that it fully complied with the requirements of the Open Records Act by responding promptly and truthfully to Dr. Hasselbacher's request. The University also contends that the Attorney General's opinion is erroneous because it improperly expanded the scope of Dr. Hasselbacher's request and incorrectly found that the University was in violation of the Open Records Act.

Issues of Law

The sole issues for the Court to decide are (1) whether the University has fully complied with its obligations under Kentucky's Open Records Act, both in responding to Dr. Hasselbacher's open records request and in responding to the Attorney General's requests for additional information regarding the search methods that it used to locate responsive documents, (2) whether Chuck Smrt, as an independent, outside consultant, is subject to the Open Records Act, and (3) whether the Attorney General erred in finding the University in violation of the Open Records Act.

Analysis

When a public agency denies a request under the Open Records Act, the requester has two ways to challenge the denial. The requestor may, under KRS 61.882, file an original action in the circuit court seeking injunctive or other appropriate relief. *See* 61.882(1). Alternatively, under KRS 61.880, the requestor may, as was done in this case, ask the Attorney General to review the matter. *See* KRS 61.880(2)(a). Once the Attorney General renders a decision on the matter, either party then has thirty days within which to bring an action pursuant to KRS 61.882(3) in circuit court. *See* KRS 61.882(3).

Although the statutes refer to the second type of proceeding in circuit court as an "appeal" of the Attorney General's decision, it is an "appeal" only in the sense that if an action is

not filed within the thirty-day limitations period, the Attorney General's decision becomes binding on the parties and enforceable in court. *See* KRS 61.880(5)(b). Otherwise, this second sort of proceeding is an original action just like the first sort. *See* KRS 61.880(5)(a) (stating that an appeal is to be treated "as if it were an action brought under KRS 61.882"). The circuit court does not review and is not in any sense bound by the Attorney General's decision, nor is it limited to the "record" offered to the Attorney General. *See* KRS 61.882(3). In other words, the circuit court is to "determine the matter *de novo*." *Id.*

The public agency bears the burden of proof in actions under KRS 61.882, and what it must prove is that any decision to withhold responsive records was justified under the Open Records Act. *See id.*; *Bowling v. Lexington–Fayette Urban County Gov't.*,172 S.W.3d 333, 341 (Ky. 2005). Its proof may include an outline, catalogue, or index of responsive records and an affidavit by a qualified person describing the contents of withheld records and explaining why they were withheld. *See, e.g., Ky. Bd. of Examiners of Psychologists v. Courier–Journal & Louisville Times Co.*,826 S.W.2d 324, 328-29 (Ky. 1992) (agency's proof included verified catalog of file's contents and affidavit by person who examined file describing the contents). The circuit court may also hold a hearing if necessary, and the parties may request or the court on its own motion may require the *in camera* inspection of any withheld records. *See id.*; KRS 61.882(3).

I. *The University has not met its burden of proving that it complied with its obligations under Kentucky's Open Records Act in responding to Dr. Hasselbacher's open records request and in responding to the Attorney General's requests for additional information regarding the search methods that it used to locate responsive documents.*

The first issue for the Court to decide is whether the University is entitled to a declaration that it has fully complied with its obligations under the Open Records Act, both in responding to Dr. Hasselbacher's open records request and in responding to the Attorney General's requests for

additional information regarding its search methods.

Having reviewed the record, the Court has determined that it must deny the University's request for declaratory relief on this issue. The Court agrees with the Attorney General's more expansive interpretation of Dr. Hasselbacher's request as encompassing all records "used to form the basis of th[e] decision" to suspend the men's basketball team, regardless of whether those records were in the possession of President Ramsey or an "administrator or program director in the athletics department" at any specific time. *See* 16-ORD-197 at 3. Based on that more expansive interpretation of Dr. Hasselbacher's record request, the Attorney General did not err in determining that the request could encompass records in Chuck Smrt's possession or in requesting those records for *in camera* inspection.[7] Nor did the Attorney General err in finding that the University violated its obligations under the Open Records Act by limiting its search to records in the possession of President Ramsey or an "administrator or program director in the athletics department." Though the Court certainly recognizes that the language used by Dr. Hasselbacher is not perfect, it did not need to be. *See Chestnut*, 250 S.W.3d at 661 (holding that a record request need only contain a description that is "adequate for a reasonable person to ascertain the nature and scope of . . . [the] request"). The University chose to conduct its search and to disregard the Attorney General's requests for *in camera* inspection based on an unreasonably narrow interpretation of Dr. Hasselbacher's request.[8] In doing so, the University

7 The Court also rejects the University's contention that the Attorney General improperly expanded the scope of its review on June 15, 2016 when it requested documents related to the NCAA's investigation into the men's basketball team for *in camera* inspection. The University has made no attempt show that the documents requested by the Attorney General exceeded the combined scope of the two appeals at issue. As a result, the Court has no basis for concluding that the Attorney General improperly expanded the scope of its review.

