

NO. 16-CI-_____

JEFFERSON CIRCUIT COURT
DIVISION _____

UNIVERSITY OF LOUISVILLE

PETITIONER

V.

PETER HASSELBACHER, M.D.

RESPONDENT

Serve: Peter Hasselbacher, M.D.
Kentucky Health Policy Institute
305 Winterberry Circle
Louisville, Kentucky 40207

PETITION FOR DECLARATION OF RIGHTS

1. This is an action for declaration of rights in which the University of Louisville (the “University”) seeks a declaration of rights vis-à-vis an Attorney General’s opinion that found, incorrectly, that the University’s response to Peter Hasselbacher’s (“Hasselbacher”) open records request was in violation of the Kentucky Open Records Act. While the University would prefer to list the Attorney General’s Office as the named defendant instead of the individual who made the underlying open records request, the University recognizes that KRS 61.880(3) requires the University to name Dr. Hasselbacher, instead of the Attorney General, as a party to this action.

PARTIES, JURISDICTION AND VENUE

2. The University is a Kentucky public agency, as that term is defined in KRS 61.870(1), with its principal office in Jefferson County, Kentucky.

3. Hasselbacher is an individual with his principal residence in Jefferson County, Kentucky.

4. This action is brought pursuant to KRS 61.880 and KRS 61.882 to appeal a decision of the Attorney General under the Kentucky Open Records Act.

5. Jurisdiction and venue are proper in this Court pursuant to KRS 61.880 and KRS 61.882 because the University's principal office is located in Jefferson County, Kentucky.

FACTS

6. On February 5, 2016, then University President James Ramsey ("Ramsey") publicly suspended post-season and NCAA tournament play for the University's NCAA Division I men's basketball team.

7. On February 10, 2016, Hasselbacher submitted a request to the University, via electronic mail, under the Kentucky Open Records Act. Specifically, Hasselbacher requested **"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 [U]niversity."** In addition, 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."**

8. The University is committed to compliance with the Kentucky open records law. The University's official records custodian, Sherri Pawson, promptly responded to Hasselbacher's request within three working days, stating truthfully that the University has no records responsive to the request. Notably, the University did not deny that Ramsey had information available to him in making the decision to impose the post-season ban; it simply denied that the University had any *records* in its possession, custody or control responsive to the request.

9. In apparent dissatisfaction with the University's response, Hasselbacher appealed the issue of whether the University's response to his request violated the Kentucky Open Records Act to the Office of the Attorney General, pursuant to KRS 61.880(2)(a). In his appeal,

dated February 27, 2016, Hasselbacher misquotes and mischaracterizes his original request as a broad request for all “documents and information relevant to the suspension by President James Ramsey of all postseason and NCAA tournament participation by the University of Louisville basketball program.” As grounds for his appeal, Hasselbacher outlines his own presumptions of what actions should be taken before such a decision is made and simply speculates that “such a serious action would [not] have been taken without any documentation.”

10. On March 8, 2016, the University responded to the appeal in a letter to the Office of the Attorney General. Again, the University stated truthfully that there are no documents responsive to the request in the possession, custody or control of the University vis-à-vis post-season and NCAA tournament play.

11. During the course of the appeal, the Attorney General sought additional information from the University concerning how the University conducted its search for “records in President Ramsey’s custody, and records in the custody of other parties” responsive to Hasselbacher’s request.

12. The University promptly responded to the Attorney General’s request for additional information on March 22, 2016, stating plainly that “President Ramsey has confirmed that he had no documents in hand” which caused him to decide to suspend postseason and NCAA tournament play. This confirmation was communicated by Dr. Ramsey directly – not through an intermediary. In order to assure compliance with Hasselbacher’s request for documents in the possession of any party involved in making or supporting the decision, the University also conferred with Chuck Smrt (“Smrt”), the University’s contracted NCAA investigator, who confirmed that Ramsey did not have any documents, from Smrt or otherwise,

at the time the decision was made by then President Ramsey to suspend post-season play in February 2016.

