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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000929-MR

PIKE COUNTY FISCAL COURT — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 11-CI-01286

UTILITY MANAGEMENT GROUP, LLC — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: JONES, MAZE, AND KRAMER, JUDGES.

JONES, JUDGE: The Appellant, Pike County Fiscal Court ("Pike County"), brings this appeal to challenge a declaratory judgment issued by the Pike Circuit Court, wherein the circuit court determined that the Appellee, Utility Management Group, LLC ("UMG"), was not a public agency subject to the disclosure requirements of Kentucky's Open Records Act, ("ORA"), KRS[1] 61.870 *et seq*. The circuit court's decision hinged, at least partially, on its determination that the

[1] Kentucky Revised Statutes.

amended version of KRS 61.870(1)(h), which became effective July 12, 2012, was a remedial clarification of the law that applied to Pike County's 2011 ORA request. Alternatively, the circuit court concluded that both versions of KRS 61.870(1)(h) were unconstitutionally vague.

On appeal, Pike County challenges both of the circuit court's conclusions. After a thorough review of the parties' arguments, the record, and the applicable law, we hold that the pre-amendment version of KRS 61.870(1)(h) applies to Pike County's 2011 ORA request. We also hold that the pre-amendment version of KRS 61.870(1)(h) is not void for vagueness because it is capable of being understood and applied by men of common intelligence. Accordingly, we REVERSE and REMAND for further proceedings.

I. BACKGROUND

Formed in 2004, UMG is a privately owned, for-profit Kentucky limited liability company. It provides management and operational services for the public waterworks of the Mountain Water District, a Pike County water district. Additionally, it provides water, sewer, garbage pickup, street services, and park maintenance for the City of Pikeville. UMG provides these services pursuant to contractual agreements with both the Mountain Water District and the City of Pikeville. UMG obtained its contracts with the Mountain Water District and the City of Pikeville through public competitive procurement processes.[2] Under their respective contracts with UMG, both the Mountain Water District and the City of

[2] *See* Kentucky's Model Procurement KRS 45A.005 *et seq*.

Pikeville pay UMG a set amount per month for the services it provides to those entities. It is undisputed that UMG derives virtually all of its revenue from the contractual payments it receives from the Mountain Water District and the City of Pikeville.

On March 4, 2011, then Assistant Pike County Attorney, C. Roland Case, sent an open records request to UMG on behalf of Pike County seeking copies of UMG's "checks and expenses" since the original contract began between UMG and the Mountain Water District. Specifically, Pike County requested "a list of expenditures including check number, date, amount and payee for all checks written from January 7, 2005, to present." By counsel, UMG replied that it was not required to produce any information to Pike County because it was a wholly private entity and was not subject to the ORA.

Pike County requested the Office of the Attorney General ("OAG") to review UMG's refusal to comply with its request. *See* KRS 61.880. The OAG found that "UMG has only two known sources of revenue - the contract with [Mountain Water District] and the City, both of which are undisputedly public agencies." At that time, KRS 61.870(1)(h) provided that a public agency included "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 OAG determined that UMG fell within this definition of a public agency and ordered UMG to comply with Pike County's ORA request.

UMG challenged the OAG's decision in Pike Circuit Court. *See* KRS 61.880(5) and KRS 61.882. Before the circuit court issued a decision on UMG's suit, the General Assembly amended KRS 61.870(1)(h). The amendment, which became effective July 12, 2012, exempted "any funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process" from being included as part of the 25% funding threshold. Since virtually all of UMG's funds are derived by virtue of contracts that fall within the exemption, the amendment, if applicable, would mean that UMG was not a public agency subject to the ORA, and therefore, had no obligation to comply with Pike County's 2011 ORA request.

For this reason, much of the arguments before the circuit court focused on whether the amended version of KRS 61.870(1)(h) governed Pike County's ORA request. Ultimately, the circuit court classified the amendment as a remedial clarification and determined that it should be applied to all pending suits, including this one. Alternatively, the circuit court determined that the terms "body" and "state or local authority funds" as used in both the original and amended versions of KRS 61.870(1)(h), were unintelligible, rendering both versions of the statute unconstitutionally vague.

The circuit court ultimately entered judgment in UMG's favor, meaning that it did not have to respond to Pike County's 2011 ORA request. This appeal followed.

