

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002138-MR

A. B. CHANDLER III, ATTORNEY GENERAL
OF COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-00947

MARVIN E. STRONG, JR.,
SECRETARY OF THE CABINET
FOR ECONOMIC DEVELOPMENT

APPELLEE

OPINION
VACATING AND REMANDING WITH DIRECTIONS
** **

BEFORE: BARBER, HUDDLESTON, AND MILLER, JUDGES.

MILLER, JUDGE: A. B. Chandler, III, Attorney General of the Commonwealth of Kentucky, brings this appeal from an August 10, 1998, Summary Judgment of the Franklin Circuit Court. We vacate and remand with directions.

The Cabinet for Economic Development is a program cabinet enumerated in Kentucky Revised Statutes (KRS) 12.020(II)(5) and defined in KRS 12.010(9). The Cabinet was established under KRS 12.250(5). It is governed by the Kentucky Economic Development Partnership, a board established by

appointment, under KRS 154.10-010. The mission and goals of the Cabinet, operating through the board, are to implement long-term strategic planning "that fosters sustainable growth in jobs and incomes and enables communities, businesses, governments, and individuals to compete in the global marketplace." KRS 154.01-020(1). Toward these ends, certain business entities are offered significant incentives to locate in the Commonwealth. To encourage businesses to apply for the incentive programs, the Cabinet agrees that confidential or proprietary information contained in the application will not be disclosed except to the extent required by law.

The matter before us springs from the Attorney General's May 1, 1997, written request to Cabinet Secretary, Marvin E. Strong, Jr., for inspection of documents in the Cabinet's possession relating to economic incentives granted to Alliance Research, Incorporated. Alliance is a private corporation which has, in the past, obtained economic incentives from the Commonwealth of Kentucky administered by the Cabinet. In early 1997, it became known that Alliance would close its facility in Radcliff, Kentucky, and move that operation to West Virginia. Presumably, a number of Hardin County citizens lost their jobs as a result thereof. Being apprised of the facility's closing in Radcliff, the Attorney General reckoned if same might be inimical to Alliance's obligation under the economic incentive package it received from the Cabinet. He further perceived that Alliance may be amenable to the state treasury.

To satisfy his suspicion, the Attorney General directed his May 1, 1997, request for a review of "all information and documents in any way relating to economic incentives granted to Alliance Research." According to the communication, the Attorney General was acting "pursuant to KRS 15.020, and the common law."¹ The purpose was to ascertain if any incentive contracts between the Commonwealth of Kentucky and Alliance were breached. If so, the Attorney General tells us, he is duty bound by the lawful authority of his office to obtain recompense for the people.

Viewing the Attorney General's request under the Kentucky Open Records Act (Open Records Act or the Act) (KRS 61.870-884), the Cabinet, through the Secretary, denied the request under the confidential or proprietary information exemption of the Act. KRS 61.878(1)(c)(2). The Cabinet reminded the Attorney General that companies such as Alliance are required to produce confidential documents from the operation of their businesses in order to qualify for incentives. The Cabinet also reminded the Attorney General of the Cabinet's commitment to hold such documents confidential.² The Secretary maintained that he and only he can determine the accessibility of the records. The Attorney General vigorously disagreed with the Secretary and maintained that the Open Records Act has no application to the request made in his official capacity.

¹Kentucky Revised Statutes 15.020 provides, *inter alia*, that the Attorney General is the "chief law officer of the Commonwealth."

²The Cabinet tells us the incentives granted to Alliance are available for public inspection upon request.

On June 18, 1997, the Cabinet filed a Declaratory Judgment action in the Franklin Circuit Court. KRS Chapter 418. In an August 10, 1998, Summary Judgment, the circuit court agreed with the Cabinet by concluding:

The [statutory] powers granted the Attorney General . . . do not give the office the absolute right to compel the Cabinet to provide the documents in contravention of the provisions and spirit of the Open Records Act. The powers of the Attorney General are not unlimited. [citations omitted.] The general powers outlined in KRS 15.060 are subject to the specific limitations established by the Open Records Act.

. . . .

