IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

LARRY H. COLEMAN	)	
	)	
Appellant-Petitioner,	)	
v.	)	**COA No. M2010-642-COA-R3-CV**
	)	
MATTHEW KISBER, in his official capacity as Commissioner of Tennessee Department of Economic and Community Development	)	**Appeal from Chancery Court For the State of Tennessee Twentieth Judicial District**
	)	
and	)	**Trial Court No. 10-137-IV**
	)	
REAGAN FARR, in his official capacity as Commissioner of Tennessee Department of Revenue	)	
	)	
Appellees-Respondents.	)	

RULE 11 APPLICATION OF APPELLANT/PETITIONER LARRY H. COLEMAN FOR PERMISSION TO APPEAL TO SUPREME COURT

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INTRODUCTION

The importance of transparency in government proceedings is a fundamental tenet of the American democracy established by our Forefathers. As James Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governours, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), 9 Writings of James Madison (Hunt Ed.1910) 103.

Tennessee has long adhered to this basic principle of open government. Article I, Section 19 of the Tennessee Constitution explicitly protects the public's right of access to government proceedings, stating that "[t]hat the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof." The General Assembly, too, codified this right of public access in the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-501 et. seq., which, as described by this Court, amounts to an "all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity," Griffin v. City of Knoxville, 821 S.W.2d 921, 923 (Tenn. 1991), reflecting a "clear legislative mandate favoring disclosure of governmental records," Schneider v. City of Jackson, 226 S.W.3d 332, 340 (Tenn. 2007). Id. Under the Public Records Act, all governmental records are presumed open absent a statutory or common law exception to the contrary. Further, the Public Record Act's policy of openness is to be applied broadly "so as to give the fullest possible access to public records...even in the face of serious countervailing considerations. Id.

With its opinion in this case, the Court of Appeals has severely undermined these basic constitutional and statutory principles of Tennessee law. The threshold question in this case is the scope of the "tax administration information" exception to the Public Records Act contained at Tenn. Code Ann. § 67-1-1702 – specifically, whether that exception, which protects information reflecting "the administration, management, conduct, direction and supervision of the state tax laws, rules or related statutes," can be used to permanently shield records related to the Tennessee Small Business Investment Company Credit Act, Tenn. Code Ann. § 4-28-101 *et. seq.* (the "TNInvestco Act"), a law enacted by the General Assembly in 2009 to fund investment in Tennessee companies and to spur the creation of jobs in this State. Focusing on the words "or related statutes," the Court of Appeals has held that this limited tax exception to the Public Records Act shields **all** records relating to the TNInvestco Act unless and until the Department of Revenue, in its sole discretion, determines otherwise. Because the State awarded TNInvestco money in the form of tax credits, the Court reasoned, the TNInvestco Act is "related to" the state tax laws, and all documents concerning its administration, execution and supervision are immune from public scrutiny.

Under the Court of Appeals' reasoning, however, every law that allocates State dollars is "related to" a tax law because, just like tax credits, tax dollars are a product of the tax laws. The Court of Appeals, in other words, has now construed the "tax administration information" exception so broadly as to conceivably shield from public view every document showing how the Tennessee government spends the revenues it receives from taxpayers. Not only is such a rule untenable under the language and policy of Tenn. Code Ann. § 67-1-1702, it also runs contrary to the basic right of access established in this State in both the Tennessee Constitution and the Public Records Act. The Court of Appeals' decision is a classic case of the exception

swallowing the rule and, accordingly, Petitioner/Appellant Larry H. Coleman ("Coleman") requests permission to appeal this important question of law and public interest to this Court.

In addition, the Court of Appeals made at least two other critical errors that adversely affect the policy of open access to governmental records in this State. First, despite the fact that the Public Records Act places the burden on the State to show, by a preponderance of the evidence, that redaction of information deemed confidential under Tenn. Code Ann. § 67-1-1702 is not "possible," the majority unilaterally decided that issue on appeal based on its own "independent review." It did so, moreover, despite the fact that the Commissioners never argued, or offered any proof of, such impossibility; and despite the fact that the trial court made no finding on the issue.

Second, both the trial court and the concurring opinion have misconstrued the so-called "ECD exception" to the Public Records Act, Tenn. Code Ann. § 4-3-730(c), to protect from public disclosure any document that contains any information that is commercially sensitive – as opposed to only the sensitive information. Like the Court of Appeal's interpretation of the "tax administration information" exception, this construction of the ECD exception is overly broad and runs contrary to the language of the statute and the express policy of access in this State.

The public has the right to know what its officials are doing with taxpayer dollars and is not bound to merely assume that those officials are acting properly. Unfortunately, the Court of Appeals' opinion in this case severely curtails that right, effectively asking the citizens of this State to trust how appointed officials spend taxpayer dollars. Respectfully, that is too much to ask. Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, Coleman respectfully requests permission to appeal the decision of the Court of Appeals to this Court.

STATEMENT OF JUDGEMENT

The judgment sought to be appealed was entered by the Court of Appeals on October 4, 2010, and is reported at 2010 WL 3893768. A copy is attached hereto as Exhibit A. No petition for rehearing was filed.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that, because the TNInvestco Act authorized the Commissioners to award benefits to six private investment funds via "tax credits," all documents evidencing the administration, execution and supervision of the TNInvestco Act constituted confidential "tax administration information" that was exempt from the requirements of the Public Records Act?
2. Whether the Court of Appeals erred in holding that the specific documents at issue in this case constituted "tax administration information" as defined in Tenn. Code Ann. § 67-1-1701(7)-(8)?
3. Whether the majority opinion erred in finding that, assuming the public records requested by Coleman constituted "tax administration information," redaction was not possible under Tenn. Code Ann. § 10-7-503(c)(2), even though the Commissioners, who bore the burden of proof on this issue, had offered no proof on this issue and the trial court had made no such finding?
4. Whether the concurring opinion erred in holding that the ECD exception to the Public Records Act, Tenn. Code Ann. § 4-3-730(c), permits Commissioner Kisber to seal, in its entirety, any document that contains any piece of commercially sensitive information, as opposed to only the commercially sensitive information?

