DETERMINING A UTILITY'S STATUS UNDER THE OPEN RECORDS ACT

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So much emphasis is often placed on the questionably sensitive nature of certain documents that many entities debate how to comply with the Open Records Act ("the Act") without first determining whether they are subject to the requirements of the Act. Sound reasoning, however, mandates that an entity first determine whether the Act even applies to it. This determination is not as easy for some as it is for others, particularly when you consider that an entities' status may change from year-to-year.

The Act requires "public agencies" to disclose all their records to the public, unless the records fall within one of fourteen exemptions. The question that must be initially asked is whether each specific small utility (or related individuals and entities) falls under the Act's definition of a public agency.

The Act defines public agency to include every county or city governing body, council, school district board, special district board, and municipal corporations.[1] Accordingly, water districts and municipal utilities fit squarely under the Act.[2] A public agency also includes entities of which the majority of its governing body is appointed by a public agency.[3] Because most commissioners on water commissions are appointed by water districts, municipalities, and other public agencies, most water commissions would be considered a public agency and subject to the Act.

Only one statutory provision could potentially draw privately-owned utilities into required compliance with the Open Records Act. KRS 61.870(1)(h) states that a public entity is defined to include "[a]ny body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state and local authority funds."[4] Because non-profit water associations often qualify for state and local authority funds, they would be more likely to be a public agency under the Act as compared to for-profit water, sewer, and gas companies.

A determination of whether a body has passed the 25% threshold is contingent on two vital elements: (1) the amount of money expended in Kentucky by the body within a specific fiscal year and (2) the percentage of these total expenditures that was derived from state or local funding. Because small utilities in Kentucky are not likely to have expenses outside of the Commonwealth, the most important factor to consider from these elements relates to the period of time in which the expenditures must be considered.

In reviewing whether a body is a public agency based on the 25% expenditure threshold, the Attorney General ("AG") has opined that a body may be considered to be a public agency under the Act in one year but not the next. In fact, the AG determined that the Murray-Calloway County Economic Development Corporation would not be considered a public agency in 2009 because only 20% of its funds expended in the first seven months of the fiscal year were from state and local funds and there was no evidence that the percentage would change during the remainder of the fiscal year.[5] The AG made this finding despite acknowledging that the body met the threshold and was considered a public agency in each of the preceding four fiscal years.[6]

When calculating the percentage of expenditures that were derived from state and local funding, small utilities should consider not only grants, but also funds received through loans from these authorities.[7] In addition, utilities should include funds that originated from the federal government but were filtered through the state treasury and appropriated by the General Assembly.[8] Utilities need not include funds that are received directly from a federal agency, nor should utilities consider funds received from a state agency that are payments for services rendered, such as the provision of utility services.[9]

Even if a body is determined to exceed the 25% limit, that public agency is not required to disclose all of its otherwise non-exempt records. Instead, those bodies need only to disclose records that are related to functions, activities, programs, or operations funded by state and local authorities. For example, North Shelby Water Company, a water association, received a $1.5 million grant from the state to construct a transmission line connecting its system with the Louisville Water Company. Even if the expenses related to that transmission line vaulted the utility over the 25% threshold, an individual would not be entitled under open records law to inspect documents involving an unrelated pipeline between the Louisville Water Company and systems to its east because no state and local funds had been spent by North Shelby Water Company for the proposed pipeline project.[10]

Privately-owned utilities that do not exceed the 25% limit will not be required to comply with the Act.[11] If an individual requests to inspect records retained by such a company, the body may decline the inspection. Should that individual appeal the body's decision to the AG, the entity should defend its position that it is not a public agency within the meaning of the Act. There have been two recent cases in which a water association was presumed by the AG to be a public agency because the utility did not challenge or provide any support to challenge that determination.[12] In both cases, the AG found that the water association had violated the Act, and both cases may have been dismissed if the water association had merely challenged the applicability of the Act and supported its position.

In summary, before a utility considers whether requested documents are exempt from disclosure by the Act, it should consider whether it is a public agency under the Act. This determination will be quite simple for water districts and municipalities, but for other utilities, it may require some analysis of the utility's funding sources and expenses. If a utility determines that it is a public agency, it can then move to the question of whether it must disclose the requested records.

[1] KRS 61.870(1)(d).
[2] *See also* Ky. OAG 88-72 (Dec. 1988); Ky. OAG 77-291 (July 1977).
[3] KRS 61.870(1)(k).
[4] The Open Meetings Act does not have a similar provision. Thus, a utility may be required to comply with the Open Records Act but not the Open Meetings Act.
[5] 09-ORD-192 at 6 (Ky. OAG Nov. 5, 2009).
[6] The AG notes conflicting authority from the Jefferson Circuit Court, which held that KRS 61.870(1)(h) is unconstitutionally vague because it does not specify the period that must be used in calculating the expenditure-to-public fund percentage. *See Chilton v. M.A. Mortenson Co.*, 09-CI-02749 (Jefferson Cir. Ct. Nov. 24, 2009). Because the AG is the initial arbiter of the Act, entities outside Jefferson County will be best suited by following his guidance on the period on which to make the calculation, unless the Supreme Court or Court of Appeals concurs with the Jefferson Circuit Court.
[7] *Id.* at 7.
[8] *See* 10-ORD-092, at 10 (Ky. OAG May 6, 2010).
[9] *See* 00-ORD-91 (Ky. OAG Apr. 4, 2000); 93-ORD-90 (Ky. OAG Aug. 5, 1993).
[10] 08-ORD-139 (Ky. OAG July 14, 2008
[11] Nevertheless, a privately-owned utility must still disclose certain records to its members. KRS 271B.16-020.
[12] 10-ORD-224 (Ky. OAG Dec. 10, 2010); 10-ORD-179 (Ky. OAG Sept. 9, 2010).