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24-ORD-159

July 9, 2024

In re: Campbell County Board of Education/Department of Revenue

Summary: The Department of Revenue ("the Department") violated the Open Records Act ("the Act") when it failed to respond to a request for records within five business days. The Department also violated the Act when it withheld records in their entirety under KRS 131.190(1), instead of redacting the confidential information as required by KRS 61.878(4).

Open Records Decision

On March 21, 2024, the Campbell County Board of Education ("Appellant") requested that the Department provide copies of "[r]ecords from as many years as can be produced regarding overpayment from" a named taxpayer, "[a]ll records regarding the [tax] overpayment from 2020 that is currently being discussed," "[a]ll email communication records from the [Department and the taxpayer] relating to this overpayment from 2020," and "[a]ll records that can be produced for any/each refund request from" the taxpayer. The request was submitted on the Department's form titled "Open Records Request to Inspect Public Records (KRS Chapter 61)." On March 24, 2024, the Appellant's counsel notified the Department that he believed the Appellant was entitled to the requested records under KRS 131.190(2)(i). On March 28, 2024, the Appellant inquired as to the status of its request and was informed it had been referred to "legal."

After several more inquiries from the Appellant, the Department issued its final response to the request on April 30, 2024. The Department provided information about the years and amounts of the taxpayer's overpayments and the status of refund requests, but denied the Appellant's request for records because "divulging information made confidential under KRS 131.190(1) . . . falls outside the scope of the Department's authority to share information with a school district affected by a refund request." This appeal followed.

Under the Act, a public agency has five business days after receiving a request for public records in which to fulfill or deny the request. KRS 61.880(1). Here, the Department admits it did not make that determination within five business days but claims it did not do so because it did not regard the Appellant's request as having been made under the Act. However, the Appellant used the Department's own "Open Records Request" form, which expressly cites KRS Chapter 61.[1] Thus, there is no credible basis for a belief that the Appellant was not making a request under the Act.

Alternatively, the Department claims it complied with KRS 61.872(5) by telling the Appellant the request was being reviewed by counsel. Under KRS 61.872(5), "[i]f the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed five (5) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection." Here, however, the Department did not claim the records were in active use, in storage, or not otherwise available. Further, the Department did not inform the Appellant of the earliest date on which records would be available for inspection. Instead, the Department merely told the Appellant the request was under review for an indefinite period and issued a denial[2] more than five weeks after receipt of the request. Thus, the Department did not comply with the requirements of KRS 61.872(5). Accordingly, the Department violated the Act when it failed to respond timely to the Appellant's request.

In its final response, the Department denied the request under KRS 131.190(1). That statute, which is incorporated into the Act by KRS 61.878(1)(l), prohibits the disclosure of certain tax information. Specifically, it provides that "[n]o . . . person, shall intentionally and without authorization inspect or *divulge any information* acquired by him or her of the *affairs of any person,* or information regarding the *tax schedules, returns, or reports* required to be filed with the [D]epartment or other proper officer, or any information produced by a hearing or investigation, *insofar as the information may have to do with the affairs of the person's business."* KRS 131.190(1) (emphasis added).

The Appellant, however, claims to be entitled to view the requested records under another provision. KRS 160.613 and KRS 160.614 authorize school districts to levy a gross receipts license tax on certain utility service providers and users,

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[1] A public agency must timely respond to a request for public records under KRS 61.880(1), regardless of whether the request expressly cites the Act. *See, e.g.,* 15-ORD-215.

[2] Although the Department provided the Appellant with information, the Appellant's request under the Act was for copies of records. The Act applies to requests for records, not for information. *See* KRS 61.872. Thus, because the Department merely provided information and not records, it denied the request under the Act.

including the taxpayer related to the records at issue here. Under KRS 160.6156, an entity that has made an overpayment on the tax levied by a school district may seek a refund by making a written request to the Department and sending a copy to the school district. KRS 131.190 contains an exception to the prohibition on disclosing taxpayer information under 131.190(1), permitting the Department to provide "any utility gross receipts license tax return information that is *necessary* to administer the provisions of KRS 160.613 to 160.617 to applicable school districts on a confidential basis." KRS 131.190(2)(i) (emphasis added). The Appellant claims all the requested records are "information necessary to administer" the gross receipts tax and should therefore have been confidentially provided by the Department. Specifically, the Appellant argues the disclosable information includes copies of the returns and other records submitted by the taxpayer, as well as "correspondence and communication between Taxpayer and [the Department] that might tend to prove or refute whether Taxpayer has complied with the provisions of KRS 160.6156(2)."[3]

The Department, however, claims the Appellant has misinterpreted KRS 131.190(2)(i), which "was enacted at the request of the Department in 2005 to facilitate administration" of the gross receipts tax. Under KRS 160.6154(1), the Department has "all the powers, rights, duties, and authority with respect to the collection, refund, and administration of [the gross receipts tax], except as otherwise provided in KRS 160.613 to 160.617." These powers and duties include authorizing refunds "in consultation with the chairman or finance officer of the district board of education," KRS 160.6156(3)(a), and making the refunds and adjusting distributions to the school districts to reflect refunds paid, KRS 160.6156(4). According to the Department, KRS 131.190(2)(i) "allows the Department to provide taxpayer information when making monthly distributions of taxes collected to the school district." The Department does so by providing an "Allocation and Distribution Report" to the school district "that identifies the names of the taxpayers, the account numbers, the period, and the distribution amount broken down by tax, interest and any applicable penalties." It is this specific information the Department considers "necessary" to provide to the school district, within the meaning of KRS 131.190(2)(i), "under the electronic filing and distribution system in place for the collection and administration of the [tax] by the Department."