STATEMENT OF FACTS

Coleman is a citizen of the State of Tennessee. (A.R. Vol. II at 000192, ¶ 1).[1]

In an effort to spur economic development and job creation in Tennessee, the Tennessee General Assembly enacted the TNInvestco Act. Under the TNInvestco Act, the General Assembly agreed to allocate $120 million in State funds in the form of tax credits to six private investment funds chosen by the Commissioners of the Departments of Economic and Community Development and Revenue (the "Commissioners"). These six "TNInvestcos" would then sell those tax credits to insurance companies, using the proceeds of such sales to invest in early-stage Tennessee businesses approved by the Commissioners.

The General Assembly set forth specific criteria for the Commissioners to follow in selecting the TNInvestcos. The Commissioners, for instance, had to pick investment funds meeting each of the five following qualifications:

a. The entity must be a for-profit or nonprofit partnership, corporation, trust, or limited liability company;

b. The entity must have at least two investment managers with at least five years of investment experience;

c. The entity must have been based, as defined by having a principal office, in Tennessee for at least five years or have at least five years of experience in investing primarily in Tennessee domiciled companies;

d. The entity must have a proposed investment strategy for achieving transformational economic development outcomes through focused investments of capital in seed- or early-stage companies with high-growth potential; and

[1] References to the Record on Appeal are denoted herein as "A.R. Vol. __."

e. The entity must have a demonstrated ability to lead investment rounds, advise and mentor entrepreneurs, and to facilitate follow-on investments.

See Tenn. Code Ann. § 4-28-105(c).

To show the public how they would endeavor to follow the selection criteria set forth by the General Assembly, the Commissioners promulgated, via a newly-created TNInvestco website, a so-called "Evaluation Matrix." (A.R. Vol. II at 000192, ¶ 2, Exh. 1). The Commissioners publicly announced that they would assign each applicant a specific score based on the applicant's demonstrated ability to meet the criteria set forth in Section 105(c) of the TNInvestco Act. (A.R. Vol. II at 000192, ¶ 2, Exh. 1). According to the Commissioners, this matrix "guided" their selection process. (A.R. Vol. II at 000192, ¶ 2, Exh. 1). Indeed, on October 6, 2009, the Commissioners issued a press release stating that they had selected as TNInvestco finalists the ten applicants that had "received the highest scores as judged against the TNInvestco scoring matrix." (A.R. Vol. II at 000192, ¶ 3, Exh. 2).

In addition to the requirements stated above, the General Assembly also required that, prior to selection, each TNInvestco applicant demonstrate the ability to obtain the requisite $14.0 million investment commitments and, if selected, provide the Commissioners no later than November 30, 2009 with proof of "irrevocable investment commitments from participating investors[2] and TNInvestco owners in an aggregate amount equal to at least [$14 million]." Tenn. Code Ann. § 4-28-105(b). Any TNInvestco that failed to provide such a commitment by November 30, 2009 was subject to a $50,000 fine and was disqualified from the TNInvestco program. See Tenn. Code Ann. § 5-28-105(b). See also, A.R. Vol. II at 000192, ¶ 2, Exh. 1.

[2] "Participating investor" is defined under the TNInvestco Act as "any insurance company...that contributes designated capital pursuant to this chapter." Tenn. Code Ann. § 4-28-102(7).

Coleman was one of twenty-five applicants who applied to become "TNInvestcos" by the October 1, 2009 deadline, including some of the most experienced professional venture capital firms in the State. (A.R. Vol. I at 000001, ¶ 8; A.R. Vol. I at 000062, ¶ 10). Five days later, on October 6, 2009, the Commissioners announced the ten finalists to become qualified TNInvestcos (A.R. Vol. II at 000192, ¶ 3, Exh. 2) – a list that, in Coleman's opinion, excluded almost all of the most experienced "professional venture capital" firms in the State, including Coleman's firm. Concerned that the Commissioners' selection process did not follow the law – including the requirement that all TNInvestcos obtain the necessary $14.0 million in investment commitments from insurance companies and TNInvestco owners by November 30, 2009 deadline – Coleman requested to copy and/or inspect five basic categories of documents under the Tennessee Public Records Act: (1) the scored TNInvestco Evaluation Matrices; (2) all investment commitments from owners and insurance companies to the TNInvestcos; (3) any legal opinions or advice to the Commissioners confirming their compliance with the Act; (4) any documents showing any TNInvestco's use of Enhanced Capital (another TNInvestco) or other third party to solicit investment commitments; and (5) documents explaining the administration of the escrow fund. (A.R. Vol. II at 000192, ¶¶ 7, 9, 11, Exhs. 6, 8, 10).

On February 9, 2010, the Commissioners produced numerous documents and confirmed the non-existence of others. (A.R. Vol. I at 000062, ¶¶ 23-25, Exhs. A-C). They refused to provide, however, two sets of documents: (1) the 25 scored Evaluation Matrices, which show how the Commissioners selected the TNInvestcos; and (2) a Tax Credit Purchase Agreement and Side Letter and Letter of Understanding that purportedly show, among other things, when the TNInvestcos obtained the commitments and/or agreements from insurance companies that are

required under the TNInvestco Act, and whether the Commissioners' allocation of tax credits to the TNInvestcos followed the specific requirements of the law.