13. The Attorney General sent a second request to the University for additional information on June 15, 2016, stating that the University's response "is based upon an erroneous belief that Dr. Hasselbacher's request was confined to 'documents, reports, and other information' that Dr. Ramsey had 'in hand on February 4 when the decision was made'." Thus, the Attorney General disregarded the language of Hasselbacher's original request, expressly stated in his February 10, 2016 email, and requested for *in camera* inspection records far in excess of what Hasselbacher had requested. Specifically, rather than seeking **"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 [U]niversity,"** the Attorney General requested "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." The Attorney General also re-stated its initial request for additional documentation regarding the method used to locate responsive records.

14. The University responded to the Attorney General's second request for additional information on July 8, 2016. While the University can certainly understand the interest in a matter garnering national media attention, the University denied the Attorney General's suggestion that Hasselbacher's request was intended to be broader than the specific language Hasselbacher used in his request. Thus, the University declined to provide the documents requested for *in camera* review. As the University respectfully asserted, the Attorney General's power of review under the Kentucky Open Records Act is limited to Hasselbacher's *specific*

open records request, and the Attorney General's ability to seek additional documentation from the University is necessarily limited to documentation concerning Hasselbacher's specific request. As the University explained, Hasselbacher's request is clearly not broad enough to encompass "all documents relating to the NCAA's investigation into the allegations concerning the University's men's basketball team."¹

15. In response to the Attorney General's reiterated request for additional documentation vis-à-vis the method used to locate responsive documents, the University reiterated that in an effort to locate any documents responsive to Hasselbacher's request, the University spoke with Ramsey and Smrt, both of whom confirmed that there were no documents, reports or other information that Ramsey had in hand that caused him to suspend post-season play. On September 1, 2016, the Attorney General rendered its decision on Hasselbacher's appeal. The decision is 16-ORD-197, which is attached to this Petition as Exhibit 1.

16. The Attorney General found that the University violated the Kentucky Open Records Act by not providing records responsive to Hasselbacher's request. Although the University stated on more than one occasion that there are no such records responsive to the request, the Attorney General incorrectly asserts that "the University acknowledges that [Smrt] is in possession of records related to this investigation." In its responses, the University never acknowledged that Smrt possessed records relating to the investigation, and Hasselbacher's request for documents used by "another party...to endorse or support" Ramsey's final decision is not broad enough to encompass such documents in any event.

¹ In apparent recognition that a fair reading of his initial request, as the University has repeatedly asserted, confined a response to documents Ramsey had "in hand" at the time he made the decision to impose the post-season ban, Hasselbacher has now filed a new open records request. The University intends to respond to that request in a timely and thorough manner, again in full compliance with the Kentucky Open Records Act.

17. Additionally, the Attorney General found that the University's search for responsive documents was inadequate. Thus, the Attorney General suggested that the University "should conduct a more comprehensive search aimed at locating the records identified in Dr. Hasselbacher's request and not just the primary players in this event...Until it has done so, its duties under the Open Records Act will not be fully discharged."

18. Pursuant to KRS 61.880 and KRS 61.882, the University promptly appeals the Attorney General's opinion to this Court and seeks a declaration from this Court that (1) the University has fully complied with its obligations under the Kentucky Open Records Act, both in responding to Hasselbacher's open records request and in responding to the Attorney General's repeated requests for additional documentation regarding the University's search methods used to locate responsive documents; (2) Chuck Smrt, as an independent outside consultant, is not subject to the Kentucky Open Records Act; and (3) the Attorney General's opinion, finding the University in violation of the Kentucky Open Records Act, is incorrect.

**COUNT I: CLAIM FOR DECLARATION OF RIGHTS WITH RESPECT TO
THE UNIVERSITY'S RESPONSE TO HASSELBACHER'S REQUEST**

19. The University reiterates and incorporates by reference each of the averments contained in the preceding paragraphs of this Petition.

20. Pursuant to KRS 61.880(5), this Court has jurisdiction to review the Attorney General's decision, 16-ORD-197, attached to this Petition as Exhibit 1.

21. The University timely and truthfully responded to Hasselbacher's open records request, plainly replying that there are no documents responsive to the specific request.

