

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY-)	
AMERICAN WATER COMPANY FOR AN)	CASE NO.
ADJUSTMENT OF RATES)	2015-00418

ORDER

On March 24, 2016, Kentucky-American Water Company (“KAWC”) pursuant to 807 KAR 5:001, Section 13(2), moved that certain materials filed with the Commission be afforded confidential treatment, not placed in the public record subject to public inspection, and held confidential in perpetuity (“March 24, 2016 Petition”). In support of its motion, KAWC stated that the materials in question are supplied in response to Commission Staff’s Second Request for Information (“Staff’s Second Request”), the Attorney General’s Initial Request for Information (“AG’s First Request”), and the Lexington-Fayette Urban County Government’s First Request for Information (“LFUCG’s First Request”).

Staff’s Second Request, Items 29.a.–29.d., required KAWC to supply information concerning American Water Works Company, Inc.’s (“AWWC”) Annual Performance Plan (“APP”) and Long-Term Performance Plan (“LTPP”) for each KAWC employee. KAWC stated that information concerning employees’ wages and compensation is of a personal nature and that disclosure of this information would invade the privacy rights of the individuals named.¹ KAWC relies upon *Zink v. Department of Workers’ Claims*,

¹ March 24, 2016 Petition at 4 and 5.

Labor Cabinet, 902 S.W.2d, 825 (Ky. App. 1994) (“*Zink*”) in support of its position that the information should receive confidential protection.²

In *Zink*, the Court of Appeals of Kentucky stated that the personal privacy analysis under KRS 61.878(1)(a) is a two-step process. First, a determination must be made as to whether the information is of a “personal nature.”³ Thereafter, if the information is of a personal nature, then a determination must be made as to whether disclosure “would constitute a clearly unwarranted invasion of personal privacy.”⁴ For this second step, “the circumstances of a given case will affect the balance.”⁵

The Commission finds that an employee’s identification number and job title are information of a personal nature. With regard to the issue of balancing the interests, the Commission finds that all employee identification numbers as well as job titles for KAWC’s non-executive officers contained in the response to Staff’s Second Request, Items 29.a.–29.d., are entitled to confidential protection. We find, however, that KAWC’s executive salaries are an expense in the rate base calculations, and we have held that such salary compensation is not entitled to confidential protection.⁶ We find that the job titles for KAWC’s executive officers contained in the response to Staff’s Second Request, Items 29.a.–29.b., are not entitled to confidential protection.

² *Id.*

³ *Zink*, 902 S.W.2d at 828 citing *Kentucky Bd. Of Examiners of Psychologist v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992).

⁴ *Id.*

⁵ *Id.*

⁶ Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates* (Ky. PSC Jan. 20, 2016); See also Case No. 2013-00167, *Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates for Gas Service* (Ky. PSC Sept. 27, 2013).

KAWC stated that its response to AG's First Request, Items 9.a.–9.d., contains information, by KAWC employee position, concerning salary, overtime pay, incentive compensation, and pay increases.⁷ It stated that its response to AG's First Request, Item 52, contains information regarding officer compensation and that its response to AG's First Request, Item 64.c., contains information regarding individuals eligible to receive non-qualified retirement benefits.⁸

The Commission finds that the analysis it uses for addressing KAWC's request for confidential protection for its response to Staff's Second Request, Items 29.a.–29.d., should also be applied to these three KAWC responses to the AG's First Request. For KAWC's response to AG's First Request, Items 9.a.–9.d., all employees identification numbers as well as job title information for individuals other than KAWC's executive officers should be granted confidential protection; however, the job title information for KAWC's executive officers does not merit confidential protection. For KAWC's response to AG's First Request, Item 52, the officer name and title information for individuals other than KAWC's executive officers is entitled to confidential information; however, the officer name and title information for KAWC's executive officers does not merit confidential protection. For KAWC's response to AG's First Request, Item 64, all employee numbers as well as job title information for individuals other than KAWC's executive officers are entitled to confidential protection; however, the job title information for KAWC's executive officers does not merit confidential protection.