The Commissioners offered two justifications for their refusal to provide these documents that are relevant to this Application: (1) that the TNInvestco Act was "related to" a tax law, thereby rendering all such documents confidential "tax administration information" under Tenn. Code Ann. § 67-1-1702; and (2) that Commissioner Kisber had determined that such documents contained "commercially sensitive information" that was immune from disclosure under Tenn. Code Ann. § 4-3-730(c), the so-called "ECD exception" to the Public Records Act. In support of the latter, Commissioner Kisber submitted an affidavit stating that on February 7, 2010 (two weeks after this lawsuit had been filed), he – with the affirmative agreement of the Tennessee Attorney General – made the determination that, with respect to the Solicitation Documents and Letter of Understanding, he believed that disclosing the **names** of the insurance companies who purchased the tax credits, and the **prices** they paid, could adversely affect market forces in subsequent rounds of the TNInvestco program and/or harm the reputation or competitive interests of those companies. (A.R. Vol. II at 000158, ¶¶ 13-14). With respect to the Evaluation Matrices, Commissioner Kisber stated that he was concerned that a low-scoring applicant "could be hurt in its business reputation" if the public misconstrued the meaning of the scores contained in those matrices. (A.R. Vol. II at 000158, ¶ 14). Commissioner Kisber did not claim to have spoken to any of the low-scoring applicants to ascertain whether or not they objected to the release of the Evaluation Matrices on such grounds.

ARGUMENT

A. The Court of Appeals' Construction of the "Tax Administration Information" Exception to the Public Records Act Vitiates the Public's Right to Know How Its Government Awards State Monies.

At issue in this case is, inter alia, the scope of the "tax administration information" exception to the Public Records Act, Tenn. Code Ann. § 67-1-1702. Coleman asserts – consistent with the Department of Revenue's position in prior cases – that this exception covers information "created by the Department of Revenue in the course of its administration of the State's revenue laws," including a "variety of state Revenue procedures and functions, including 'assessments, collections, enforcement, litigation, publication and statistical gathering'" and "documents concerning 'the development and formulation of state tax policy relating to existing tax laws.'" Bridgestone/Firestone, Inc. v. Chumley, 2008 WL 22415483 at *8 (quoting the Department of Revenue) (copy attached as Exhibit B). The Commissioners, however, take the position that this exception covers all documents that relate to a law that relates to a tax law. (Appellees' Brief at 31).

Siding with the Commissioners, the Court of Appeals held that the "tax administration information" exception to the Public Records Act covers all documents evidencing the "administration, management, conduct, direction, and supervision" of any statute that is related to a tax law. Coleman v. Kisber, 2010 WL 3893768, **11-13 (Tenn. Ct. App. Oct. 4, 2010). Because the TNInvestco Act awards tax credits to private investment companies chosen by the Commissioners, the Court of Appeals reasoned, it logically "relates to" the state's tax laws. Id at *11. All documents evidencing the government's administration, execution and supervision of that statute, including the Evaluation Matrices, Solicitation Documents and Letter of Understanding at issue in this case, are therefore confidential and need not be produced by the Public Records Act. Id. at **12-13.

The fundamental problem with the Court of Appeal's opinion, however, is that it construes the "tax administration information" exception to the Public Records Act so broadly as to subsume the Public Records Act itself. The TNInvestco Act, for instance, is not a tax law. Its only connection to tax law is that, instead of funding private investment companies directly with $120 million in cash, the General Assembly authorized the Commissioners to fund those companies via tax credits that they could then sell to insurance companies. By focusing on the vehicle by which the State conveyed benefits as opposed to the substance of TNInvestco Act itself (entrepreneurial development and job creation), however, the majority has now expanded the reach of the "tax administration information" exception to cover not only the development of tax policy and audit decisions, but also any use of taxpayer dollars. In other words, it has vitiated the Public Records Act in the very instance where government transparency and accountability is paramount: the doling out of state monies.

Indeed, under the Court of Appeals' reasoning, it is difficult to imagine any documents relating to the State's use of public monies that would not constitute "tax administration information." At heart, the State can only award money in one of two ways: (1) by awarding cash that has already been collected pursuant to the tax laws, or (2) by awarding credits against future tax obligations. Either way, the result is the same: the taxpayer receives (or foregoes paying) money that is collectible under Tennessee's tax laws. Thus, if any law awarding credits against future tax payments is necessarily and logically related to Tennessee's tax laws, then so too must be any law awarding monies that have already been collected under those same laws. To hold otherwise is to draw a line based on an artificial and illogical distinction. It makes no sense to open records where the State chooses to pay cash, but seal them when the State chooses to accomplish the same purpose using tax credits instead.

The Court of Appeals, in short, has expanded Tenn. Code Ann. § 67-1-1702 to protect from disclosure any document that is related to a law that conveys public dollars, in the form of either direct payments of taxpayer money, or credits against future obligations. The ramifications of such an opinion are far-reaching, detrimental to, and in contravention of, the public's constitutional right to access. Any decision regarding who receives State monies arguably become immune from public scrutiny.

This stands in stark contrast to the policy of this State as set forth in Article I, Section 19 of the Tennessee Constitution, which explicitly provides "[t]hat the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof." Tenn. Const. art. I, § 19. Moreover, it runs contrary to the General Assembly's "clear mandate in favor of disclosure", The Tennessean v. Electric Power Bd. of Nashville, 979 S.W.2d 297, 305 (Tenn.1998), and its explicit instruction to the courts "to give the fullest possible public access to public records," T.C.A. § 10-7-505(d) (1999). The majority's broad reading of Tenn. Code Ann. § 67-1-1702, quite simply, turns the right of public access in this State on its head. For that reason, Coleman seeks permission to appeal this case to this Court.

B. The Scored Evaluation Matrices and Solicitation Documents Do Not Constitute Confidential "Tax Administration Information."

