



Kentucky Open Records Act: Fixing the Loophole a Relief for Contractors

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Countless privately owned construction companies earn some, or possibly, most of their revenue from publicly awarded contracts. In the past in Kentucky, that could have equated to a private company being deemed a “public agency”. Fortunately, the Kentucky legislature correctly closed this gaping loophole in the law.

The Kentucky Open Records Act requires all public agencies to provide access of their records to the public. This part of the statute is typical and similar to statutes adopted by most states as well as the federal government. However, the problem arose with the statute’s definition of “public agency” and the state’s interpretation of that definition.

The statute defined “public agency” as “any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds”. The Kentucky courts and the Kentucky Attorney General’s (AG’s) office interpreted this definition to include any private entity that received 25% or more of its revenue from a state or local authority. Therefore, any contractor that specialized in state projects, such as schools or courthouses, could be considered a public agency.

In 2011 and 2012, several open records requests were submitted to many of Kentucky’s construction companies. These companies refused to produce the records. Ultimately, the cases ended up in the AG’s office. In each matter, the AG’s office looked to the amount of revenue the company earned from public projects. Companies deriving more than 25% of their income from public contracts were largely deemed to be public agencies and ordered to turn over their records.

As a result, a charge was lead to amend the statute. The amendment passed largely uncontested. The statutory definition of “public agency” now excludes companies that earned income from a public project by way of a competitive procurement process. The definition of “competitive procurement” should generally include projects won by design and construction companies. Design-build jobs should also fall under the exception. It should also be noted that the exception is not restricted to construction projects. It covers any contract with the state or local authority whether it be for goods or services.

The text of the revised statute can be found [here](#) (KRS 61.870 – 61.884).