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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000089-MR

MITZI D. WYRICK — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 06-CI-00381

DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY; AND MARIAN DAVIS, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE — APPELLEES

OPINION
REVERSING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES, SENIOR JUDGE.

KELLER, JUDGE: In this Open Records action, Mitzi D. Wyrick has appealed from an order of the Franklin Circuit Court denying her request to inspect four categories of records held by the Department of Revenue (the DOR). Having

determined that the DOR incorrectly applied the applicable law in denying Wyrick access to the materials, we reverse in part, vacate in part, and remand this matter to the circuit court for further proceedings.

FACTS

Wyrick is a practicing attorney who is representing the Courier-Journal and Louisville Times Co. (the Courier-Journal) in a proceeding before the Kentucky Board of Tax Appeals regarding the Courier-Journal's taxpayer refund claim.[1] In the course of that administrative proceeding, the Courier-Journal sought discovery from the DOR via Interrogatories and Requests for Production of Documents seeking information concerning, for example, the DOR's interpretation or administration of tax laws, other taxpayers and the DOR's resolution of their matters, and the internal operations of the DOR. The DOR disputed the Courier-Journal's right to that information, arguing that the requested discovery was not relevant to the matter before the Board of Tax Appeals. The DOR was successful in its argument, and the Courier-Journal was not permitted to obtain the material in discovery.

On September 1, 2005, the day after the Kentucky Board of Tax Appeals sustained the DOR's objection to the Courier-Journal's discovery requests, Wyrick filed an Open Records request with the DOR, seeking nine categories of public records to inspect and copy (Request No. 1). Those public records were:

[1] Kentucky Board of Tax Appeals File No. K04-R-03.

1. Any and all training manuals or guides from 1975 to 1994 used to instruct personnel to process, audit, review, or otherwise handle unitary/combined audits and/or tax returns of taxpayers.

2. Any and all policies or procedures regarding the filing, auditing or review of tax returns under the unitary method of reporting.

3. Any correspondence, questionnaires and similar material sent to taxpayers seeking information about unitary attributes and other matters pertaining to the determination of a unitary group.

4. A copy of Revenue Cabinet policy 41P225, any preceding policies related to the filing of unitary/combined returns, and any subsequent policies regarding the filing of unitary/combined returns.

5. All memos and drafts of memos regarding the filing, auditing, review of tax returns under the unitary method and how the unitary method should be applied in Kentucky.

6. All files regarding unitary filings in Kentucky and how unitary filings should be treated, reviewed, audited, or processed.

7. All legal memos regarding the application, interpretation, or analysis of unitary filing under *Early & Daniels*, 682 S.W.2d [sic] (Ky. 1982); *Armco*, 748 S.W.2d 372 (Ky. 1988); *V.E. Anderson*, 87-SC-122-DG (Nov. 5, 1987)(unpublished); or *GTE v. Revenue Cabinet*, 889 S.W.2d 788 (Ky. 1994).

8. Any contracts, memorandums of agreement or understanding, or similar documents in which the Commonwealth of Kentucky or the Revenue Cabinet on its behalf participated in the Joint Audit Program of the Multistate Tax Commission.

> 9. The audit files related to all audits conducted by the Multistate Tax Commission's Joint Audit Program on behalf of the Revenue Cabinet.

The DOR sent a preliminary response to Wyrick on September 8th, noting that it was working diligently to locate the requested information, but that it would need additional time through October 14th pursuant to KRS 61.872(5) and (6) to determine whether it had any of the materials in its possession that were not exempt from disclosure. In response, Wyrick sent a letter to the DOR on September 27, 2005, in which she stated her disagreement with the DOR's delayed response. In the same correspondence, Wyrick also submitted a second Open Records request (Request No. 2): "All documents produced by the Revenue Cabinet in the *Johnson Controls* litigation in the Franklin Circuit Court, Civil Action No. 00-CI-00661."

The DOR responded to Request No. 2 in a letter dated September 30, 2005, stating that no records existed, as the DOR did not keep or maintain any copies of the documents the plaintiffs in the *Johnson Controls* litigation inspected, and its files did not contain any of the documents. The DOR then stated that even if it did maintain the requested records, the material would be exempt from disclosure. By letters dated October 11 and 21, 2005, Wyrick sought clarification from the DOR concerning the *Johnson Controls* litigation documents, and requested that the DOR more thoroughly search for these records. The DOR responded to Wyrick's two letters on October 25, 2005, again stating that the

requested records did not exist and that such records would have been excluded from application of the Open Records Act.