Assuming arguendo that the Court of Appeals correctly decided that the TNInvestco Act "relates to" a tax law, it still erred in holding that the specific documents at issue – the Evaluation Matrices, the Solicitation Documents and the Letter of Understanding – constitute "tax administration information."

Tenn. Code Ann. § 67-1-1702 provides "[tax] returns, tax information and tax administration information shall be confidential" unless the tax commissioner determines

disclosure in the best interests of the state. Tenn. Code Ann. §§ 67-1-1702, 1711 (emphasis added). "Tax administration information" means:

> criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration.

Tenn. Code Ann. § 67-1-1701(7). "Tax administration," in turn, is defined as:

> the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements

Tenn. Code Ann. § 67-1-1701(6).

Read as a whole, the intent of this limited "tax administration" exception to the Public Records Act is to protect the confidentiality of taxpayer information from anyone other than the taxpayer; and to protect tax administration information that is "created by the Department of Revenue in the course of its administration of the State's revenue laws," including a "variety of state Revenue procedures and functions, including 'assessments, collections, enforcement, litigation, publication and statistical gathering'" and "documents concerning 'the development and formulation of state tax policy relating to existing tax laws.'" Chumley, 2008 WL 2415483 at *8 (Tenn. Ct. App. June 11, 2008) (quoting the Department of Revenue). According to the Department of Revenue in Chumley, "the formulation of tax policy does not happen in a 'theoretical void,' but arises within the context of the Department's consideration of facts involving a specific taxpayer." Chumley, 2008 WL 2415483 at *8 (quoting the Department of Revenue). The "tax administration information" exception to the Public Records Act, therefore,

is meant to protect the ability of State officials "to engage in frank, open communication" regarding the formulation of tax policy. Id. Thus, even if the records at issue are related to a law that is related to a tax law, the inquiry does not end there. Rather, they only constitute "tax administration information" if they bear some reasonable relation to the formulation of tax policy.

At issue here are a limited number of records that bear no relation to the State's formulation and administration of tax policy. The scored Evaluation Matrices, for example, reflect the Commissioners' application of the selection criteria established by the General Assembly to each of the 25 TNInvestco applications. How, exactly, does the mechanical application of previously-established criteria impede the formulation of effective tax policy? Indeed, far from revealing the "assessments, collection, enforcement, litigation, publication, and statistical gathering functions" of the Department of Revenue (see Tenn. Code Ann. § 67-1-1701(7)), the Evaluation Matrices merely show how the Commissioners scored applicants for state monies vis-à-vis selection criteria mandated by the General Assembly.

Similarly, the Tax Credit Purchase Agreement, Side Letter and Letter of Understanding identified by the Commissioners as responsive to Coleman's requests are agreements between TNInvestcos and third-parties – not the State. Simply because the Department of Revenue has obtained copies of such agreements does not transform them into "tax administration information" immune from public view. Indeed, the definition of "tax administration" speaks in terms of records "**develop[ed] and formulat[ed]**" by the Department of Revenue. See Tenn. Code Ann. § 67-1-1701(6) (emphasis added). Further, the Commissioners' policy arguments in favor of deeming such records "tax administration information" – to ensure "open and frank" discussion of tax policy; and to protect the development and formulation of state tax policy

relating to the TNInvestco Act and interdepartmental consideration of tax issues (A.R. Vol. I at 000052-53) – necessarily relate to documents the State creates in order to discuss, create or formulate tax policy, not copies of agreements they obtain from third parties.

Assuming arguendo that the TNInvestco Act is related to a tax law, it does not follow that **all** information concerning the Act necessarily impacts tax policy and/or administration of a tax law such that they should be deemed confidential under § 67-1-1702. The Public Records Act presumes openness unless, by a preponderance of evidence, the State proves the applicability of an exception thereto. Under the Court of Appeals' opinion, however, that presumption has been reversed: so long as the State can form a logical connection to some tax provision, all documents – including third party agreements that the State has merely obtained copies of – are presumed confidential. For this reason, Coleman seeks review and reversal by this Court.

C. The Court of Appeals Incorrectly Held That Redaction is Not Possible.

The Public Records Act is to be "broadly construed so as to give the fullest access to public records." Tenn. Code Ann. § 10-7-505(d). Accordingly, even assuming that some exception applies to protect a record from disclosure, the inquiry is not over. Rather, "whenever possible," that record "shall be redacted." Tenn. Code Ann. § 10-7-503(c)(2) (emphasis added). If and only if the State can show, by a preponderance of the evidence, that redaction is not possible may the applicable record be withheld in its entirety.

In this case, the Commissioners have offered no proof – nor have they even argued – that redaction of any of the records at issue is not possible. Nonetheless, a majority of the panel at the Court of Appeals held that redaction was not possible.[3] It made this decision, moreover, not

[3] Neither the trial court, nor the Court of Appeals, has addressed the issue of whether redaction of any of the records at issue is required under Section 503(c)(2) of the Public Records Act.

on the basis of any proof offered by the parties but, instead, based on its own "independent review" of the documents.

This finding was wrong. The question of whether it is possible to redact the confidential information from the records at issue is one for the trial court – not the Court of Appeals. At the very least, it is a question that must be decided consistent with the burden of proof established by the General Assembly and based on the proof in the record and arguments of the parties – not on the Court of Appeal's "independent review." As noted in the concurring opinion,

> Nowhere in the lengthy excerpts quoted from the Commissioners' affidavits do either Commissioner Farr or Commissioner Kisber claim that redaction of confidential tax administration information in the subject documents is not 'possible.' Rather, the Commissioners carefully eschew this issue, asserting instead that redaction is not required."

Coleman v. Kisber, 2010 WL 3893768 at *14.