When it requested records from the Department, the Appellant stated its purpose was "to verify that the overpayment is indeed legitimate, and investigate why consistent overpayments are being made." But the Appellant cites no statutory provision assigning to a school district the authority or responsibility to conduct such independent verifications or investigations. On the contrary, the plenary authority to authorize refunds rests with the Department, while the school district serves in a role of "consultation." KRS 160.6156(3)(a). Thus, it is not apparent why the requested

[3] KRS 160.6156(2) requires a taxpayer seeking a refund to submit a request identifying "the amount requested, the applicable period, and the basis for the request."

records would be "necessary" for the Department to disclose under KRS 131.190(2)(i). In an open records appeal, the Office "will generally defer to the public agency in its interpretation of confidentiality provisions which are binding upon it" if that interpretation is reasonable. 21-ORD-006 n.2 (quoting 05-ORD-186). Accordingly, the Office concludes KRS 131.190(2)(i) does not require the Department to provide the requested records to the Appellant.

However, the Appellant did not request the records under KRS 131.190(2)(i), but under the Act. Thus, the question is not whether the Appellant as a school district is entitled to the records, but whether the requested records are exempt from disclosure to the public under KRS 131.190(1). Under KRS 61.880(2)(c), the Department bears the burden of proof that the withheld records are exempt.

Under KRS 61.878(4), "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination." When considering a claim of taxpayer privacy under KRS 131.190(1), it is necessary to weigh the "legislatively recognized policy of protecting the affairs of the taxpayer and the taxpayer's business against the competing public interest of the [Act]." *Dep't of Revenue v. Eifler,* 436 S.W.3d 530, 533 (Ky. App. 2013). The public interest in disclosure of tax records is the need to determine that "the burden of public expenses is equitably distributed" among taxpayers, that a taxpayer "is meeting his public responsibilities . . . and legal obligation," and that "public servants are carrying out their duties in an efficient and law-abiding manner." 10-ORD-184 (quoting *Attorney General v. Collector of Lynn,* 385 N.E.2d 505 (Mass. 1979)). In weighing those competing interests, "[t]he courts continue to favor openness of records and the ability to redact private information which is exempt under the statute." *Eifler,* 436 S.W.3d at 533; *see also* 23-ORD-199. A tax record that contains both exempt and non-exempt information must be redacted "however limited the information may be once redacted." 18-ORD-046 (quoting *Kenton Cnty. Fiscal Ct. v. Kentucky Enquirer*, No. 2008-CA-002064-MR, 2010 WL 890012 (Ky. App. 2010)).

Exempt information under KRS 131.190(1) includes Social Security numbers, federal identification numbers, and information that "reveals the private details of the taxpayer's business," such as "profits, taxes,[4] deductions, and salaries." 07-ORD-255; 01-ORD-63; 94-ORD-64. It does not include information that is "in any way made a matter of public record." KRS 131.190(2)(b). Thus, for example, the name and location of a business is not exempt from disclosure. *See, e.g.,* 07-ORD-255; 01-ORD-63. Therefore, the question is whether any of the requested records can be redacted to protect information that is confidential under KRS 131.190(1).

[4] As a school district, the Appellant is obviously able to obtain certain information about taxes under KRS 131.190(2)(i).

Here, the Appellant requested all records pertaining to overpayments and refund requests from the taxpayer, including emails between the Department and the taxpayer regarding the 2020 overpayment. The Department describes the responsive records as "the taxpayer's returns, audit workpapers[,] and correspondence between the taxpayer and the Department."

Regarding "the taxpayer's returns," the Department has not explained why it is unable to redact information that is confidential under KRS 131.190(1). Rather, "the redaction of private information on the tax returns c[an] be accomplished as well." *Eifler*, 436 S.W.3d at 533. Similarly, the Department has not explained why the "audit workpapers and correspondence" cannot be redacted to mask the information made confidential by KRS 131.190(1). Thus, the Department has not met its burden of proof under KRS 61.880(2)(c). Accordingly, the Department violated the Act when it withheld records in their entirety instead of producing them in redacted form.[5]

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ James M. Herrick
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Distributed to:

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[5] The Department also cites KRS 61.878(1)(a), which exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." However, the Department has not articulated any personal privacy interests at issue beyond those protected by KRS 131.081(15) and KRS 131.190(1).