The DOR responded to Request No. 1 on October 18, 2005. It provided Wyrick with a copy of Revenue Policy 41P225, but denied the remainder of her request, both in the aggregate (pursuant to the application of KRS 61.878(1)) and as to each of the nine categories (pursuant to one of the fourteen listed exclusions).

On November 21, 2005, Wyrick initiated an appeal with the Attorney General, seeking enforcement of the Open Records Act for both of her requests. In a lengthy order dated February 13, 2006,[2] the Attorney General upheld the DOR's denial of five of the nine requests for records in Request No. 1, but determined that the DOR's denial of the remaining four categories of records was improper. The Attorney General also determined that the DOR improperly denied Request No. 2. The Attorney General specifically did not address whether the party litigation limitation in KRS 61.878(1) provided a defense for the DOR, as that issue was not raised in the DOR's response.

The DOR sought review of the Attorney General's decision pursuant to KRS 61.880(5)(a) by filing an appeal with the Franklin Circuit Court on March 15, 2006. In the appeal, the DOR asserted that Wyrick's review to the Attorney General was untimely, that inspection was prohibited as beyond pretrial discovery pursuant to KRS 61.878(1), and that each of the categories for which the Attorney

[2] 06-ORD-032.

General authorized inspection was barred from inspection by a listed exclusion. In her answer, Wyrick put forth defenses based upon the DOR's failure to state a claim upon which relief could be granted as well as based upon estoppel. Wyrick requested a declaration that the records would be available for review, and also requested penalties and costs.

Soon thereafter, the parties engaged in a dispute concerning discovery. In an order entered July 17, 2006, the circuit court ruled on the discovery dispute and held that in a *de novo* appeal, such as this, evidence not introduced below may not be introduced before it. In the same order, the circuit court ordered the parties to brief the issue of whether the action was properly before the circuit court pursuant to KRS 61.878(1) based upon the party litigation limitation. After the parties filed their respective briefs, the circuit court entered an Opinion and Order on December 11, 2006, solely addressing that issue. The circuit court ultimately held that the party litigation limitation applied to bar inspection by Wyrick of the subject documents, as Wyrick had made the Open Records request on behalf of a party (the Courier-Journal) that was involved in legal proceedings against the Commonwealth after a determination had been made that the documents were not discoverable. The circuit court made the December 11th Opinion and Order final and appealable pursuant to CR 54.02, and this appeal followed.

## STANDARD OF REVIEW

Our standard of review in Open Records actions is set forth in *Medley v. Board of Educ., Shelby County*, 168 S.W.3d 398, 402 (Ky. App. 2004), as follows:

> [T]he circuit court's review of an Attorney General's opinion is *de novo*. As such, we review the circuit court's opinion as we would the decision of a trial court. Questions of law are reviewed anew by this Court. When there are questions of fact, or mixed questions of law and fact, we review the circuit court's decision pursuant to the clearly erroneous standard. [Footnotes omitted.]

The issue raised in this appeal deals with a question of law; namely, the interpretation of a statute. Accordingly, our review is *de novo*.

## ANALYSIS

Before we are able to reach the merits of this appeal, we must first address several issues that may have some bearing on our scope of review.

We shall first address the DOR's contention that Wyrick's appeal to the Attorney General seeking review was untimely. The DOR relies upon KRS Chapter 13B to urge this Court to imply a 30-day time period in which a denial of an Open Records request must be appealed to the Attorney General. Here, the DOR denied Request No. 1 on October 18, 2005, and it denied Request No. 2 on September 30, 2005. Wyrick did not seek review by the Attorney General until November 21, 2005. Wyrick argues in her reply brief that the Open Records Act does not contain a timeframe for challenging an agency's denial to the Attorney General. We agree with Wyrick's position.

In KRS 61.880, the General Assembly described the role of the Attorney General in actions to seek enforcement of the Open Records Act. Under KRS 61.880(2)(a), a complaining party who wishes to seek review of a public agency's denial of an open records request simply must "forward to the Attorney General a copy of the written request and a copy of the written response denying inspection." The General Assembly chose not to attach a time limitation on a complaining party's decision to appeal to the Attorney General, as it did on the Attorney General's time to issue a decision and on a party's time to appeal the Attorney General's decision to the circuit court. *See* KRS 61.880(2)(a) and (b); KRS 61.880(5)(a). Furthermore, we note that the General Assembly has provided

for such time limitations elsewhere. In KRS 197.025(3), the General Assembly specifically provided that "all persons confined in a penal facility shall challenge any denial of an open record with the Attorney General by mailing or otherwise sending the appropriate documents to the Attorney General within twenty (20) days of the denial . . . ." As we recognized in *Hahn v. University of Louisville*, 80 S.W.3d 771, 774 (Ky. App. 2001), *citing Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994), "'[w]e are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.'" Accordingly, we decline the DOR's request that we infer a 30-day time limitation for seeking review before the Attorney General and hold that pursuant to the plain language of the statute, Wyrick's appeal to the Attorney General would have been timely whenever she chose to file it.