Disregarding prior precedent requiring the trial court to make determinations regarding redaction, Chumley, 2008 WL 2415483, *13 (Tenn. Ct. App. June 11, 2009), the Court of Appeals held that the State had met its burden of proof under the Public Records Act to show that redaction was "not possible." This finding was in error, and Coleman requests that it be reversed and the issue of redaction be remanded.

D. The Concurring Opinion Misconstrues the ECD Exception.

In her concurring opinion, Judge Kirby criticized the majority for invading the purview of the trial court and making its own, independent finding that redaction was not "possible," as opposed to remanding the issue to the trial court. Coleman v. Kisber, 2010 WL 3893768 at *14.

Nonetheless, she concurred with the result of the majority opinion based on the so-called "ECD exception" to the Public Records Act, Tenn. Code Ann. § 4-3-730(c), which she interpreted to "clearly authorize[] [Commissioner Kisber] to declare documents confidential, and

not just certain information contained in the documents," any time he determines, in his discretion and with the assent of the Attorney General, that such documents contain commercially sensitive information. Coleman v. Kisber, 2010 WL 3893768 at *15. In other words, if Commissioner Kisber can identify even a single piece of confidential information in a document maintained by his Department, he can seal that document, in its entirety, thereby obviating the need to decide the redaction issue.

Unfortunately, not only is the concurring opinion inconsistent with the language of the Tenn. Code Ann. § 4-3-730(c), it also runs contrary to the policy of this state as set forth in the Tennessee Constitution and the Public Records Act itself.

First, if the ECD exception is constitutional in the first instance, its plain language gives Commissioner Kisber authority to seal only "such document or information" that he has identified as commercially sensitive – not any document in which commercially sensitive information is contained:

> If the commissioner, with the agreement of the attorney general and reporter, determines pursuant to subdivision (c)(1) that a document or information should not be released or disclosed because of its sensitive nature, **such document or information** shall be considered confidential for a period of up to five (5) years from the date such a determination is made. After such period, the document or information made confidential by this subsection (c) shall become a public record and shall be open for inspection.

Tenn. Code Ann. § 4-3-730(c)(2) (emphasis added). Contrary to Judge Kirby's concurring opinion, therefore, the Commissioner's sensitivity determination and his decision to withhold a particular document or information must be linked. The key word is "such": only "**such** document[s] or information" that the Commissioner specifically determines to be sensitive under Section 730(c)(1) can be withheld. Id. (emphasis added). If the Commissioner determines (and the Attorney General agrees) that an entire document is commercially sensitive, then the ECD

exception permits him to seal "such" document. If, on the other hand, he identifies only certain information in a document as commercially sensitive, only that information can be sealed. Documents or information not specifically identified by the Commissioner as sensitive "shall be considered public." Tenn. Code Ann. 4-3-730(c)(1). Commissioner Kisber, of course, identified only two specific pieces of commercially-sensitive information in the Solicitation Documents: (1) the **price** of the tax credits that were sold by TNInvestcos to private insurance companies, the disclosure of which could "artificially set a floor and ceiling for future tax credit sales under the program"; and (2) the **names** of the insurance companies who purchased those tax credits, the disclosure of which could deter future participation. (A.R. Vol. II at 000158, ¶¶ 13-14). Accordingly, under the plain language of Tenn. Code Ann. § 4-3-730(c), only that specific information can be sealed, and the remaining contents of the documents "shall be considered public." Tenn. Code Ann. 4-3-730(c)(1).

Permitting the State to seal documents in their entirety based on the mere fact that they purportedly contain discrete, commercially-sensitive information runs contrary to the express policy of openness set forth in both the Tennessee Constitution and the Public Records Act. In light of the policy of this State "to give the fullest possible access to public records," it makes little sense to limit the public's access to entire documents based on as little as a single name or price contained therein. Unfortunately, both the trial court's and the concurring opinion's construction of the ECD exception do just that, restricting the public's right of access to only those documents that contain not even a single word of confidential information.

If Commissioner Kisber was legitimately concerned that releasing even a portion of the Solicitation Documents would seriously harm the ability of this state to compete or conclude agreements or contracts for economic or community development, then he could have and,

indeed, was required to attest to those concerns and the basis for them.[4] He did not do so, focusing exclusively on the potential market and reputational repercussions of disclosing the purchasers and purchase price of the TNInvestco tax credits. (A.R. Vol. II at 000158, ¶¶ 13-14). As such, his authority to seal the Solicitation Documents under the ECD exception and the policy of this State should limited to that specific name and price information.

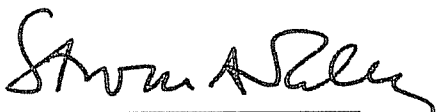
CONCLUSION

The right to access governmental records, protected by both the Tennessee Constitution and the Public Records Act, Tenn. Code Ann. § 10-7-501 et. seq., is a necessary component of self-government. It provides citizens with the ability to observe their government and to ensure accountability, integrity and equity, while minimizing malfeasance. The Court of Appeals' decision in this case, however, severely limits that fundamental safeguard; and its reasoning provides the basis for a far-reaching and dangerous "zone of confidentiality" that the government can, whenever it so chooses, use to cloak in secrecy essentially all its activities involving the use of taxpayer money. Coleman submits that the Court of Appeals has misconstrued the scope of the tax administration information and ECD exceptions to the Public Records Act – exceptions that, pursuant to their language and the policy of this State – are far more limited than the Court of Appeals has found, if they pass constitutional muster at all.

