

August 31, 2011

MUNICIPAL LAW ALERT
EMPLOYEE'S W-2 ARE NOT PUBLIC RECORDS
UNDER THE RIGHT-TO-KNOW LAW

On August 4, 2011, the Commonwealth Court, in *Office of the Budget v. Campbell*, ___ A.3d. ___ (Pa. Cmwlth. 2011), reversed the final determinations of the Office of Open Records (“OOR”) that required the release of redacted employees’ W-2s. The Commonwealth Court held that under Federal law W-2s are confidential and therefore not a public record under the Right-to-Know Law (the “RTKL”).¹

In the *Office of the Budget v. Campbell*, Campbell requested current and former employees’ W-2s. On appeal to the OOR from the agencies denial, which included the confidentiality provisions in Section 6103(a) of the Internal Revenue Code as a ground for denial, the OOR’s final determination upheld a portion of Campbell’s request. The OOR dismissed the Office of the Budget’s argument that both federal and state law prohibits the release of tax returns. The OOR held that the W-2s are public records; however, all information except, the employee’s name and the contributions to State Employee Retirement System could be redacted. On appeal of the OOR’s final determination, the Commonwealth Court relying on the language of Section 6103(a) of the Internal Revenue Code and the United States Supreme Court’s decision in *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9 (1987) held that W-2s are confidential records under Federal law. The Commonwealth Court further held that W-2s are not public records under the RTKL as the RTKL exempts records protected by Federal law.²

When reviewing an open records request, an agency’s Open Records Officer should not limit the review to only the exemptions provided in the RTKL, but should determine if any Federal or State law prohibits disclosure. A review of Federal and/or State law should always be considered when the requested record contains personal information required by the Federal or State government. Furthermore, this review must be done and if applicable included as a grounds for denial of a request, as the RTKL prohibits agencies from including additional grounds for denial on appeal.

A copy of the decision in *Office of the Budget v. Campbell* is enclosed.

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¹ As the Commonwealth Court held that Federal law prohibits the production of W-2s under the RTKL, the Commonwealth Court never addressed the issue of whether State law prohibits the release of W-2s.

² RTKL definition of “public record” excludes any record that is exempt from being disclosed under any Federal or State law. 65 P.A.C.S. §67-102.



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Office of the Budget, Petitioner v. Simon Campbell, Respondent

No. 1745 C.D. 2010

COMMONWEALTH COURT OF PENNSYLVANIA

2011 Pa. Commw. LEXIS 382

January 21, 2011, Submitted

August 4, 2011, Decided

August 4, 2011, Filed

PRIOR HISTORY: [*1]

Appealed from No. AP 2010-0542. State Agency Office of Open Records.

concluded that the W-2 forms were not "public records" under 65 Pa. Stat. Ann. § 67.102 of the RTKL.

CASE SUMMARY:

OUTCOME: The court reversed the order of the OOR.

LexisNexis(R) Headnotes

PROCEDURAL POSTURE: Petitioner, the Office of the Budget (OB), sought review of an order of the Office of Open Records (OOR) (Pennsylvania), which required it to release to respondent requester redacted W-2 forms of all current and former employees of the OOR under the Right-to-Know Law (RTKL), 65 Pa. Stat. Ann. §§ 67.101-67.3104.

Tax Law > Federal Tax Administration & Procedure > Administration > Identification Numbers & Information Returns (IRC secs. 6031-6065) > Information at Source

OVERVIEW: The requester sought copies of the current and former OOR employee W-2 forms, subject to any redactions. The OB denied the request, noting that tax returns and related information was confidential under federal and state law, and that their disclosure was prohibited. The OB indicated that the W-2 forms had been filed with the Internal Revenue Service under § 6041(a) of the Internal Revenue Code, 26 U.S.C.S. § 6041. On appeal, the OOR mostly ruled in the requester's favor upon noting that it had previously determined that W-2 forms were public records subject to release. On further review, the court disagreed with the OOR's decision. It held that the W-2 forms were within the definitions of "return" and "return information" under 26 U.S.C.S. § 6103(b), such that they were confidential and not subject to disclosure under § 6103(a). The court

[HN1] Section 6041(a) of the Internal Revenue Code, 26 U.S.C.S. § 6041, requires persons engaged in business to file information returns, in the form and manner prescribed by the Secretary, to report payments of income to other persons.

Administrative Law > Governmental Information > Freedom of Information > Enforcement > Standards of Review

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN2] Although a court reviews an appeal from the Office of Open Records in its appellate jurisdiction, the court functions as a trial court and subjects the matter to independent review. By statute, the court is required to enter narrative findings and conclusions, based on the

evidence as a whole, and to clearly and concisely explain its rationale. 65 Pa. Stat. Ann. § 67.1301(a).

Administrative Law > Governmental Information > Freedom of Information > Disclosure Requirements > Record Requests

[HN3] See 65 Pa. Stat. Ann. § 67.701(a).