8 Even assuming that the University's narrow interpretation of Dr. Hasselbacher's open records request was reasonable, its conduct still violated the spirit, if not the letter, of the Open Records Act. The basic policy of the Open Records Act is that "free and open examination of public records is in the public interest" and any exceptions provided by law are to be "strictly construed," even though inspection might cause "inconvenience or embarrassment to public officials or others." KRS 61.871. To further the public interest in the "free and open examination of public records," the Open Records Act requires that public agencies engage in active dialogue with

violated its obligations under the Open Records Act. *See id.* at 662 (adopting the holding of the District Court of Rhode Island that open records requests should not be subject to "narrowing legalistic interpretations by the government" and that a citizen "should be able to submit a brief and simple request for the government to make full disclosure or openly assert its reasons for non-disclosure"). *See also City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 855 (Ky. 2013) (holding that the Open Records Act requires an agency to make "all reasonable efforts" to locate records responsive to the requester's application).

For those reasons, the Court finds that the University is not entitled to prevail on its first request for declaratory relief on the issue of whether it complied with the requirements of the Open Records Act.

II. *Contrary to the University's assertions, documents in the possession of a public agency's "independent, outside consultant" are not necessarily exempt from disclosure under the Open Records Act.*

The second issue is whether the University is entitled to a declaration that Chuck Smrt, as an "independent, outside consultant," is not subject to Kentucky's Open Records Act.[9]

Having reviewed the law in this area, the Court has determined that it must deny the University's request for relief on this issue simply because the Open Records Act does not create

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any person who has made a request to inspect public records and to explain the absence of, or its denial of access to, public records. *See, e.g.*, KRS 61.872(4) (requiring the person responding on behalf of a public agency to furnish the name and location of the official custodian of the agency's public records if that person does not have custody or control of the public record that has been requested); KRS 61.872(5) (requiring the official custodian to notify any person who has made a request to inspect public records if the public records are "in active use, in storage, or not otherwise available" and to designate "a place, time, and date for inspection of the public records" not to exceed three days from receipt of the request, unless the official custodian gives a "detailed explanation" for further delay); KRS 61.880(1) ("An agency 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."). By failing to explain how it had chosen to interpret Dr. Hasselbacher's open records request and to identify other individuals who might have been in possession of records that were responsive to his request, the University's conduct fell below the standards established by the Open Records Act.

9 The University's request for declaratory relief on this issue is extremely vague. The Court interprets this request to mean that the University wants the Court to declare that any records in Mr. Smrt's possession are exempt from disclosure under the Open Records Act because he is not a "public agency" and, therefore, any records in his possession cannot be "public records." The University seemed to agree with this interpretation during oral arguments.

a categorical exemption for public records held by independent, outside consultants. *See, e.g.*, KRS 61.878 (listing the various public records that are exempt from disclosure by public agencies). The Open Records Act gives any person the right to inspect records that are "prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2). *See also* KRS 61.870(1) (defining "public agency" for purposes of the Open Records Act); KRS 61.872(1) ("All *public records* shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right.") (Italics added). Contrary to the University's assertions, just because Mr. Smrt does not meet the definition of a "public agency," the records in his possession could nevertheless be subject to mandatory disclosure under the Open Records Act. In other words, possession by a public agency is only one factor for determining whether a record constitutes a "public record." If a public agency "owns," "uses," or otherwise "controls" a record, it is subject to disclosure under the Open Records Act, even though it is in the possession of an independent, outside consultant.[10] In the absence of evidence showing that the University has completely relinquished control over the public records in Mr. Smrt's possession that are