[4] It is unclear how details about whether the TNInvestcos selected by Commissioners used third-party brokers to market and sell tax credits to insurance companies, and the terms of those brokerage and placement arrangements, would affect the market price of tax credits or participation by insurance companies going forward – the two specific concerns identified by Commissioner Kisber in his affidavit. (A.R. Vol. II at 000158, ¶¶ 13-14). Indeed, details about the brokerage and placement of the tax credits awarded by Commissioners go directly to the fundamental question of whether Commissioners complied with the requirements of Tenn. Code Ann. § 4-28-105 in selecting the six funds that received those tax credits. Pursuant to Section 105 of the TNInvestco Act, Commissioners conditioned TNInvestco certification and the receipt of tax credits on (1) the proven ability to obtain investment commitments; and (2) actually obtaining those commitments from insurance companies prior to November 30, 2009. See A.R. Vol. II at 000198; Tenn. Code Ann. § 4-28-105(b). If the Solicitation Documents show that these requirements were not met – and that the TNInvestcos that Commissioners chose did not meet the criteria set forth in the Act – Coleman certainly has a right to inspect them.

For these reasons and the reasons set forth above and in the record as a whole, Coleman requests the permission of this Court to appeal this case and to address the important issue of the Commissioners' right to block the public's access to records showing how the State chose to distribute $120 million in taxpayer money to six private investment funds.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served via hand delivery this 3rd day of December, 2010 to:

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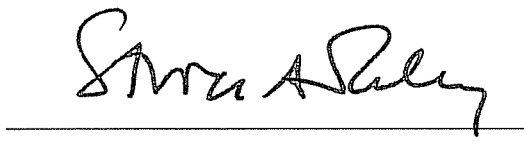


2010 WL 3893768
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Larry H. COLEMAN
v.
Matthew KISBER, et al.

No. M2010-00642-COA-R3-CV. Aug. 4, 2010 Session. Oct. 5, 2010.

Direct Appeal from the Chancery Court for Davidson County, No. 10-137-IV; Russell T. Perkins, Judge.

Attorneys and Law Firms

Stephen A. Riley and James N. Bowen, II, Nashville, Tennessee, for the appellant, Larry H. Coleman.

Robert E. Cooper, Jr., Attorney General and Reporter; Janet M. Kleinfelter, Deputy Attorney General; Joe R. Shirley, Assistant Attorney General; Virginia Barham, Assistant Attorney General for appellees, Matthew Kisber and Reagan Farr.

J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., joined and HOLLY M. KIRBY, J. filed a separate concurring opinion.

Opinion

OPINION

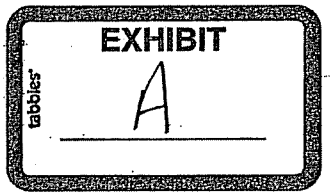
J. STEVEN STAFFORD, J.

*1 This case involves a petition for access to certain documents pursuant to the Tennessee Public Records Act, Tenn.Code Ann. § 10-7-101 *et seq.* The Appellees asserted in the trial court, and on appeal, that the documents are confidential and privileged pursuant to the tax information and tax administration information exceptions found in Tenn.Code Ann. § 67-1-1702; pursuant to the "ECD exception" provided in Tenn.Code Ann. § 4-3-730(c); and also pursuant to the Deliberative Process Privilege. The trial court denied the Appellant's petition finding that the ECD exception applied and therefore, held that the documents at issue should remain confidential for five years. The trial court, however, found that the tax information and tax administration information exceptions did not apply and declined to apply a Deliberative Process Privilege. Appellant appealed the trial court's denial of his petition. On appeal, the Appellees assert that the trial court erred in not finding the tax information and tax administration information exceptions applicable and in not applying the Deliberative Process Privilege. After reviewing the record, including the withheld documents, we find that the trial court erred in not finding that the tax information and tax administration information exceptions, as provided in Tenn.Code Ann. § 67-1-1702, applied. Consequently, we affirm the trial court's denial of the Appellant's petition but for different reasoning.

In 2009, the Tennessee General Assembly enacted the Tennessee Small Business Investment Company Credit Act, Tenn.Code Ann. § 4-28-101 *et seq.* ("TNInvestco Act") in an effort to spur economic development and job creation. Under the TNInvestco Act, the State allocates up to $120 million in tax credits to up to six "qualified TNInvestcos." [1] The chosen TNInvestcos then sold the tax credits to participating insurance companies (taxpayers) to generate capital. The insurance companies purchasing the tax credits could then use the tax credits to reduce their tax liability in the years 2012 through 2019. According to the statute, the decision of which qualified TNInvestcos will receive the tax credit lies within the sole discretion of the Commissioner of Economic and Community Development and the Commissioner of Revenue. To assist them in making their decisions, the Appellees, the Commissioner of Revenue, Commissioner Reagan Farr, and the Commissioner of Economic and Community Development, Commissioner Mathew Kisber, developed an evaluation matrix which they each used separately to evaluate and rank the entities which applied.

1 A "TNInvestco" is a business which completes the application process and is certified by the Department of Economic and Community Development as meeting the established criteria.

Twenty-five entities, including Appellant Larry H. Coleman's ("Mr.Coleman") company-Coleman Swenson Booth Inc.,-applied to become a TNInvestco and to receive the tax credit. From these twenty-five, Commissioner Kisber and Commissioner Farr chose ten finalists. As announced by the Commissioners, the finalists were the ten entities which received the highest score on the TNInvestco evaluation matrices developed by the Commissioners. On November 5, 2009, Commissioner Kisber and Commissioner Farr announced the six entities chosen to receive the tax credit,



along with two alternates. Unfortunately, Mr. Coleman's company was not one of the chosen entities.

*2 Mr. Coleman and his attorney made several public records requests in December 2009 and January 2010. The Commissioners responded to these requests and provided some, but not all, of the requested records related to the TNInvestcos. The Commissioners asserted that some of the requested documents did not exist and denied the requests for other documents which the Commissioners determined to be confidential under State law.