Administrative Law > Governmental Information > Freedom of Information > Disclosure Requirements > Record Requests

Evidence > Inferences & Presumptions > Presumptions > Effects

[HN4] The term "public record" includes a Commonwealth agency record that is not exempt from being disclosed under any other Federal or State law. 65 Pa. Stat. Ann. § 67.102. A record possessed by a Commonwealth agency is presumed to be a public record unless the record is exempt from disclosure under any other Federal or State law. 65 Pa. Stat. Ann. § 67.305(a).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > Confidentiality of Returns & Return Information

[HN5] See 26 U.S.C.S. § 6103(a).

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > Confidentiality of Returns & Return Information

[HN6] See 26 U.S.C.S. § 6103(b).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > Confidentiality of Returns & Return Information

[HN7] Because W-2 forms are exempt from disclosure

under federal law, they are not public records under the Right-to-Know Law, 65 Pa. Stat. Ann. §§ 67.101-67.3104. Tax returns themselves are protected from disclosure and, thus, cannot be released with redactions.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions

Tax Law > Federal Tax Administration & Procedure > Audits & Investigations > Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435) > Confidentiality of Returns & Return Information

[HN8] Every state in the country (including the District of Columbia) has adopted a statutory regime, evincing a national consensus that taxpayers' tax returns are considered confidential, private communications with the Department of Revenue and should be made available for non-tax purposes only in the rarest of circumstances. For Pennsylvania, § 353(f) of the Tax Reform Code of 1971, 72 Pa. Stat. Ann. § 7353(f): (1) makes it unlawful for an employee of the Commonwealth to divulge, except for official purposes, information disclosed in an income tax return; and (2) imposes criminal sanctions and dismissal from employment as penalties for unlawful disclosure.

COUNSEL: Brian D. Zweiacher, Assistant Counsel, Harrisburg, for petitioner.

Simon Campbell, Pro se.

JUDGES: BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge, HONORABLE P. KEVIN BROBSON, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge. OPINION BY SENIOR JUDGE FRIEDMAN.¹

¹ This case was reassigned to the authoring Judge on July 8, 2011.

OPINION BY: FRIEDMAN

OPINION

OPINION BY SENIOR JUDGE FRIEDMAN

The Office of the Budget (OB) petitions for review of the July 29, 2010, order of the Office of Open Records (OOR), which required the OB to release to Simon

Campbell under the Right-to-Know Law (RTKL)² the W-2 forms of all current and former employees of the OOR, redacting all information except the name of the employer, the name of the employee and the State Employees' Retirement System (SERS) contribution. We reverse.

2 Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

Campbell submitted a right-to-know request to the OB, seeking copies of the 2009 W-2 forms issued and sent by the OB to all current and former employees of the OOR, subject to any redactions. The OB denied the request because federal law and state law make tax returns and tax return information [*2] confidential and prohibit their disclosure. The OB advised Campbell that the OB had filed the requested W-2 forms with the Internal Revenue Service (IRS) under [HN1] *section 6041(a) of the Internal Revenue Code, 26 U.S.C. §6041* (requiring persons engaged in business to file information returns, in the form and manner prescribed by the Secretary, to report payments of income to other persons).

Campbell appealed to the OOR, challenging the OB's denial of his request only with respect to the boxes on the W-2 containing the employer's name and address, the employee's name and address and the SERS contribution. For the most part, the OOR ruled in favor of Campbell. The OOR stated that, in prior cases, it had determined that W-2 forms are public records subject to release. However, this court has enjoined the release of employee home addresses. *See Pa. State Educ. Ass'n v. Dep't of Cmty. & Econ. Dev., 981 A.2d 383 (Pa. Cmwlth. 2009), aff'd, 606 Pa. 638, 2 A.3d 558 (2010)*. Thus, the OOR directed the OB to release the requested W-2 forms, redacting all information except the name of the employer, the name of the employee and the SERS contribution. [*3] The OB now petitions this court for review.³

3 [HN2] Although we review this appeal in our appellate jurisdiction, we function as a trial court and subject this matter to independent review. *Jones v. Office of Open Records, 993 A.2d 339, 340 n.2 (Pa. Cmwlth. 2010)*. By statute, we are required to enter narrative findings and conclusions, based on the evidence as a whole, and to clearly and concisely explain our rationale. *Id.*; see Section 1301(a) of the Law, 65 P.S.

§67.1301(a).

The OB argues that federal law makes tax returns and tax return information, including W-2 forms, confidential and prohibits their disclosure.⁴ We agree.

4 Section 701(a) of the RTKL states that, [HN3] "[u]nless otherwise provided by law, a public record . . . shall be accessible for inspection and duplication . . ." 65 P.S. §67.701(a). [HN4] The term "public record" includes a Commonwealth agency record that "is not exempt from being disclosed under any other Federal or State law . . ." Section 102 of the RTKL, 65 P.S. §67.102. A record possessed by a Commonwealth agency is presumed to be a public record unless "the record is exempt from disclosure under any other Federal or State law . . ." Section 305(a) of the RTKL, 65 P.S. §67.305(a).