⁷ March 24, 2016 Petition at 4 and 5.

⁸ *Id.* at 5.

KAWC stated that its response to Staff's Second Request, Item 50, contains information that shows how its OPEB forecast was calculated and that its response to AG's First Request, Item 20, contains the expected return on pension assets. KAWC stated that the "responses contain actuarial information relating to employee benefits that is governed by Securities and Exchange Commission ["SEC"] 'Regulation RD' (fair disclosure) that is material non-public information."⁹ Citing to KRS 61.878(1)(k) which exempts from disclosure "information the disclosure of which is prohibited by law or regulation," KAWC stated that, due to the SEC's fair disclosure regulation, the disclosure of the information in the instant case "could require broad, non-exclusionary disclosure to the general public."¹⁰ KAWC stated that the Commission granted confidential protection to similar information in Case No. 2010-00036.¹¹

The Commission finds that KAWC's responses to Staff's Second Request, Item 50, and AG's First Request, Item 20, contain information that is subject to the SEC's fair disclosure regulation which requires a broad, non-exclusionary disclosure in order for the information to be made public. The Commission finds that KAWC has not made such a disclosure of this information. We find that in the absence of a broad, non-exclusionary disclosure, public disclosure is prohibited by law; therefore, the information is exempt from disclosure pursuant to KRS 61.878(1)(k). We find that it should be granted confidential protection.

⁹ *Id.* at 3.

¹⁰ *Id.* at 3 and 4.

¹¹ *Id.* (citing Case No. 2010-00036, *The Application of Kentucky-American Water Company for an Adjustments of Rates on and after March 28, 2010* (filed Feb. 26, 2010)).

KAWC's response to AG's First Request, Item 12, contains policies and procedures that KAWC relies upon when making a determination to provide a wage or salary increase.¹² Its response to AG First Request, Item 118, contains KAWC's tax sharing agreement, and its response to LFUCG's First Request, Item 26, contains KAWC's policies and procedures for testing, maintaining, and replacing fire hydrants.¹³ KAWC stated that these policies and procedures "are the product of extensive time and substantial investment by KAWC and American Water Works Company."¹⁴ KAWC stated that public disclosure would allow other utilities to obtain the proprietary work product of these efforts for free and would place KAWC at a competitive disadvantage.¹⁵ The Commission finds that the information is generally recognized as confidential or proprietary and, if disclosed publicly, would permit an unfair commercial advantage to KAWC's and AWWC's competitors; therefore, the information is entitled to confidential protection.

KAWC stated that its response to AG's First Request, Item 16, contains presentations made to credit rating agencies from January 1, 2015, to present, and that it provided the information to the rating agencies on a confidential basis and is obligated to protect the information from public disclosure.¹⁶ KAWC stated that the information contains commercially sensitive information and that public disclosure of the information

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

“would discourage KAWC from providing such information to the credit rating agencies in the future,” which could, in turn, “lead to less favorable credit ratings and higher capital costs for KAWC than their competitors.”¹⁷

We find that KAWC did not provide evidence of a written agreement with the credit rating agencies that obligates KAWC to protect the information from public disclosure. Nonetheless, we find that its presentations made to the credit rating agencies contains information that is generally recognized as confidential or proprietary and that the public disclosure of this information would permit an unfair commercial advantage to its competitors, and the information should be granted confidential protection.

KAWC’s response to AG’s First Request, Item 99, contains a copy of KAWC’s contracts with consultants and third parties for rate case services. KAWC stated that it may not be able to enter into contracts with as “favorable pricing terms if the contracts are disclosed publicly.”¹⁸ We find that public disclosure of the contracts would permit an unfair commercial advantage to its competitors and that the response to AG’s First Request, Item 99, should be granted confidential information. We do, nevertheless, note that the amounts of compensation paid pursuant to a contract with a consultant or third party are not entitled to confidential protection if a utility seeks to recover the compensation through its rates. Our finding that the contracts submitted in response to AG’s First Request, Item 99, are entitled to confidential protection is limited to the

¹⁷ *Id.*

¹⁸ *Id.* at 3.

documents and should not be read to extend confidential protection to the amounts actually paid to the consultant and third parties pursuant to the contracts.