II. Standard of Review

If a timely circuit court action is filed following an OAG opinion, it proceeds as an original action just as if it had been filed there in the first instance. *See* KRS 61.880(5)(a). The circuit court is not bound by the prior OAG opinion in any way or limited to the OAG's evidentiary record. KRS 61.882(3). The burden of proof in an ORA circuit court action is on the agency from which the records are sought. *Cabinet for Health and Family Serv. v. Lexington H-L Serv., Inc.*, 382 S.W.3d 875, 883 (Ky. App. 2012). The agency must prove that its decision to withhold documents from the requesting party is justified under the terms of the ORA. *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 (Ky. 2013).

On appeal, we review the circuit court's factual findings for clear error, and issues concerning the construction of the ORA *de novo*. *Commonwealth, Department of Corr. v. Chestnut*, 250 S.W.3d 655, 660 (Ky. 2008).

III. ANALYSIS

A. The Open Records Act

In applauding the Kentucky Legislature's commitment to educating its citizenry, James Madison wrote in 1822, that "[p]eople who mean to be their own Governors, must arm themselves with the power which knowledge gives." *See* http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html. This same premise, that an informed citizenry is necessary for our Government to function at its highest potential, is the bedrock of Kentucky's ORA. First passed in 1976, Kentucky's ORA is clear to this point stating "access to information concerning the conduct of the people's business is a fundamental and necessary right of every citizen of the Commonwealth of Kentucky." *See* H.B. 138 (1976).

Although Kentucky's ORA has been amended several times since 1976, its objective of providing the people with a mechanism to inform themselves about the business of their Government has remained steadfast. Its purpose today is the same as it was in 1976, to provide the public access to information about their Government "even though such examination may [at times] cause inconvenience or embarrassment to public officials or others. KRS 61.871.

While the purposes behind the ORA might be abstract, the rights it bestows on the public are "real, direct, present and substantial[.]" *Taylor v. Barlow*, 378 S.W.3d 322, 326 (Ky. App. 2012). It bestows on the people of this Commonwealth, the right to inform themselves about "what their government is up to." *Lawson v. Office of Atty. Gen.*, 415 S.W.3d 59, 73 (Ky. 2013) (quoting *U.S.*

Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989)).

Under the ORA, "records that are open are open to 'any person' for any purpose." *Kentucky New Era, Inc. v. City of Hopkinsville*, 415 S.W.3d 76, 85 -86 (Ky. 2013). While there are exceptions to disclosure of some public information, those exceptions are to be strictly construed. *See* KRS 61.871. Overall, "[t]he statute demonstrates a general bias favoring disclosure." *Hardin Cnty. Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001) (citing *Kentucky Bd. of Exam'r of Psychologists v. Courier–Journal*, 826 S.W.2d 324 (Ky. 1992)).

B. UMG's Status as a Public Agency under the ORA.

Only the public records of public agencies are subject to disclosure under the ORA. The ORA defines what constitutes a public agency in KRS 61.870(1)(a)-(k). At issue in this appeal is subsection (1)(h) of KRS 61.870. As outlined above, subsection (h) was amended effective July 12, 2012, while this case was pending in circuit court. A brief review of the nature of the amendment is central to understanding this appeal.

Prior to July 12, 2012, subsection (h) defined a public agency to include:

> 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.

H.B. 64 (1994).

As amended, subsection (h) defines a public agency to include:

> Any body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, *any funds derived from a state or local authority in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a public agency under this subsection*[.]

KRS 61.870(1)(h) (effective July 12, 2012) (emphasis added).

A side-by-side comparison of the two statutes reveals that the main changes in the 2012 amendment were the inclusion of the "within any fiscal year" language and the exemption allowing a body to exclude state and local authority funds received "in compensation for goods or services that are provided by a contract obtained through a public competitive procurement process" in determining whether the body meets the 25% threshold necessary to make it a public agency under the ORA. Only the latter change is at issue in this appeal.

The circuit court determined that the 2012 amendment applied to this case. If the circuit court was correct, it settles this appeal, as there is no serious dispute that UMG receives virtually all its revenue in exchange for the services it

provides under contracts obtained through a public procurement process. The central issue in this appeal then is whether the circuit court's determination that the 2012 amendment applied in this case was correct.