Next, we shall address the DOR's argument concerning what issues are properly before this Court on appeal. This contention was specifically addressed in the DOR's motion to strike and limit Wyrick's appellate brief and in Wyrick's response to that motion.[3] In her brief, Wyrick included an argument that the circuit court improperly foreclosed discovery in its July 17, 2006, order. The DOR contends that the only ruling capable of being appealed to this Court is the December 11, 2006, Opinion and Order, in which the circuit court only addressed Request No. 1. The circuit court chose to make that particular Opinion and Order

[3] A three-judge panel denied the DOR's motion in an interlocutory order entered November 19, 2007.

final and appealable by including the appropriate CR 54.02 language, as it had not ruled on any other pending issues, such as the merits of Request No. 2 or whether the materials Wyrick requested fell under any of the enumerated exclusions. The DOR also pointed out that the circuit court did not choose to make the July 17, 2006, discovery order final and appealable.

Wyrick, in her response to the DOR's motion, stated that Request No. 2 was an attempt to narrow the scope of Request No. 1, meaning that the circuit court had in fact ruled on both requests. Although that statement might be true, the record does not support Wyrick's statement. In her September 27, 2005, letter, Wyrick stated as follows:

> In the interim, however, we are submitting this, a second request, which is extremely limited in nature and cannot possibly present any of the perceived timely concerns raised by the Department previously. . . .
>
> . . . .
>
> 1. All documents produced by the Revenue Cabinet in the *Johnson Controls* litigation in the Franklin Circuit Court, Civil Action No. 00-CI-00661.
>
> . . . .
>
> Please know that this request does not supercede [sic] our previous Open Records request and we expect that documents responsive to [the] first request will be available for inspection on or about October 14, 2005, as promised by your attorney. . . .

There is nothing in Wyrick's correspondence to allow us to determine what the documents produced in the *Johnson Controls* litigation were, or any indication that

those documents were part of the same documents she had previously requested in Request No. 1. Additionally, the circuit court made it clear in the Opinion and Order that it was entering a final judgment only as to the claims arising out of Wyrick's Request No. 1 and the DOR's October 18, 2005, response to that request.

Accordingly, we agree with the DOR that the circuit court has not yet ruled on all of the pending issues, meaning that Wyrick's appeal must be limited to any rulings that were made final and appealable. Therefore, the only ruling properly before this Court on review is the December 11, 2006, Opinion and Order, which only addresses the materials Wyrick requested in Request No. 1. We shall decline to review Wyrick's argument concerning the circuit court's discovery ruling. This holding shall in no way foreclose Wyrick's right to appeal that interlocutory order upon the entry of a judgment finally adjudicating all of the claims, including Wyrick's claims for penalties and costs, should the circuit court be in the position to consider those claims.

Finally, Wyrick contends that the DOR failed to preserve its argument under KRS 61.878(1), as it failed to argue this defense before the Attorney General. The DOR argues that it raised that defense in its aggregate denial of Wyrick's Request No. 1, and that it was not required to rehash all of its possible defenses in its brief to the Attorney General. It is axiomatic that before an issue may be raised on appeal, "a trial court must first be given the opportunity to rule on a question for which review is sought." *Taxpayer's Action Group of Madison County v. Madison County Board of Elections*, 652 S.W.2d 666, 668 (Ky. App.

1983). Failure to do so renders an argument unpreserved for appeal. *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 769 (Ky. 1995). Although we believe that the DOR probably should have raised this defense before the Attorney General, we nevertheless hold that the DOR sufficiently preserved this issue when it included the defense as an aggregate reason for denying Wyrick's request. Pursuant to KRS 61.880(2)(a), "[t]he Attorney General shall review the request and *denial* . . . ." (Emphasis added.) Accordingly, the Attorney General would have received the DOR's October 18th response, despite the DOR's apparent failure to discuss this defense in its response to Wyrick's letter of appeal.[4] In our view, the DOR sufficiently preserved this issue for review before the circuit court as well as this Court. Having determined that the DOR preserved this issue, we shall now turn to the merits of this appeal.