This case began on January 27, 2010 when Mr. Coleman filed his Petition for Access to Public Records. In his petition, Mr. Coleman requested that the trial court order the Commissioners to turn over all of the requested records "pursuant to the Tennessee Public Records Act, Tenn.Code Ann. § 10-7-503 *et seq.*" Mr. Coleman also requested that the trial court award him attorney's fees. The parties agree that the documents in dispute on appeal are (1) the twenty-five scored evaluation matrices, (2) a Tax Credit Purchase Agreement, (3) a Side Letter to that Agreement, and (4) the Letters of Understanding between an insurance company and a TNInvestco regarding the purchase of investment tax credits. The documents at issue were filed on February 9, 2010, under seal for review by the court.

On February 5, 2010, the trial court entered an order requiring the Commissioners to appear on February 16, 2010 and show cause as to why Mr. Coleman's petition should not be granted.

On February 9, 2010, the Commissioners filed a response to Mr. Coleman's petition. In their response, the Commissioners asserted that the information requested, was (1) confidential "tax information" or "tax administration information" pursuant to Tenn.Code Ann. § 67-1-1702; (2) was confidential pursuant to Tenn.Code Ann. § 4-3-730(c) (the "ECD exception") as the records were designated by the Commissioner of Economic and Community Development with the agreement of the Attorney General, as harmful to the ability of this state to compete or conclude agreements or contracts for economic or community development; and (3) that the scored evaluation matrices were protected by the Deliberative Process Privilege. Accordingly, the Commissioners requested that the trial court deny Mr. Coleman's petition.

On February 9, 2010, Commissioner Farr, as Commissioner of the Department of Revenue, filed an affidavit. His affidavit details his background and experience as well as the process he and Commissioner Kisber utilized in selecting the six entities to receive the tax credit. His affidavit details what is considered "taxpayer information" or "tax administration information" and therefore confidential pursuant to Tenn.Code Ann. § 67-1-1702. He also explains why he believes it is in the best interests of the State not to produce the requested documents. In pertinent part, his affidavit provides:

14. Business tax incentives and credits are enacted by states (and by Congress) for various reasons. The Tennessee General Assembly has enacted a number of statutes authorizing business tax incentives and credits that are designed to generate economic development and create jobs in Tennessee.... Furthermore, the General Assembly has charged the Department of Revenue with administering these tax credits and incentives. In administering these programs, the Department has consistently considered the information created by the Department or collected from participants in the programs used by the Department to constitute "tax administration information" as provided in Tenn.Code Ann. §§ 67-1-1701(6)-(7). Additionally, the Department has consistently considered information related to such programs to be "taxpayer information" as provided in Tenn.Code Ann. § 67-1-1701(8) if the information concerns a *taxpayer's identity* or the *nature, source, or amount of the taxpayer's* income, payments, receipts, deductions, exemptions, *credits,* assets, liabilities, net worth, tax liability, tax collected, deficiencies, over assessments, or tax payments.

*3 15. As described above, the TNInvestco program represents a tax policy decision enacted by the General Assembly that is formulated to generate economic development in Tennessee. Accordingly, the Department considers information created by the Department or obtained from participants in this program and used by the Department in administering and executing the program to constitute tax administration information. To the extent that such information identified a taxpayer participating in the TNInvestco program or identifies the nature, source, or amount of the taxpayer's investment tax credit issued under this program, the Department considers such information to constitute tax information.

16. Tenn.Code Ann. § 67-1-1702 provides that "tax information" and "tax administration information" shall be confidential and shall not be disclosed by any officer or employee of the State or by any other person, except as otherwise authorized under title 67, chapter 1, part 17. Tenn.Code Ann. § 67-1-1711 provides that the Commissioner of Revenue is authorized to disclose tax administration

information if the commissioner determines that such disclosure is in the best interests of the State. Accordingly, information obtained in connection with the Department's administration and execution of the TNInvestco program will be disclosed only in accordance with these statutes.

* * *

30. Based on my experience in administering business tax incentive programs and recruiting businesses to the State, as set forth above, and in the exercise of my discretion given to me as the Commissioner of Revenue under Tenn.Code Ann. § 67-1-1711, I have determined that the disclosure of the withheld documents is not in the best interests of the State. Participation of qualified businesses is fundamental to the success of the State tax policies like the TNInvestco program-policies that are designed to generate economic growth and development through the offering of business tax incentives and credit. Because all of the withheld documents, except for the scored matrices, contain proprietary business and financial information of qualified TNInvestcos and/or participating insurance companies, I have determined that their disclosure will inhibit businesses from participating in future rounds of the TNInvestco program, as well as in future economic development tax incentive programs.

31. With respect to the scoring matrices, I have determined that public disclosure of these documents would not be in the best interests of the State because such disclosure could also chill participation in future rounds of the TNInvestco program, as well as in future economic tax incentive programs. The General Assembly created the TNInvestco program for the purpose of growing small business in Tennessee by generating capital through the use of tax credits. The program's success is dependent upon attracting a pool of well qualified TNInvestco applicants from which the State chose those applicants whose investment strategies are most closely aligned with the economic development strategies of the State. Commissioner Kisber and I used the scoring matrices as a tool for ranking the applicants for purposes of reducing the pool from twenty-five to the ten applicants that we would interview. Making public that the State ranked Firm X ten places higher than Firm Y would only do harm to those firms who chose to participate in the evaluation process and would undoubtedly have a chilling effect on future participation in any similar economic incentive program. Furthermore, the State only ranked the firms in the context of the State's economic development goals, but the appearance could be that the State considers certain firms to be "better" than others, which is certainly not the case. Moreover, there would be no benefit to making these documents public. By the very nature of the program, it is already known which firms were ranked in the top ten for purposes of conducting follow-up interviews. Whether another firm was ranked eleventh or twenty-fifth on the scoring matrix is irrelevant and disclosure of that information would only do harm to the TNInvestco program itself, as well as the State's long-term goals for economic development.

