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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002064-MR

KENTON COUNTY FISCAL COURT

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CI-00033

KENTUCKY ENQUIRER

APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

CAPERTON, JUDGE: The Appellant, Kenton County Fiscal Court, appeals the October 3, 2008, judgment of the Kenton Circuit Court, affirming Kentucky Attorney General Opinion 07-ORD-255, which found that the Fiscal Court violated the Kentucky Open Records Act when it refused to disclose an occupational license application after same was requested by Appellee, the Kentucky Enquirer.

After a thorough review of the arguments of the parties, the record, and the applicable law, we affirm in part and reverse in part.

On October 17, 2007, the Kentucky Enquirer submitted a request to the Kenton County Fiscal Court to inspect the occupational license application for Empire Buffet, Inc., which operated a restaurant in Crescent Springs, Kentucky. The Kenton County Fiscal Court denied the request, asserting that the document was confidential. In so doing, the Fiscal Court asserted that KRS 67.790(8)(a) as defined by KRS 67.790(7) prohibited disclosure. Additionally, the Fiscal Court denied the request pursuant to KRS 61.878(1)(l), which exempts records made confidential by act of the General Assembly from disclosure under Kentucky's Open Records Act.

Upon receiving the denial, the Enquirer appealed the Fiscal Court's decision to the Kentucky Attorney General. In so doing, the Enquirer asserted that the denial was erroneous because the Fiscal Court interpreted KRS 67.790(8)(a) over broadly, and because the basic occupational licensing document was traditionally a public record.

On December 5, 2007, the Attorney General issued an opinion finding that Kenton County's reliance on KRS 67.790(8) was misplaced, and that it interpreted the statute at issue over broadly. Accordingly, the Attorney General ordered the Fiscal Court to permit inspection of the application. The Fiscal Court appealed the opinion of the Attorney General to the Kenton Circuit Court.

Thereafter, on October 3, 2008, the circuit court entered judgment affirming the decision of the Attorney General on the basis that the occupational license application did not require disclosure of the business affairs of an applicant. The Fiscal Court now appeals that decision to this Court.

At the outset, we note that the circuit court's review of an attorney general's opinion on review of a public agency's denial of a request to inspect a public record is de novo. Accordingly, this Court reviews the circuit court's opinion as we would the decision of a trial court. *See* KRS 61.882 and *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398, 402 (Ky. App. 2004). Thus, questions of law are reviewed anew by this Court. *Medley* at 402, *citing Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001).

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. *Medley* at 402, *citing Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Under this standard, this Court will only set aside the findings of fact of the circuit court if those findings are clearly erroneous. The dispositive question is whether the findings are supported by "substantial evidence." *Id.* "Substantial evidence" is evidence "that a reasonable mind would accept as adequate to support a conclusion," and evidence that, when "taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men." *Id.* Furthermore, the public agency bears the burden of proof in this matter. *See* KRS 61.882.

Having set forth the applicable standard of review, we now turn to the statutory provisions at issue in this matter. In so doing, we note that KRS 67.790(8)(a) states as follows:

a) No present or former employee of any tax district 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 tax district 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*. This prohibition does not extend to information required in prosecutions for making false reports or returns for taxation, or any other infraction of the tax laws, or in any way made a matter of public record, nor does it preclude furnishing any taxpayer or the taxpayer's properly authorized agent with information respecting his or her own return. Further, this prohibition does not preclude any employee of the tax district from testifying in any court, or from introducing as evidence returns or reports filed with the tax district, in an action for violation of a tax district tax laws or in any action challenging a tax district tax laws.

(Emphasis supplied.)

Furthermore, KRS 67.790(7) provides that:

A return for the purpose of this section shall mean and include any return, declaration, or form prescribed by the tax district and required to be filed with the tax district by the provisions of KRS 67.750 to 67.790, or by the rules of the tax district or by written request for information to the business entity by the tax district.