[T]he Cabinet's motion for Summary Judgment is SUSTAINED, and Declaratory Judgment is hereby entered on behalf of the Cabinet The Cabinet therefore may properly decline to produce documents to the Attorney General which fall within the relevant exemptions.

This appeal follows.

The Attorney General contends that the circuit court committed error by granting summary judgment in favor of the Cabinet. In fact, the Attorney General asserts that it was he who was entitled to summary judgment as a matter of law. Summary judgment is proper when there exists no material issue of fact and the movant is entitled to judgment as a matter of law. Ky. R. Civ. P. (CR) 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

The Attorney General maintains entitlement to the records by virtue of statutory and/or common law powers. The office of Attorney General is a parcel of our English heritage. Once attorney for the English crown, in America, the Attorney

General is counsel for the people. See Hancock v. Terry Elkhorn Mining Company, Inc., Ky., 503 S.W.2d 710 (1973). The office is clothed with power and authority emanating from the Constitution, legislative enactment, and the common law. See Commonwealth v. Paxton, Ky., 516 S.W.2d 865 (1974); Hancock v. Schroering, Ky., 481 S.W.2d 57 (1972); Matthews v. Pound, Ky., 403 S.W.2d 7 (1966), and Johnson v. Commonwealth, ex rel. Meredith, 291 Ky. 829, 165 S.W.2d 820 (1942). Sections 91 and 93 of the Kentucky Constitution are given to the creation and duties of the office. These sections authorize the Attorney General to perform such duties as may be "prescribed by law." In KRS 15.020, our legislature has provided that the Attorney General "shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment." The Kentucky Supreme Court has recognized that the Attorney General shall exercise all the common law powers to the extent not modified by statute. See Commonwealth v. Paxton, 516 S.W.2d 865; Johnson v. Commonwealth, 165 S.W.2d 820.

Notwithstanding the foregoing, we are of the opinion the resolution of the matter before us need not rest on the Attorney General's common law power. The Attorney General has directed our attention to KRS 15.060 as statutory authority for his request. That section provides as follows:

15.060. Actions to collect and recover money due Commonwealth.

The Attorney General shall:

(1) With the assistance of the Auditor of Public Accounts and the Revenue Cabinet, investigate the condition of all unsatisfied claims, demands, accounts and judgments in favor of the Commonwealth.

(2) When he believes that any fraudulent, erroneous or illegal fee bill, account, credit, charge or claim has been erroneously or improperly approved, allowed or paid out of the Treasury to any person, institute the necessary actions to recover the same. To this end he may employ assistants and experts to assist in examining the fee bills, accounts, settlements, credits and claims, and the books, records and papers of any of the officers of the Commonwealth.

(3) Institute the necessary actions to collect and cause the payment into the Treasury of all unsatisfied claims, demands, accounts and judgments in favor of the Commonwealth, except where specific statutory authority is given the Revenue Cabinet to do so. (Emphasis added.)

The Attorney General argues the above statute grants his office authority to inspect the requested documents relating to Alliance's economic incentives. The Attorney General specifically relies upon subsection (2) which allows for "assistants and experts to assist in examining . . . the books, records, and paper of any of the officers of this Commonwealth." Upon the foregoing language, the Attorney General contends his office, *a fortiori*, has the power to compel inspection of documents possessed by officers of the Commonwealth. To deny such, he asserts, would render the statute meaningless. In contrast, the Cabinet argues that KRS 15.060(2) does not specifically give the Attorney General the authority to compel inspection of such documents but, rather, authorizes the employment of assistants to inspect and martial same incident to

civil or criminal proceedings. No civil or criminal proceedings are pending. All parties agree that if such proceedings were pending, the Attorney General could avail himself of traditional subpoena power.