22. In a good faith and reasonable effort to locate responsive documents, the University spoke to Ramsey and Smrt, both of whom confirmed that there were no documents that Ramsey had in hand that caused him to suspend the University's men's basketball team from

post-season play, nor were there any such documents responsive to the remainder of Hasselbacher's request.

23. The University's search for documents responsive to Hasselbacher's request was adequate and the search methods utilized were reasonably likely to lead to the discovery of responsive documents.

24. The University fully complied with its obligations under the Kentucky Open Records Act vis-à-vis Hasselbacher's open records request.

25. Pursuant to KRS 61.882(4), this action should take precedence on this Court's docket over all other causes and should be assigned for hearing at the earliest practicable date.

**COUNT II: CLAIM FOR DECLARATION OF RIGHTS WITH RESPECT TO
CHUCK SMRT**

26. The Attorney General grossly misconstrues the University's responses to Hasselbacher's request and the Attorney General's requests for additional documentation as suggesting that Chuck Smrt is in possession of records relating to the investigation that are responsive to Hasselbacher's request. The University has never stated such.

27. Nevertheless, Smrt is an independent, outside consultant hired by the University for the purpose of conducting an investigation of the allegations surrounding the University's men's basketball team.

28. As such, Smrt does not meet the definition of a "public agency" under KRS 61.870.

29. Because Smrt does not meet the definition of a "public agency," he is not subject to the disclosure requirements of the Kentucky Open Records Act.

**COUNT III: CLAIM FOR DECLARATION OF RIGHTS WITH RESPECT TO
THE ATTORNEY GENERAL'S OPINION**

30. The University reiterates and incorporates by reference each of the averments contained in the preceding paragraphs of this Petition.

31. The University responded to Hasselbacher's appeal, again reiterating to the Attorney General that the University has no documents responsive to Hasselbacher's open records request.

32. The University responded to the Attorney General's request for additional information concerning how the University conducted its search for responsive records.

33. The Attorney General's second request for additional information from the University, sent on July 8, 2016, exceeded the Attorney General's power of review under the Kentucky Open Records Act because it sought *in camera* review of documents well outside of the scope of Hasselbacher's specific open records request.

34. The University again explained to the Attorney General, at the Attorney General's request, its efforts to locate documents responsive to Hasselbacher's open records request.

35. The University's search for documents responsive to Hasselbacher's request was adequate and the search methods utilized were reasonably likely to lead to the discovery of responsive documents.

36. In the Attorney General's Opinion, 16-ORD-197, the Attorney General incorrectly found that the University violated its obligations under the Kentucky Open Records Act and incorrectly suggested that the University's duties under the Act will not be discharged until the University conducts a more comprehensive search to locate responsive documents.

37. Pursuant to KRS 61.882(4), this action should take precedence on this Court's docket over all other causes and should be assigned for hearing at the earliest practicable date.

WHEREFORE, Petitioner the University of Louisville respectfully prays for relief as follows:

- A. An expedited hearing on this matter at the earliest practicable date;
- B. A declaration that the University fully complied with its obligations under the Kentucky Open Records Act in response to Hasselbacher's open records request for "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 [U]niversity";
- C. A declaration that Chuck Smrt, as an independent, outside consultant to the University, is not subject to the Kentucky Open Records Act;
- D. A declaration that the Attorney General was incorrect in finding that the University violated the Kentucky Open Records Act by not providing the Attorney General's Office with all records relating to the NCAA investigation into the widely reported allegations concerning the University's men's basketball team and Mr. McGee which led to the decision to forgo post-season play;
- E. A declaration that the Attorney General was incorrect in suggesting that the University's obligations under the Kentucky Open Records Act would not be discharged unless and until the University conducted an additional search to locate responsive documents;
- F. An award of costs, including reasonable attorneys' fees, incurred in connection with this legal action; and
- G. All other relief to which Petitioner may be entitled.

Respectfully submitted,

/s/Craig C. Dilger

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400021.147465/1398462.1

Exhibit 1

16-ORD-197

September 1, 2016

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

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

Open Records Decision

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

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

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

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

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

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

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

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

² KRS 61.880(2)(c) provides:

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Andy Beshear
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Distributed to:

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