Section 6103(a) of the Internal Revenue Code [*4] provides, in pertinent part, as follows:

[HN5] (a) General rule. -- **Returns and return information shall be confidential**, and except as authorized by this title --

....

(2) no officer or employee of any State . . .

(a) General rule. -- **Returns and return information shall be confidential**, and except as authorized by this title --

....

(2) no officer or employee of any State . . .

shall disclose any return or return information obtained by him in any manner . . .

26 U.S.C. §6103(a) (emphasis added). *Section 6103(b) of the Internal Revenue Code* defines "return" and "return information," in pertinent part, as follows:

[HN6] (1) Return. The term "return" means any tax or **information return**. . . required by . . . the provisions of this title which is **filed with** the Secretary by . . .

any person . . . including supporting . . . attachments

(2) Return information. The term "return information" means --

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits . . . tax withheld . . . or any other data, received by, recorded by, prepared by, **furnished to**, or collected by the Secretary with respect to a return

26 U.S.C. §6103(b) (emphasis [*5] added).

Here, the OB "filed with the Secretary" information returns that included W-2 forms and thereby "furnished to . . . the Secretary" the return information appearing on the W-2 forms. Thus, the W-2 forms fall within the definitions of "return" and "return information"; as such, they are confidential and cannot be disclosed. [HN7] Because W-2 forms are exempt from disclosure under federal law, they are not public records under the RTKL.⁵ As to whether the OOR could allow the release of redacted W-2 forms, in *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9, 14-15, 108 S. Ct. 271, 98 L. Ed. 2d 228 (1987), the United States Supreme Court held that the returns themselves are protected from disclosure and, thus, could not be released with redactions.

⁵ In reaching a different result, the OOR relied upon *Stokwitz v. United States*, 831 F.2d 893, 894 (9th Cir. 1987), in which the United States Court of Appeals for the Ninth Circuit held that *section 6103 of the Internal Revenue Code* did not preclude a government employer from disclosing the tax returns of an employee to persons investigating the employee for misconduct. In so holding, the federal appeals court concluded that *section 6103* prohibits disclosure of tax [*6] information only by government officers and employees with access to IRS filings. *Id.*

First, we note that decisions of intermediate federal appeals courts are not binding on this court. *Reeser v. NGK North American, Inc.*, 2011 PA Super 17, 14 A.3d 896, 899 n.3 (Pa. Super. 2011). Second, the federal appeals court in *Stokwitz* did **not** hold that employers may disclose an employee tax return to anyone who requests it;

the court held only that an employer may provide an employee tax return to persons investigating the employee for misconduct.

Finally, we cannot agree with the federal appeals court that *section 6103* prohibits disclosure of tax information only by those with access to IRS filings. In ascertaining the intention of the legislature in the enactment of a statute, we presume that the legislature did not intend a result that is absurd. *Section 1922(1)* of the Statutory Construction Act of 1972, 1 Pa. C.S. §1922(1). It would be absurd to make a W-2 form confidential in the hands of persons with access to IRS filings, but not confidential in the hands of the filers. As stated in *McElfresh v. Department of Transportation*, 963 A.2d 582, 585 (Pa. Cmwlth. 2008), to allow the disclosure of otherwise statutorily [*7] protected tax information under the RTKL would result in a complete evisceration of confidentiality.

Accordingly, we reverse.⁶

⁶ Having concluded that W-2 forms are confidential under federal law, we need not address the OB's argument that they also are confidential under state law. Nevertheless, we point out that, in *People v. Gutierrez*, 222 P.3d 925, 933 (Colo. 2009), the Supreme Court of Colorado stated that:

[HN8] every . . . state in the country (including the District of Columbia) has adopted [a] . . . statutory regime, evincing a national consensus that taxpayers' tax returns are considered confidential, private communications with the department of revenue and should be made available for non-tax purposes only in the rarest of circumstances.

For Pennsylvania, the court cited *section 353(f)* of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, added by *section 4* of the Act of August 31, 1971, P.L. 362, as amended, 72 P.S. §7353(f). *Id.* at 933 n.7. That provision: (1) makes

it unlawful for an employee of the Commonwealth to divulge, except for official purposes, information disclosed in an income tax return; and (2) imposes criminal sanctions and dismissal from employment as penalties [*8] for unlawful disclosure. *72 P.S. §7353(f)*.

ROCHELLE S. FRIEDMAN, Senior Judge

ORDER

AND NOW, this 4th day of August, 2011, the order of the Office of Open Records, dated July 29, 2010, is hereby reversed.

ROCHELLE S. FRIEDMAN, Senior Judge