Finally, KRS 61.878(1)(l) establishes that:

(1) 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: (l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly . . .

On appeal to this Court, the Fiscal Court argues that the occupational license application¹ requested by the Enquirer is confidential pursuant to KRS 67.790(8). Specifically, the Fiscal Court argues that KRS 67.790(8) unambiguously prohibits an employee from releasing any return required to be filed with the taxing district. The Fiscal Court thus asserts that as it is a taxing district which requires businesses to file occupational license applications, those applications meet the definition of return as set forth in KRS 67.790(7), above, and accordingly, should be confidential and prohibited from release.

The fiscal court further asserts that the circuit court erred in finding that Kenton County's occupational license application does not require the disclosure of a taxpayer's business affairs because it does not include information concerning profits, taxes, deductions, or salaries. The Fiscal Court asserts that the application does require the disclosure of private details of the taxpayer's business insofar as it requires disclosure of the use of hazardous materials, the number of

¹ We note that no argument was made that the application for occupational license requested information beyond that which would be necessary for the issuance of a license or the enforcement of occupational tax licenses. Certainly an application might be drafted to request extraneous information that has little or no relation to the license or enforcement of licensing. In such a case an issue might be presented as to whether this unnecessary or extraneous information is proper for disclosure as not within the purview of information necessary for an agency or entity to achieve its purpose.

employees, the names and addresses of independent contractors, the name and address of any temporary agency used by the business, and a description of the business, including where and how sales, services, and other activities take place.

In response to the arguments asserted by the Fiscal Court, the Kentucky Enquirer asserts that the requested application does not meet the confidentiality requirements of KRS 67.790(8), and that no other applicable confidentiality exemption applies. In support of this assertion, the Kentucky Enquirer states that the application does not reveal the “affairs of the business,” such as proprietary information, profits, taxes, deductions, or salaries.

The Enquirer further argues that nothing in KRS 67.790(8) or its legislative history suggests that the legislature intended to make occupational licenses confidential, and that the Fiscal Court’s “plain language” argument ignores the straightforward limitation language contained in KRS 67.790(8)(a), which limits the statute’s scope. The Enquirer asserts that, according to the statute, information should be confidential *only if* it reveals the affairs of a person’s business.

The Enquirer also asserts that in making the foregoing arguments, the Fiscal Court ignores the second limitation set forth in KRS 67.790(8)(a), which specifically excludes items “in any way made a matter of public record.” The Enquirer argues that this limitation would extend to the occupational license application requested in this instance, because, according to the Enquirer, that document is considered a matter of public record for which disclosure is necessary

for the public to monitor the efficacy of licensing entities and to ensure that all statutory duties are being fulfilled. In support of this assertion, the Enquirer notes that pursuant to numerous decisions of the Attorney General, these records were treated as matters of public record for decades, long prior to the adoption of KRS 67.790.

The Enquirer also directs this Court's attention to the fact that the language at issue in KRS 67.790 was also utilized in KRS 131.190(1), a statute which has been interpreted on previous occasions by the Attorney General. In an opinion interpreting KRS 131.190(1), the Attorney General stated that only information such as "profits, taxes, deductions and salaries" reveal the affairs of a person's business.² Further, the Enquirer cites the portion of the Attorney General's opinion in OAG 87-57, which states:

This office has on several occasions dealt with requests to inspect records and documents pertaining to occupational license fee and taxes . . . a person should be allowed to inspect a city's records of occupational license to obtain business names and address . . . The public is entitled to know what business and professions have been licensed to exist and operate within the boundaries of a governmental unit.

The Enquirer further states that this opinion goes on to indicate that the *basic* information contained in a business license application is "not, in our opinion, information which reveals the affairs of a person's business and is not the type of information protected by KRS 131.190(1)."

² See 92-ORD-1119, at 1, and, e.g., OAG 82-2, OAG 84-93, OAG 85-119, and OAG 87-57.