"The General Assembly can, by appropriate law, vitiate the interpretations of statutory law and case law but, unless expressly provided, it can do so only in a prospective manner as distinguished from a retroactive or *ex post facto* way." *Gould v. O'Bannon,* 770 S.W.2d 220, 221 (Ky. 1989); *Woodland Hills Min., Inc. v. McCoy*, 105 S.W.3d 446, 448 (Ky. 2003) (recognizing the "general rule [that] the law in effect on the date of injury controls the rights and obligations of the parties."). To this end, KRS 446.080(3) directs that "[n]o statute shall be construed to be retroactive, unless expressly so declared." *Id.* "KRS 446.080(3) does not require that the legislature expressly declare when a statute is *not to be construed* as retroactive. It requires that this Court *not construe* a statute as retroactive unless the legislature expressly so declares." *Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 614 (Ky. 2000). In other words, there is a strong presumption that statutory amendments operate prospectively, only. *Id.* Retroactive application of statutes will be approved only where we can be absolutely certain that the General Assembly intended the statute to operate retroactively. *See Commonwealth Dept. of Agriculture v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000).

An injury occurs under the ORA when the agency at issue withholds the documents in response to a properly issued ORA request. This is when the

requester has a right to file suit and this is the date from which damages for the wrongful withholding of information can be assessed by the circuit court. *See* KRS 61.882(5) (providing the circuit court with the discretion in certain situations to award the prevailing party in an ORA action "an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record.").

There is no question that the 2012 amendment was not in effect when the records were generated, requested by Pike County under the ORA, or when such request was denied by UMG. When UMG denied the ORA request, Pike County's action against UMG accrued.[3] The prior version of KRS 61.870(1)(h) was in effect at this time. The amendment became effective only *after* the records had been created, requested, and denied under the ORA, and suit filed in the circuit court.

Since UMG's rights under the ORA had accrued prior to the effective date of the 2012 amendment, we must determine whether the General Assembly expressly provided for retroactive application. While no "magic words" are required to make a statute retroactive, we must be able to ascertain from the face of

[3] The federal courts have held that a cause of action accrues under the Freedom of Information Act ("FOIA") when the requester has the right to file suit under the statute. *Spannaus v. U.S. Dept. of Justice*, 643 F. Supp. 698, 700-01 (D.D.C. 1986). Our Supreme Court has observed that case law interpreting FOIA is often useful given its similarities to Kentucky's ORA. *See Kentucky New Era*, 415 S.W.3d at 81 ("Given the broad statutory similarities, cases construing the federal Act often inform-whether by comparison or by contrast—state decisions construing parallel provisions.").

the statute that "retroactivity was the intended result." *Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006).

The amended version of KRS 61.870(1)(h) does not specifically provide for retroactive application as related to records generated and/or open records requests made prior to its effective date of July 12, 2012. It is completely silent in this regard. Perhaps the General Assembly meant the law to apply retroactively. Without some statutory authority to suggest an explicit desire on its part to do so, however, any suggestion by us that the 2012 General Assembly intended the amendment to have retroactive effect with respect to all outstanding ORA requests, even those in which suit had already been commenced under the prior law, would be based on mere speculation and conjecture. As set forth in KRS 446.080(3), retroactivity must be based on an express declaration of intent, not speculation on the part of the courts. Finding no express declaration of intent by the General Assembly, we cannot conclude that the 2012 amendment applies retroactively in cases where the ORA request had already been made and denied under the prior law.

Of course, this does not end our inquiry. KRS 446.080(3) bars retroactive application of substantive statutory changes only. Remedial statutes do not come within the scope of the rule requiring express language to be retroactively applied. *Vinson*, 30 S.W.3d at 169. A remedial amendment is one that does no more than expand an existing remedy "without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy." *Jeffers*, 13 S.W.3d at

609. Conversely, substantive amendments are those that "change and redefine the out-of-court rights, obligations and duties of persons in their transactions with others[.]" *Moore v. Stills*, 307 S.W.3d 71, 80 (Ky. 2010).