The Cabinet urges this Court to strictly interpret KRS 15.060(2). We decline to do so. In interpreting a statute, we are to be guided by the intent of the legislature in enacting same. Davis v. Commonwealth Life Insurance Co., Ky., 284 S.W.2d 809 (1956). We observe that no single word or sentence is determinative, but, rather, the statute as a whole is to be considered. Democratic Party of Kentucky v. Graham., Ky., 976 S.W.2d 423 (1998). Examining KRS 15.060 as a whole, it is clear the legislature intended the Attorney General to act as a protector of this Commonwealth's Treasury. The legislature clearly must have recognized that the Attorney General would necessarily need to inspect sundry state documents in order to perform his assigned duty. We, therefore, agree with the Attorney General that implicit in KRS 15.060(2) is authority to compel inspection of documents possessed by other officers of the Commonwealth. Indeed, without the ability to inspect such documents, the Attorney General would be virtually incapable of carrying out his legislative mandate under KRS 15.060(2) - - that of instituting actions to recover treasury funds. It is well recognized that a statute naturally carries with it all powers necessary to its exercise. Commonwealth, ex rel. Breckinridge v. Nunn, Ky., 452 S.W.2d 381 (1970), and Dodge v. Jefferson County Board of Education, 298 Ky. 1, 181 S.W.2d 406 (1944). We, thus,

interpret KRS 15.060(2) as empowering the Attorney General to compel production of documents that are in the possession of officers of the Commonwealth and are relevant to the recovery of treasury funds.

In the case at hand, the Attorney General requested production of the documents in order to ascertain whether Alliance breached its incentive contract with the Cabinet and, if so, whether Alliance owes monies to the Treasury. We view such request as squarely within the authority granted the Attorney General under KRS 15.060(2). The Cabinet, however, believes the Open Records Act shields these documents from examination by the Attorney General. We disagree.

The circuit court held the documents in question were protected from disclosure under a provision of the Act, namely KRS 61.878(1)(c)(2)(b). KRS 61.878(1) reads in relevant part as follows:

- (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:

. . . .

2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as

confidential or proprietary, which
are compiled and maintained:

. . . .

- b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154; (Emphases added.)

The analysis, however, cannot end with a simple finding of confidentiality under subsection (1)(c)(2)(b); we must proceed by examining subsection 5 of the above statute which specifically addresses the exchange of documents between public agencies:³

- (5) The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function. [Emphasis added.]

We view subsection 5 as clear and unambiguous. The mandates set forth in KRS 61.878 shall not "prohibit or limit" the exchange of information between public agencies if such exchange "is necessary in the performance of a legitimate government function."

It is uncontroverted that the Attorney General requested the confidential documents for the purpose of determining whether Alliance breached its incentive contract with the Cabinet and, if so, whether Alliance owed monies to the

³Kentucky Revised Statutes 61.870(1) defines public agency, in part, as "[e]very state or local government officer" and "[e]very state or local government department, division, bureau, board, commission, and authority."

Treasury. In requesting said information, we think the Attorney General was exercising a "legitimate government function" under KRS 61.878(5). The Attorney General was fulfilling his statutory role as protector of the Treasury. We observe the Attorney General is restricted by the Cabinet's promise to Alliance of non-disclosure and by operation of KRS 61.878(1)(c)(2)(b) from revealing these documents publicly. Nevertheless, we do not view KRS 61.878(1)(c)(2)(b), nor the Cabinet's commitment of confidentiality to Alliance, as removing the documents from the purview of the Attorney General.

In sum, we are of the opinion that the circuit court erred by granting summary judgment in favor of the Cabinet. We hold the Attorney General is entitled to inspect the Cabinet's documents which bear upon the Attorney General's inquiry of whether Alliance breached its incentive contract and perforce owes monies to the Treasury. We, thus, think it incumbent to remand this matter to the circuit court for an *in camera* inspection of the requested documents in order to determine their relevancy to the Attorney General's inquiry. If the documents are relevant, the Attorney General is entitled to inspect same; if the documents are not relevant, the Attorney General is not entitled to inspect same.

Our opinion should not be misconstrued as passing upon whether these documents are, or are not, subject to public disclosure. KRS 61.878(1)(c)(2)(b). We only reach the issue of

whether the Attorney General is entitled to inspection of same under the statutory authority of KRS 15.060.⁴

For the foregoing reasons, the judgment of the Franklin Circuit Court is vacated and this cause is remanded with directions to conduct an *in camera* review of the documents requested and enter appropriate order(s) in conformance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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⁴Nor, do we address the question of whether the Attorney General by virtue of his common law power alone is entitled to inspect confidential government held documents.