10 In holding that the University "cannot avoid the provisions of the [O]pen [R]ecords [A]ct by housing public records with its investigator," the Attorney General was simply following precedent that it had established in a long line of similar cases under the Open Records Act. *See* 95-ORD-114; 99-ORD-202; 00-ORD-46; 12-ORD-120. The University has not cited any authority from this jurisdiction that conflicts with the Attorney General's decisions in those cases. The University's position does receive some support from the United States Supreme Court's decision in *Kissinger v. Reporters Comm. for Freedom of the Press*, in which it held that an agency cannot be required to retrieve documents from private individuals, even if those documents arguably retain the status of government records under the federal Freedom of Information Act (FOIA). 445 U.S. 136, 139 (1980). The Court, however, agrees with later decisions interpreting the Supreme Court's ruling in *Kissinger* to apply only where an agency has "effectively ceded" control of disputed documents, as was the case in *Kissinger*. *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016). In addition, though courts in Kentucky generally rely on federal decisions under the FOIA when interpreting the provisions of the Open Records Act, the Court can find no case in which a local court has cited *Kissinger* in support of the proposition that a public agency necessarily "cedes" control of public records in the possession of an independent, outside consultant or that records of that kind are categorically exempt from disclosure. *Cf. City of Fort Thomas*, 406 S.W.3d at 856 (citing *Kissinger* for the proposition that a public agency *is* responsible for disclosing public records in its own "custody and control"). And, once again, the University has produced absolutely no evidence that it has effectively ceded control of any documents in Mr. Smrt's possession that "formed the basis" of its decision to suspend the men's basketball team from postseason and NCAA tournament play.

responsive to Dr. Hasselbacher's request (which it has not produced), the Court has no basis for concluding that those documents are not subject to disclosure under the Open Records Act.

For those reasons, the Court has determined that it must deny the University's second request for declaratory relief on the issue of whether Chuck Smrt is subject to the requirements of the Open Records Act.

III. *The Attorney General did not err in finding that the University violated the Open Records Act.*

The third issue is whether the University is entitled to a declaration that the Attorney General's opinion, finding it in violation of the Open Records Act, is incorrect. In the first subsection of this section, the Court stated all the reasons why it believes that the Attorney General was correct in finding the University in violation of the Open Records Act. For the same reasons, the Court has determined that it must deny the University's request for declaratory relief on the issue of whether the Attorney General erred in finding it in violation of the Open Records Act.

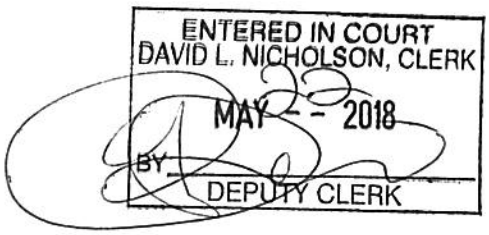
IV. *Dr. Hasselbacher is entitled to recover the costs, including reasonable attorney's fees, that he has incurred in connection with this action.*

Having found that Dr. Hasselbacher is entitled to prevail on all claims asserted by the University, one final issue is whether he is entitled to recover the costs, including reasonable attorney's fees, that he has incurred in connection with this action. To award Dr. Hasselbacher the costs that he has incurred in connection with this action, the Court must find that the University has "willfully withheld" public records in violation of the Open Records Act. KRS 61.882(5). The record strongly suggests that Chuck Smrt is in possession of records that fall within the scope of Dr. Hasselbacher's record request. The University has consistently refused to produce those records based on an unreasonably narrow interpretation of Dr. Hasselbacher's

open records request. Moreover, the University has never articulated a plausible legal basis for denying Dr. Hasselbacher access to those records. Under the circumstances, the University's conduct appears to be nothing more than a deliberate attempt to conceal information from the public that it considers to be embarrassing and damaging to its reputation. As a result, the Court finds that Dr. Hasselbacher is entitled to recover any costs, including reasonable attorney's fees, that he has incurred in connection with this action. *See City of Fort Thomas*, 406 S.W.3d at 854 (holding that, in the context of KRS 61.882(5), "willful" connotes that the agency "withheld requested records without plausible justification and with conscious disregard of the requester's rights").

Conclusion

For the foregoing reasons, the University's petition for declaration of rights is DENIED. Having prevailed on all claims asserted by the University, Dr. Hasselbacher is entitled to a judgment against the University in the amount of all costs, including reasonable attorney's fees, that he has incurred in connection with this action. No later than thirty days from the date on which this Order is entered, the University shall conduct a diligent search for any records, either in its own possession or in the possession of Chuck Smrt or any other agent, that President Ramsey, or any other agent of the University, used in making the decision to suspend the men's basketball team from postseason and NCAA tournament play in February 2016. The University shall also, within the same timeframe, produce any such records to Dr. Hasselbacher in a form and manner that comply with the requirements of the Open Records Act. This is a final and appealable Order, there being no just cause for delay.



BARRY WILLETT
JEFFERSON CIRCUIT COURT JUDGE

Date Signed: 5/18/18

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