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Kentucky Court of Appeals Affirms Holds Attorney Is Entitled to Obtain Records from the Kentucky Department of Revenue

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In *Department of Revenue v. Timothy J. Eifler*, No. 2012-CA-000302-MR (Ky. App. Sept. 20, 2013), the Kentucky Court of Appeals affirmed a ruling by the Franklin Circuit Court requiring the Department of Revenue (“DOR”) to produce records requested on behalf of a taxpayer by its attorney, Timothy J. Eifler. Mr. Eifler is a member of this firm.

The case involves Kentucky’s utility gross receipts license tax, commonly known as the “school tax.” The school tax is imposed by school districts across the Commonwealth at the rate of three percent (3%) of the total gross receipts derived from “*the furnishing, within the district, of utility services.*” KRS § 160.613 (emphasis added). Although the school tax was originally administered by each individual school district, the DOR began administering the tax in 2005.

Taxpayer Delta Resources, Inc. (“Taxpayer”) is a gas marketer that purchases gas from suppliers and resells that gas to commercial and industrial customers. The school district never attempted to collect the school tax from Taxpayer. However, the DOR maintains that Taxpayer is subject to the school tax. The DOR has not identified any substantive changes to the taxing statutes that would result in Taxpayer being subject to the school tax from 2005 forward. However, the DOR has alleged that other gas marketers are paying the tax. To verify the DOR’s claim, Mr. Eifler (on behalf of Taxpayer) made an open records request pursuant to Kentucky’s Open Records Act, KRS § 61.870 *et seq.*

On July 19, 2010, Mr. Eifler requested the names, addresses and dates of registration of all taxpayers currently registered with the DOR for the school tax. If these records did not exist, Mr. Eifler requested “to inspect all documents, materials, computer software/databases or other records containing the names, addresses and/or dates of registration of all taxpayers currently registered” for the school tax. On July 23, 2010, the DOR denied Mr. Eifler’s request, explaining that (1) a record of the names, addresses and date of registration of all taxpayers did not exist; (2) there was no existing method of extracting such information; (3) the DOR was not obligated to create a query to extract such information; and (4) the DOR did not need to release the entire database to Mr. Eifler because the requested information fell within an exemption to the open records law. In particular, the DOR claimed that the requested records constituted confidential taxpayer information that the DOR was prohibited from producing pursuant to statute. *See* KRS § 131.190(1)(a), § 131.081(15), and § 61.878.

Mr. Eifler appealed the DOR's ruling to the Kentucky Attorney General. The Attorney General overruled the DOR, finding that the DOR maintained documents containing the requested information and that these documents should be produced for inspection. The Attorney General also found that the DOR violated the Open Records Act by applying an overbroad interpretation of the confidentiality statutes, KRS §§ 131.190(1)(a) and 131.081(15), and that the registration applications of the taxpayers easily could have been redacted to comply with statutory privacy requirements. On appeal, the Franklin Circuit Court affirmed the decision of the Attorney General. *See Department of Revenue v. Eifler*, No. 10-CI-01640. The DOR then appealed to the Kentucky Court of Appeals.

On September 20, 2013, the Kentucky Court of Appeals affirmed the decision of the Franklin Circuit Court. The court found that the DOR could have redacted the private information included in the documents requested by Mr. Eifler, noting that "courts continue to favor openness of records and the ability to redact private information which is exempt under the statute." Citing *Kenton County Fiscal Court v. Kentucky Enquirer*, 2010 WL 890012 (Ky. App. 2010), the court noted that "it is in the interest of public policy to have access to occupational license applications however limited the information may be once redacted to provide the name and location of the business." *Kenton County Fiscal Court v. Kentucky Enquirer*, 2010 WL 890012, at *6 (Ky. App. 2010). The court also agreed with both the Attorney General and the Circuit Court that the DOR's interpretation of KRS §§ 131.190(1)(a) and 131.081(15) was overbroad. Accordingly, the court held that the records sought by Mr. Eifler are not exempt under the Open Records Act. The court found that the DOR may redact the private information from the database and then allow Mr. Eifler to inspect the records.

In October, 2013, the DOR filed a motion for discretionary review at the Kentucky Supreme Court.