"The Open Records Act[5] requires public agencies[6] to make all public records[7] open for inspection and copying by any person, except when specifically exempted." *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860, 862 (Ky. App. 2001). In *Medley*, this Court described the basic policy of the Open Records Act

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[4] The record does not contain Wyrick's letter of appeal or the DOR's response. Based upon the Attorney General's decision, we acknowledge that Wyrick challenged the DOR's position regarding the application of the party litigation limitation as stated in its October 18th response in her letter of appeal, but the DOR did not address that particular issue in its own response. Therefore, the Attorney General did not address Wyrick's argument concerning the DOR's position on this issue.

[5] KRS 61.870, *et seq*. (Footnote 4 in original.)

[6] As defined by KRS 61.870(1). (Footnote 5 in original.)

[7] As defined by KRS 61.870(2). (Footnote 6 in original.)

"that 'free and open examination of public records is in the public interest . . . .'" 168 S.W.3d at 402. In KRS 61.878(1)(a) through (n) are listed the fourteen separate categories of records that are excluded from application of the Open Records Act. These categories are comprised of records including personal information, confidential or proprietary information, test questions for examinations, preliminary drafts or recommendations, and specifically described law enforcement agency records, to name a few. The public agency bears the burden of establishing that a requested record is exempt from release. *Medley*, 168 S.W.3d at 402. A more general exclusion regarding material pertaining to civil litigation (the party litigation limitation) is contained in KRS 61.878(1), which provides that:

> The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, *except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery*[.] [Emphasis added.]

In analyzing the statutes under the Open Records Act, "we are guided by the principle that 'under general rules of statutory construction, we may not interpret a statute at variance with its stated language.'" *Hoy v. Kentucky Industrial Revitalization Authority*, 907 S.W.2d 766, 768 (Ky. 1995).

In *Kentucky Lottery*, the Court of Appeals explained the party litigation limitation as follows:

> That statute does not exempt or exclude all records from the open records disclosure, in favor of discovery in litigation or anticipated litigation cases, but limits the release of records specifically listed in KRS 61.878(1) to those records which parties can obtain through a court order. The gist of this wording is not to terminate a person's right to use an open records request during litigation, but to limit a court on an open records request *on excluded records*, to those records that could be authorized through a court order on a request for discovery under the Rules of Civil Procedure governing pretrial discovery. Any other interpretation would allow a nonparty (like the press, which also made a request in this case) to obtain records not exempted, while a party before an administrative agency could not obtain these same nonexempted records because administrative agencies are generally not subject to pretrial discovery.[8] This would bring about an absurd or unreasonable result which cannot be fostered by the courts.[9] "[T]he Legislature clearly intended to grant any member of the public as much right to access to information as the next." [Emphasis in original.]

*Kentucky Lottery*, 41 S.W.3d at 863. *See also Zink v. Commonwealth*, 902 S.W.2d 825, 828 (Ky. App. 1994). The *Kentucky Lottery* Court went on to state:

> The Attorney General's Office has previously taken the position that a party to litigation has the same rights to disclosure as a nonparty:
>
> > Although there is litigation in the background of the open records request under review, the requester . . . stands in relationship to the agency under the Open Records Law as any other person. The fact

[8] *Starr v. Commissioner of Internal Revenue*, 226 F.2d 721 (7th Cir. 1955), *cert. denied*, 350 U.S. 993, 76 S.Ct. 542, 100 L.Ed. 859 (1956). (Footnote 8 in original.)

[9] *Com., Cent. State Hospital v. Gray*, Ky., 880 S.W.2d 557 (1994); *George v. Alcoholic Beverage Control Board*, Ky., 421 S.W.2d 569 (1967); *Commonwealth v. Anderson*, Ky.App., 694 S.W.2d 465 (1985). (Footnote 9 in original.)

> that he may have a special interest by reason of the litigation provides no reason to grant or deny his request to inspect the records.[10]

In a subsequent decision, the Attorney General addressed not only contemplated litigation, but a request by parties in litigation and opined:

> Inspection of public records held by public agencies under Open Records provisions is provided for by statute, without regard to the presence of litigation. There is no indication in the Open Records provisions that application of the rules therein are [sic] suspended in the presence of litigation. Requests under Open Records provisions, to inspect records held by public agencies, are founded upon a statutory basis independent of the rules of discovery. Public agencies must respond to requests made under the Open Records provisions in accordance with KRS 61.880.[11]
>
> We agree with those Attorney General's Opinions which opine that an open records request should be evaluated independently of whether or not the requester is a party or potential party to litigation, and we so hold.

