

Executive Branch Ethics Commission
ADVISORY OPINION 07-10
May 10, 2007

RE: Is KRS Chapter 11A, the Executive Branch Code of Ethics, applicable to the Louisville Arena Authority?

DECISION: Yes.

This opinion is issued in response to your March 20 and March 30, 2007 requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 10, 2007 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You represent the Louisville Arena Authority, Inc. (the "Authority"), concerning the application of the Executive Branch Code of Ethics, KRS 11A.001, et. seq., and the statutory language found in the 2006-2008 Kentucky Biennial Budget Bill text of House Bill 380, to same. The Authority seeks to fully comply with any and all obligations lawfully imposed upon it by the Kentucky General Assembly through the text in House Bill 380, which states, "The provisions of KRS Chapter 11A shall apply to the Authority's directors, officers, and management and policymaking employees." You believe that such compliance would include financial disclosure filings imposed by KRS 11A.050, and due April 15, 2007.

You ask the Commission for an advisory opinion as to what provisions of KRS Chapter 11A, if not the entirety thereof, is imposed upon the Authority and its volunteer board of directors, and whether the review and enforcement thereof is imposed upon the Executive Branch Ethics Commission, by way of House Bill 380. You seek clarification as to whether "agency" as defined in KRS 11A.010(10) addresses *only* entities otherwise contained within the executive branch of state government. You also ask for the Commission's interpretation of KRS 11A.015, concerning agencies exempt from KRS Chapter 11A when a law or administrative regulation creates a separate agency code of ethics, and the provision's relevance to the Authority.

You further ask whether you, as the outside general counsel for the Authority, and any other attorneys, outside (non-employee) accountants, etc...for the Authority need to file a statement of financial disclosure with the Commission. You are not a member of the board of directors, nor are you an officer or employee of the Authority. You are engaged by the Authority

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through your law firm, with your representation continuing at the convenience of the Authority's directors.

The Finance and Administration Cabinet, Office of Statewide Accounting, researched and reviewed the Authority to determine whether the entity is a component unit of the Commonwealth of Kentucky for financial reporting purposes. The Office of Statewide Accounting determined that although the Authority is not a component unit of the Commonwealth for financial reporting purposes, it is a related organization that will require disclosure in the notes of the statewide annual financial report. Thus, based on that analysis, the Commission does not believe that the Authority is an executive branch "agency" of state government, as defined in KRS 11A.010(10) below;

(10) "Agency" means every state office, cabinet, department, board, commission, public corporation, or authority in the **executive branch** of state government. A public servant is employed by the agency by which his appointing authority is employed, unless his agency is attached to the appointing authority's agency for administrative purposes only, or unless the agency's characteristics are of a separate independent nature distinct from the appointing authority and it is considered an agency on its own, such as an independent department; (emphasis added).

Whereas the ethical requirements contained in KRS Chapter 11A are generally applicable only to "public servants" in the executive branch as defined below, the 2006-2008 Kentucky Biennial Budget Bill (House Bill 380) extends the ethical requirements of the code of ethics in KRS Chapter 11A for "public servants" to also include directors, officers, and management and policymaking employees of the Authority. Pursuant to Section 15 of the Kentucky Constitution and existing case law, e.g., *Armstrong v. Collins*, (Ky. 1986) 709 S.W.2d 437, the General Assembly may suspend or modify existing statutes in a budget bill. Thus, the Commission believes that even though the Authority is not an executive branch agency, the members of its board of directors are required to comply with the provisions contained in KRS Chapter 11A applicable to public servants concerning certain conduct, abstention on official decisions, prohibited acts, acceptance of gifts, and financial disclosure so long as the 2006-2008 Budget remains in effect.

KRS 11A.010 defines "public servant" and "officer" as provided below:

- (9) "Public servants" means:
- (a) The Governor;
 - (b) The Lieutenant Governor;
 - (c) The Secretary of State;
 - (d) The Attorney General;
 - (e) The Treasurer;

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- (f) The Commissioner of Agriculture;
- (g) The Auditor of Public Accounts; and
- (h) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees;

(7) "Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, executive directors, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Kentucky Retirement Systems board of trustees, Public Service Commission, Worker's Compensation Board and its administrative law judges, the Kentucky Occupational Safety and Health Review Commission, the Kentucky Board of Education, the Council on Postsecondary Education, and any person who holds a personal service contract to perform on a full-time basis for a period of time not less than six (6) months a function of any position listed in this subsection;

In order to fully comply with the requirements imposed by the 2006-2008 budget bill, the board of directors for the Authority, who are considered by the Commission to be major management personnel and thus "officers" as defined above, must file with the Commission annual statements of financial disclosure. Despite the fact that "officer" is defined as major management personnel within the "executive branch" of state government, again the Commission believes that the language of the biennial budget bill applying the code of ethics to the Authority directors modifies the statutory language contained in this definition, at least for the current biennium.

Given that you, as outside general counsel, are not a director, officer, or employee of the Authority, but rather represent the Authority through an engagement letter with your law firm, you are not subject to the provisions of KRS Chapter 11A, nor required to file with the Commission a statement of financial disclosure. In the same way, any other outside professionals hired on a contractual or agreement basis to provide services for the Authority, but who are not employees of the authority, are not subject to KRS Chapter 11A, nor required to file with the Commission a statement of financial disclosure.

Further, as KRS 11A.080 authorizes the Commission to investigate any alleged violation of KRS Chapter 11A, and the biennial budget bill makes the Authority's directors and others subject to KRS Chapter 11A, the Commission thus is empowered to investigate any matter brought to its attention involving a potential violation of KRS Chapter 11A by a director, officer, or management

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or policymaking employee of the Authority, and also to initiate administrative charges if probable cause of a violation is found.

Regarding the Commission's interpretation of KRS 11A.015, stated below, the Commission believes that this statute exempts a public servant employed by an "executive branch" agency within state government from the provisions of KRS Chapter 11A if the agency by which the public servant is employed is directed by statute to create a separate code of ethics for the agency through statute or administrative regulation. It does not appear that the Authority has been granted an exemption under this provision as no statutory language exists authorizing the Authority to create its own code of ethics through statute or administrative regulation.

KRS 11A.015 provides:

An agency that is directed by statute to adopt a code of ethics shall be exempt from KRS Chapter 11A upon the effective date of an Act of the General Assembly creating the agency's code of ethics or upon the effective date of an administrative regulation that creates the agency's code of ethics.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Vice Chair: Cynthia C. Stone