The circuit court concluded that it was beyond dispute that the amendment at issue was remedial in nature because its purpose was simply to clarify, not change, the prior law. It is true that statutory amendments that seek only to clarify, not substantively change, existing law are remedial in nature. *Id.* at 81 ("Among the 'remedial' enactments are statutory amendments that clarify existing law or that codify judicial precedent."). "A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. North Carolina Dept. of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (N.C. 2012).

Kentucky does not appear to have adopted a specific test to determine whether an amendment is a clarification or substantive change. In examining case law from other jurisdictions, we have identified three criteria courts generally consider in assessing whether an amendment is a curative clarification or a substantive change: 1) the plain language used by the General Assembly in the amendment itself; 2) any case law or agency decision indicating the prior statute was susceptible to differing interpretations; and 3) legislative history surrounding the amendment. *See Leshinsky v. Telvent GIT, S.A.*, 873 F.Supp.2d 582, 591 (S.D.N.Y. 2012); *Miller v. LaSalle Bank Nat. Ass'n*, 595 F.3d 782, 789 (7th Cir.

2010); *City of Colorado Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007). We find these criteria useful in considering the nature of the amendment at hand.

The General Assembly did not include any language in the actual text of the 2012 amendment which suggests the changes were intended as mere clarifications of the prior law. Indeed, there is nothing in the language of the amendment itself which even hints at its purpose. As such, the text of the amendment is not useful in this regard.

The overall history of this portion of the ORA is far more enlightening. Some ideation of the prior statute had been part of the ORA since it first became law in 1976. *See* H.B. 138 (1976) ("'Public agency' means every . . . body which derives at least 25% of its funds from state or local authority."). The statute remained fairly consistent in defining public agencies to include bodies deriving at least twenty-five percent (25%) of their funds from local, state, and federal authority over the course of several subsequent amendments. The only notable change that occurred in this subsection from 1976 up until the latest amendment was the addition of a requirement that the total funds referenced in the statute related to the total funds expended by a body in the Commonwealth of Kentucky. *Compare* H.B. 106 (1992) *and* H.B. 64 (1994) *with* H.B. 138 (1976).

For over thirty-five years, this part of the ORA remained virtually unchanged. We find it remarkable that even though the General Assembly amended other parts of the ORA several times, it did not see a need to clarify its original intent until 2012. This suggests to us that the true intent of the General

Assembly in 1976 and in the subsequent amendments in the years preceding 2012 was for all funds derived from state and local authorities to be counted without any exemptions related to the source of the funds. *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 62 (Fla. 1995) ("It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent[.]").

We also find it relevant that there appears to be no prior case law by our courts deeming this portion of the ORA ambiguous. Nothing in the prior statute, or the ORA as a whole, ever hinted at there being an exemption for funds received in exchange for goods or services provided under a contract the body received as part of a public competitive procurement process. Thus, we cannot conclude that the amendment was merely meant to codify existing case law or conform to the OAG's interpretation of the statute.

In determining that the amendment was a clarification, the circuit court relied on a statement from the Legislative Research Commission's website summarizing H.B. 496 (2012). *See* http://www.lrc.ky.gov/record/12rs/HB496.htm. As part of the summary introducing H.B. 496 (2012), the website indicates that the Bill was meant to:

> change the requirement that the company derive at least 25 percent of its funds expended by it in the Commonwealth within the current fiscal year to within any fiscal year; *clarify that the exclusion applies to funds derived from a state or local authority in compensation for goods or services provided by a contract obtained through a public competitive procurement process*.

Id. (emphasis added).

While the Bill summary does refer to the amendment as a clarification, we do not find the summary persuasive in this instance. First, the language of the summary itself states that its purpose is to clarify "the exclusion." There were no exclusions in the prior version of the statute. All funds received by a body from a state or local authority were to be counted in determining whether the body was a public agency. It strains credulity to suggest that the amendment was meant to clarify an exclusion that did not previously exist.

Additionally, while the General Assembly is certainly permitted to clarify its own statutes, the temporal proximity between the original statute and the amendment is certainly worthy of consideration in determining the General Assembly's actual intent. *See Western Sec. Bank v. Super. Ct.*, 15 Cal.4th 232, 244, 933 P.2d 507, 514, 62 Cal.Rptr.2d 243, 250 (Cal. 1997) ("There is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies."). In this case, over thirty-five years had passed without an exemption being added to the statutory language. In our opinion, this is more suggestive of a substantive change.