*Id.* at 863-64.

Because of the confusion inherent in interpreting the party litigation limitation, we shall set forth in clear terms the steps a circuit court must take in reviewing an Open Records Act decision:

1) Determine whether the material requested falls under one of the fourteen listed exclusions, without regard to whether the requester is a party (or a potential party) to litigation;

[10] OAG 82-169, p. 2. (Footnote 15 in original.)
[11] OAG 89-65, p. 3. (Footnote 16 in original.)

a) If it does not fall under one of the exclusions, the material is subject to inspection, and the analysis ends.

b) If it does, see 2) below.

2) If an exclusion applies, the circuit court must look to the party litigation limitation.

a) If the material is pertaining to civil litigation and a party is the requester, then the limitation applies and the circuit court CANNOT grant access to the records in the Open Records action;

b) If the material is NOT pertaining to civil litigation (even if a party from a civil litigation is the requester), then the circuit court MAY, within its discretion, grant access to the excluded record as in any other Open Records action.

Here, the circuit court opted to first decide the issue as to whether the party litigation limitation applied in this case. After permitting the parties to brief the issue, the circuit court decided that the materials requested were pertaining to civil litigation and denied access to Wyrick. However, the circuit court never determined whether the materials were subject to one of the fourteen exclusions listed in the statute. We note that at that point in the proceedings, the Attorney General had ordered the DOR to produce several categories of documents Wyrick had requested, meaning that those materials were not subject to any of the fourteen listed exclusions. In its Opinion and Order, the circuit court stated that it made

> no determination whether the documents described by Categories 1, 2, 4, and 8 of the September 1 request were (i) excluded from the application of the Open Records Law under one of the 14 specific exceptions provided by KRS 61.878(1), (ii) excepted under KRS 61.876, or (iii) otherwise not subject to inspection on any other basis set forth in the Revenue Department's October 18, 2005 response.

Therefore, we must remand this case to the circuit court to make a determination as to whether the materials Wyrick requested were specifically excluded under one or more of the fourteen listed exclusions.

Furthermore, we hold that the circuit court incorrectly decided that the party litigation limitation applied in this case. First, as pointed out by Wyrick, the Kentucky Board of Tax Appeals action in which the Courier-Journal sought, but was denied, the discovery of the material at issue, is an administrative, not a civil, proceeding. Pursuant to the clear language of the statute, the exemption applies only to civil litigation.

Second, assuming for the sake of this analysis that the underlying action was civil litigation, the DOR cannot on the one hand argue, successfully, that the material sought in the tax appeal case is irrelevant to that litigation to defeat the discovery request, and then on the other hand argue in the Open Records proceeding that it is pertaining to that litigation and therefore subject to the limitation. The DOR is not "permitted to feed one can of worms" to the Board of Tax Appeals and another to the circuit court in the Open Records action. *Kennedy*

*v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). *See also Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 755 (Ky. 2005).

We reject the DOR's argument that just because a record requested in discovery is deemed irrelevant, does not mean that it is not related to that litigation. We agree with Wyrick's response as well as the Attorney General's decision addressing this point. While we are "not bound by the opinions of the Attorney General, 'they have been considered highly persuasive.'" *Medley*, 168 S.W.3d at 402, *quoting Palmer v. Driggers*, 60 S.W.3d 591, 596 (Ky. App. 2001). In addressing the amendment to the Open Records Act to include the party litigation limitation in KRS 61.878(1), the Attorney General stated: "If, in fact, they have no bearing on the action, the records do not fall within the language of the amendment since they do not 'pertain [] to [the] civil litigation' to which the requester is a party." 95-ORD-18.

For the foregoing reasons, the December 18, 2006, Opinion and Order of the Franklin Circuit Court is reversed in part as to the ruling that the party litigation limitation applies and vacated in part as to the ruling denying Wyrick access to the materials at issue. Finally, this matter is remanded to the Franklin Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Deborah H. Patterson
Rania M. Basha
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Deborah H. Patterson
Louisville, Kentucky

BRIEF FOR APPELLEES:

Laura M. Ferguson
Frankfort, Kentucky

C. Christopher Trower
Atlanta, Georgia

ORAL ARGUMENT FOR APPELLEES:

C. Christopher Trower
Atlanta, Georgia