In addition to the foregoing argument, the Kentucky Enquirer also argues that the application, as the only proof of compliance with the licensing requirements, is a matter of public concern, and is traditionally made available to the public, and that public policy favors disclosure. In support thereof, the Enquirer cites to KRS 61.871, which provides, “the basic policy . . . is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law must be strictly construed, even though revealing documents may cause inconvenience or embarrassment to public officials or others.”

The Fiscal Court acknowledges that the basic policy of Kentucky’s Open Records Act is the free examination of public records. Nevertheless, the Fiscal Court notes that Subsection (1) of KRS 67.878 exempts from disclosure “public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by the enactment of the General Assembly.” On this basis, the Fiscal Court argues that the plain language of the statute indicates the clear intent of the legislature that tax returns, including business license applications, are to remain confidential.

Finally, the Fiscal Court draws this Court’s attention to a recent opinion of the Attorney General opining that the release of a business’ subcontractors would violate KRS 67.790(8),³ as that information does in fact

³ See Ky. Op. Atty. Gen. 09-ORD-015. This was a case in which Louisville-Jefferson County Metro Revenue Commission relied on KRS 67.790(8) and KRS 131.190(1), incorporated into the Open Records Act by KRS 61.878(1)(l), in denying a company’s request for a list of all independent contractors submitted to the Commission by the company over a course of six years

pertain to the business affairs of the applicant. The Fiscal Court therefore asserts that the Attorney General's opinion finding that Kenton County's form did not violate KRS 67.790(8) is therefore contradictory, as Kenton County's application requires the release of subcontractor information.

In response to the Fiscal Court's final argument concerning the issue of whether the inclusion of the names of subcontractors makes the application a document which discloses the "business affairs" of the applicant, the Enquirer asserts that the Fiscal Court failed to preserve this argument by not asserting it below. In the alternative, the Enquirer asserts that even if the release of subcontractor information were to be considered the divulging of business affairs, the proper remedy would have been to redact that particular item of information, rather than withhold the entire public document.

As we have noted previously herein, the law is clear that the governmental entity bears the burden of proof. Thus, any lack of evidence should be construed in favor of the requestor of the public document. *See* KRS 61.882(3). The Enquirer asserts that the Fiscal Court has offered no evidence that an occupational license application was proprietary, or that disclosure would result in competitive harm. Further, the Enquirer asserts that the Fiscal Court's brief does

and appearing on IRS Form 1099 for purposes of collection of occupational license tax. The requesting company made clear that it was not seeking information regarding the independent subcontractors' tax status, income, or other information of a personal nature, and that it was simply seeking a list of names and addresses of the independent subcontractors employed over the last six years. The Attorney General affirmed the decision not to disclose the records, finding that the names and addresses of the company's subcontractors did in fact pertain to the affairs of its business.

not establish any abuse of discretion by the Circuit Court in arriving at its findings and conclusions. Having reviewed the record and applicable law, we are compelled to disagree.

The law is clear that free and open examination of public records is in the public interest, and that we are to strictly construe any exceptions provided by law. *See* KRS 61.871. As the Attorney General has previously stated, it is in the public interest to know what businesses and professions have been licensed to exist and operate within the boundaries of the governmental unit. *See* OAG 84-93, p. 2.

While items which reveal the affairs of the business are exempt from disclosure according to the clear language of KRS 67.790(8)(a), it is our opinion that it is incumbent upon Kenton County to disclose any and all information appearing upon the application as it relates to what professions or businesses are licensed to operate and which *does not reveal the affairs of any person or affairs of the business*, and to redact that information which does. KRS 67.790(8)(a). KRS 61.878(4).

In the matter *sub judice*, the Attorney General found that the “affairs of the business” was a phrase which had consistently been construed to include information such as profits, salaries, deductions, and taxes, none of which were included in the application at issue. Accordingly, the Attorney General found that the application should have been released, albeit with the social security number and date of birth of the sole proprietor redacted.