To be clear, we do not question the 2012 General Assembly's authority to write this exception into the law. The General Assembly has the right to make the law and to change it as it deems necessary. The fact that the General

Assembly exercised its prerogative to change the law, however, does not make that change retroactive to rights which had already vested, unless the General Assembly expressly so provides. It did not do so in this instance.

The 2012 amendment fundamentally changed the nature of UMG's duties with respect to the ORA, and conversely, Pike County's rights. Application of the amendment in this case would cause Pike County to lose its right to compel UMG to produce documents that Pike County had a right to access when it originally requested them under the ORA. Having examined all the relevant factors, we hold that the 2012 amendment to KRS 61.870(1)(h) was a substantive, not a remedial, change in the law.

Having determined that the pre-amendment version of KRS 61.870(1)(h) governs this action, we must apply it to determine whether UMG qualifies as a public agency under the ORA. UMG asserts, and the circuit court concluded, that UMG does not qualify as a public agency under the pre-amendment version because it is a wholly private entity. The circuit court reasoned that interpreting the statute to include entities like UMG would be inconsistent with the plain reading of the balance of the ORA. We disagree.

Section 2 of KRS 61.870 defines "public records" and specifically references section (1)(h).[4] It states that public records do not include "any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded

[4] Section 2 was part of the ORA prior to the 2012 amendment and remained unchanged.

by state or local authority." By their very nature, governmental bodies function solely for the benefit of the government, and therefore, would not be likely to have records that were not in some way related to the functions, activities, programs, or operations funded by state or local authority. We can discern no purpose for the inclusion of KRS 61.870(2), if "body" as used in subsection (h) was not clearly meant to also include entities like UMG. Only such entities would be likely to possess the type of records section (2) references. *See Kidd v. Board of Educ. of McCreary Cnty.*, 29 S.W.3d 374, 377 (Ky. App. 2000) ("A fundamental principle of statutory interpretation is that the legislature intends the act to be effective as an entirety and that each part is entitled to significance and effect.... A statute must be construed so that no part of it is meaningless."). Thus, we believe that the logical reading of KRS 61.870 is that the term "body" as used in subsection (1)(h) includes entities like UMG.

Likewise, we find UMG's argument that it does not receive state or local funds unavailing. UMG asserts that the funds at issue are not really government funds because they actually derive from fees charged to private citizens and simply "pass through" the public coffers on their way to UMG. However, those private citizens do not contract with UMG and pay no money to it directly. The funds UMG receives are paid monthly by local authorities as established by contract. Simply put, UMG receives funds from state and local authorities.

In sum, based on the undisputed evidence of record, we are satisfied that UMG qualified as a public agency as defined by the pre-amendment version of KRS 61.870(1)(h).

C. Constitutionality of Pre-Amendment KRS 61.870(1)(h).

Lastly, we must address the constitutionality of pre-amendment KRS 61.870(1)(h).[5] The circuit court concluded that the statute was overly vague, and therefore, unconstitutional because it does not define "body" or "state and local authority funds." It concluded that these deficiencies render the statute unintelligible.

Statutes enacted by the General Assembly are presumed to be constitutional. *Curd v. Kentucky State Bd. of Licensure for Prof. Eng'r and Land Surveyors*, 433 S.W.3d 291, 305 (Ky. 2014). In considering the constitutionality of a statute, we must draw all fair and reasonable inferences in favor of the statute's validity. *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). "[T]he violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional." *Kentucky Indus. Util. Cust., Inc. v. Kentucky Util. Co.*, 983 S.W.2d 493, 499 (Ky. 1998); *Talbott v. Thomas*, 151 S.W.2d 1, 8 (Ky. 1941).