KAWC's responses to AG's First Request, Items 33 and 34, contain copies of reports issued by AUS Consultants ("AUS"). KAWC stated that AUS provided the information to it "as a courtesy" and that AUS considered the information contained in the reports confidential and proprietary.¹⁹ KAWC stated that public disclosure would place AUS at a competitive disadvantage and would cause AUS to "no longer provide this relevant information as a courtesy to KAWC."²⁰

We find that KAWC is seeking confidential protection in order to protect AUS against an unfair commercial advantage to the competitors of AUS. We find that KRS 61.878(1)(c)1 grants an exemption from public disclosure to the entity that discloses the records, in this instance, KAWC rather than AUS. KAWC did not provide evidence of a written agreement with AUS that obligates KAWC to protect the information from public disclosure. Rather, the information was provided by AUS to KAWC as a "courtesy."²¹ We find that since AUS is not requesting confidential protection, 807 KAR 5:001, Section 13, and KRS 61.878 do not extend confidential protection to the AUS reports. Therefore, we find that we should deny confidential protection to KAWC's responses to AG's First Request, Items 33 and 34.

KAWC's responses to AG's First Request, Items 119, 120, 122, 123, 124, and 128, contain information from KAWC's income tax filings.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

KAWC stated that 26 U.S.C.A § 6103(a) prohibits state officials from publicly disclosing any federal income tax return or its contents; therefore, per KAWC, the information is entitled to confidential protection pursuant to KRS 61.878(1)(k).²² The Commission finds that the information falls within the exemption provided by KRS 61.878(1)(k) and should be granted confidential treatment.

Having carefully considered the petition and the materials at issue, the Commission also finds that the materials granted confidential protection by this Order should not be placed in the public record or made available for public inspection for an indefinite period or until further Order of the Commission.

IT IS THEREFORE ORDERED that:

1. KAWC's petition for confidential protection is granted in part and denied in part.
2. KAWC's request for confidential protection for its responses to Staff's Second Request, Items 29.a.–29.d., AG's First Request, Items 9.a.–9.d., 52, and 64.c., is granted in part, as discussed in the findings above. Confidential protection for all employee identification numbers and the job title information for all individuals who are not KAWC's executive officers is granted, and the information shall neither be placed in the public record or made available for public inspection for an indefinite period or until further Orders of this Commission. Confidential protection for the officer and job title information for KAWC's executive officers is denied confidential protection.

²² *Id.* at 4.

3. KAWC's request for confidential protection for its responses to AG's First Request, Items 33 and 34, is denied without prejudice to an amended petition's being filed by AUS individually or jointly with KAWC.

4. KAWC's request for confidential protection for its responses to Staff's Second Request, Item 50, AG's First Request, Items 12, 16, 20, 99, 118, 119, 120, 122, 123, 124, and 128, and LFUCG's First Request, Item 26, is granted. The information shall not be placed in the public record or made available for public inspection for an indefinite period of time.

5. Within 14 days of the date of this Order, KAWC shall file a revised response reflecting as unredacted the information which has been denied confidential treatment in accordance with ordering paragraphs 2 and 3.

6. Use of the materials in question in any Commission proceeding shall be in compliance with 807 KAR 5:001, Section 13(9).

7. KAWC shall inform the Commission if the materials in question become publicly available or no longer qualify for confidential treatment.

8. If a non-party to this proceeding requests to inspect materials granted confidential treatment by this Order, KAWC shall have 20 days from receipt of written notice of the request to demonstrate that the materials still fall within the exclusions from disclosure requirements established in KRS 61.878. If KAWC is unable to make such demonstration, the requested materials shall be made available for inspection.

9. The Commission shall not make the requested materials available for inspection for 20 days following an Order finding that the materials no longer qualify for confidential treatment in order to allow KAWC to seek a remedy afforded by law.

By the Commission

ENTERED
AUG 31 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


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Case No. 2015-00418

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