While we agree that those items were appropriate for redaction, a further and more complete review of the statute indicates that the phrase “affairs of any person” adds additional protection for the information found within the application. In so reading, the protection of the statute is extended to information that may have been previously thought to be appropriate for public disclosure.

The circuit court, having thoroughly reviewed the opinion of the Attorney General, and the application at issue, agreed that it did not disclose the “affairs of the business.” It was the burden of the Fiscal Court to establish that the information was proprietary, and the circuit court affirmed the Attorney General in finding that this burden was not met. Having reviewed the opinion of the circuit court, we find that it was clearly erroneous in finding as it did, and we therefore reverse as to any information that may disclose either the affairs of *any* person or the affairs of the persons’ business.

Having so found, we do note that in the brief to this Court, the Fiscal Court put forth a sound argument with respect to the protection of the names of subcontractors in the application. Unfortunately for the Fiscal Court, our review of the record indicates that the Fiscal Court failed to make this argument to the court below. Accordingly, we are without authority to review this argument for the first time on appeal. Indeed, it has long been the rule that failure to raise an argument below results in it not being preserved for review. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). As this argument was not properly preserved,

we will not consider it now for the first time on appeal. *See Commonwealth v. Duke*, 750 S.W.2d 432 (Ky. 1988).

In so stating, we nevertheless reaffirm our position that it is in the interest of public policy for the public to have access to occupational license applications however limited the information may be once redacted to provide the name and location of the business.⁴ Accordingly, it is for the Fiscal Court or other entity which maintains the record to redact such information. The information regarding subcontractors may well be such information and properly the subject of redaction as is social security information, affairs of any person and affairs of the persons' business.

Accordingly, having found that information concerning the names and addresses of licensed professions and businesses as they appear in the occupational tax license application can be disclosed in the interest of public policy, and having found that the Fiscal Court interpreted KRS 67.790 over broadly in this instance so as to exclude from disclosure the name and address of businesses and professions, we hereby affirm the October 3, 2008 judgment of the Kenton Circuit Court with respect to that issue. In all other respects, the judgment is reversed.

DIXON, JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

⁴ We note that the drafter of such applications might include extraneous information unrelated to the *basic* application that may pertain to the affairs of a person, professions or businesses and that such information may well be confidential, proprietary, or otherwise properly excludable from disclosure.

CLAYTON, JUDGE, DISSENTING: I concur with that portion of the majority's opinion which affirmed the October 3, 2008, judgment, of the Kenton Circuit Court which allowed the disclosure of the names, addresses of licensed professions and businesses. However, I respectfully dissent from the majority's decision that held that the circuit court's findings were clearly erroneous in affirming the Attorney General's finding that the Fiscal Court did not meet its burden of proof in establishing that the information was proprietary.

The applicable statute KRS 67.790(8)(a) states in part:

No present or former employee of any tax district 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 tax district 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. . . .** (Emphasis added).

The Kenton County Fiscal Court relied upon KRS 67.790(8)(a) as defined by KRS 67.790(7) in denying the *Kentucky Enquirer* access to and a copy of the application for a business license fee of Empire Buffet of Kentucky, Inc. The Fiscal Court asserted that their denial was based upon KRS 67.790(8), which prohibits divulging returns to be filed with the tax district. The Attorney General opined that the Open Records Act has a presumption of openness and that public agencies resisting disclosure have the burden of proof. The Fiscal Court inquiry stopped with their determination that the business license was a return and

therefore could not be disclosed. There was no proof that the other information was proprietary.

The trial court's judgment of October 3, 2008, did not set forth any factual findings at all; therefore, we are unable to determine that its findings were clearly erroneous. The trial court agreed as a matter of law that the Attorney General's interpretation of KRS 67.790(8)(a) was correct. The Attorney General noted that personal information of the applicant (affairs of the person) and the affairs of the business should not be revealed. In reading its decision, the majority found the same thing. Thus, I do not believe a reversal of the trial court's opinion is required. Thus, I respectfully dissent.

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