"Our strong presumption of a statute's constitutionality allows a certain leeway for vagueness[.]" *Curd*, 433 S.W.3d at 305. "The fact that a statute

[5]The circuit court concluded that both versions of the statute were unconstitutional. Because we have determined that the amended version of KRS 61.870(1)(h) does not apply in this case, we decline to address any issues related to its constitutionality.

is nonsensical if read literally, or is susceptible to more than one interpretation, does not require a holding that the statute is unconstitutional if . . . those who are affected by the statute can reasonably understand what the statute requires of them." *Gurnee v. Lexington-Fayette Urban Cnty. Gov't*, 6 S.W.3d 852, 856 (Ky. App. 1999). "Constitutional infirmity only arises when, in the context of the particular conduct to which the statute or regulation is being applied, the statute or regulation is beyond comprehension. Essentially, the language of either the statute or regulation is so vague and indefinite as really to be no rule or standard at all or men of common intelligence must necessarily guess at its meaning and differ as to its application." *Curd*, 433 S.W.3d at 305 (internal citations omitted).

The circuit court's finding that KRS 61.870(1)(h) was unconstitutional relied heavily on the lack of a definition for the term "body." The circuit court reasoned that without such a definition, it was impossible to tell whether the statute included entities like UMG. We disagree.

In Kentucky, statutes are to be "written in nontechnical language and in a clear and coherent manner using words with common and everyday meanings." KRS 446.015. The General Assembly has charged the courts to construe and interpret statutes in harmony with "the common and approved usage of language" used therein. *See* KRS 446.080(4).

The *American Heritage Dictionary of the English Language*, (5th ed. 2011), defines the term "body" in part as being "a group of individuals regarded as an entity; a corporation." Similarly, *Black's Law Dictionary* (9th ed. 2009), defines

the term "body" as "an artificial person created by a legal authority." On its face, it is clear to us that the term body includes any entity created under the law.

Likewise, we cannot agree that the General Assembly's failure to define or provide any parameters for construing the meaning of "state or local authority funds" renders the statute too susceptible to arbitrary enforcement by the OAG. The *American Heritage Dictionary of the English Language*, (5th ed. 2011), defines the term "funds" as "available money; ready cash." *Chambers Dictionary*, (9th ed. 2003), defines a "fund" as "a sum of money on which some enterprise is founded or financially supported; a supply or source (of money)." Thus, it is clear to us that "funds" means money. While there may be some room for interpretation in applying this part of the statute, we simply cannot agree that it is "so obscure that any effort to ascribe some rational meaning to it would be based solely upon conjecture." *Burke v. Stephenson*, 305 S.W.2d 926, 929 (Ky. 1957). Simply because a statute could have been written more precisely, does not mean the statute as written is unconstitutionally vague. *See Commonwealth v. Kash*, 967 S.W.2d 37, 43 (Ky. App. 1997).

In sum, the pre-amendment version of KRS 61.870(1)(h) is sufficiently definite that a common man of ordinary intelligence could read and subscribe meaning to it. It provided adequate notice to entities, like UMG, that received state and local authority funds exceeding 25% of the funds expended by them in the Commonwealth of Kentucky that they were subject to the ORA.

IV. Conclusion

For the reasons set forth above, we reverse the Pike Circuit Court's declaratory judgment in favor of UMG and remand this matter for further action consistent with the opinion stated herein.

MAZE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KRAMER, JUDGE, CONCURS AND ALSO JOINS IN JUDGE MAZE'S CONCURRING OPINION.

MAZE, JUDGE, CONCURRING: I whole-heartedly concur with both my colleagues' conclusion and with the well-reasoned analysis they employ in reaching it. I write only to amplify their reference to the historical origins of the principles advanced by our Open Records Act.

> Liberty cannot be preserved without a general knowledge among the people, who have a right …, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge; I mean, of the characters and conduct of their rulers.

John Adams, Dissertation on Canon and Feudal Law 118-123 (Robert J. Taylor, ed., Harvard University Press, 1977) (1765). Presidents Adams and Madison agreed on nearly nothing during their parallel political careers. However, they agreed on the public's right to information. This fact speaks to the timelessness and universality of that right which lies at the heart of the Kentucky Open Records Act. Therefore, exceptions to the public's right to know are rightfully few and narrowly read.

The people of Pike County, and their representatives, were entitled under the Open Records Act to seek answers regarding the conduct of UMG and

its expenditure of public funds. That these answers might contain "the most dreaded … of knowledge" concerning UMG or others is of no consequence. On the contrary, it is all the more reason they must be given.

BRIEF FOR APPELLANT:

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Pikeville, Kentucky

ORAL ARGUMENT
FOR APPELLANT:

John Doug Hayes
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BRIEF FOR APPELLEE:

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