*4 (emphasis original). Commissioner Farr also asserted the Deliberative Process Privilege as to the evaluation matrices.

Commissioner Kisber, as Commissioner of the Department of Economic and Community Development, also filed an affidavit on February 9, 2010. In it he details his background and experience as well as the process he and Commissioner Farr utilized in selecting the six entities to receive the tax credit. In pertinent part, his affidavit provides:

11. As was previously determined under Tenn.Code Ann. § 4-3-730(c) that information supplied to the State in response to Part 2 of the TNInvestco application should be confidential and not subject to personal inspection by any citizen of Tennessee. I have also determined, with General Cooper's affirmative agreement, that the documents Commissioner Farr and I are withholding from public inspection by Mr. Coleman are of such a sensitive nature that their disclosure or release would seriously harm this State's ability to conclude agreements or contracts for economic or community development. Shortly after I became Commissioner, I met with Attorney General Paul Summers to discuss how we should proceed when public records requests are made for information that I think should be confidential under Tenn.Code Ann. § 4-3-730(c), and General Cooper and I are following that same process under which the Attorney General reviews documents that I deem to be sensitive, we discuss my reasoning, and if he agrees that the documents or information is of such a sensitive nature that its disclosure or release would seriously harm the ability of the State to compete or conclude agreements or contracts for economic or community development, his staff then sends me a memo to memorialize our discussion. I have attached as Exhibit B to this affidavit the memorandum that I received from the Attorney General's Office memorializing our decision that the records being withheld from public inspection in this lawsuit are of such a sensitive nature that their disclosure or release would seriously harm the ability of the State to compete or conclude agreements or contracts for economic or community development.

12. More specifically, Commissioner Farr has determined that the Tax Credit Purchase Agreement; the Side Letter to this agreement; a Letter of Understanding between an insurance company and one of the TNInvestcos; ... and the completed scoring matrices that we used as a tool in awarding the tax credit allocations are tax information under Title 67 of the Tennessee Code or tax administration information that is therefore confidential. In addition, it is my determination under Tenn.Code Ann. § 4-3-730(c), to which the Attorney General has affirmatively agreed, that this same information is of such a sensitive nature that its disclosure or release would seriously harm the ability of our State to compete or conclude agreements or contracts for economic or community development.

13. My reasons for this determination include that, the tax credits created by the Act, and that Commissioner Farr and I have awarded to the six qualified TNInvestcos, have been sold to insurance companies under the Act in order to raise capital to be invested in small businesses qualified under the statutes. In light of my experience in working to grow economic development in Tennessee, it is my opinion that disclosing the details of the financial transactions under the TNInvestco program would seriously harm the State's ability to conclude future agreement or contracts for economic or community development. Commissioner Farr and I are working with members of the legislature in an effort to expand the TNInvestco program this legislative session. The price of the tax credits that have been sold resulted from private negotiations by the TNInvestcos, brokers on their behalf, and various insurance companies. If details of these financial transactions become part of public domain, that would remove the market forces and artificially set a floor and ceiling for future tax credit sales under the program, thereby harming the State's ability to raise as much capital from the future sale of tax credits as possible.

*5 14. Further, an insurance company that may have paid more than a competitor for the tax credits received could be harmed in its business reputation. In my opinion, for this program to be successful, it needs a large pool of insurance companies willing to participate, and disclosing their investment decisions to the general public will deter participation. Additionally, the scoring matrices reflect my judgment of a TNInvestco's application, not necessarily what I might think of the firm separate and apart, for example, from its proposed strategy for achieving transformational economic development outcomes through focused investments of capital in seed or early stage companies with high-growth potential. A firm I may have scored low on its application because of its proposed strategy could be hurt in its business reputation if the scores become public record, and the public were to misunderstand the matrices were only a guide for my decision under the TNInvestco Program, and not necessarily my opinion on whether a particular firm might be a good choice for its clients and investors in other circumstances, trying to achieve goals different from those of the TNInvestco Program. In my experience, the willingness of insurance companies and venture capital firms to participate in future rounds of the TNInvestco Program, or even in future state programs of a similar nature, will be seriously harmed if the details of their financial transactions to date under the Act are disclosed or released to the general public.

Attached to Commissioner Kisber's affidavit was the memorandum from the Attorney General's office which memorialized the discussion the Commissioners and the Attorney General had regarding the confidentiality of the requested documents. The memorandum states that the Attorney General reviewed the documents at issue and agreed that the documents should be confidential pursuant to the ECD exception under Tenn.Code Ann. § 4-3-730(c). The memorandum explains in detail the concerns with releasing the documents as discussed by the Commissioners and the Attorney General. Some of these concerns include: that disclosing the details of the financial transactions by which the tax credits were sold would harm the State's ability to conclude future agreements in the TNInvestco program; that an insurance company participating in these transactions may have its business reputation harmed by the release of the details of the financial transactions; that the prices paid could become the floor and the ceiling for future transactions, thus harming the State's ability to raise capital; and that the release of the documents would chill the willingness of insurance companies and venture capital firms to participate in the TNInvestco program in the future, harming the future success of the program. The memorandum also details the discussion had regarding the evaluation matrices and the concern that the release of this information could harm a business' relationship with others and put it at a disadvantage; and that releasing these matrices would chill willingness to participate in the TNInvestco program in the future, harming the State's ability to conclude the sale of tax credit agreements in the future for purposes of economic development.

*6 On February 11, 2010, Mr. Coleman filed a memorandum of law in support of his petition. In this memorandum, Mr. Coleman asserted that if the

Commissioners were concerned about releasing the identities of the insurance companies that purchased the tax credits, they could redact the names and prices paid. Mr. Coleman also asserted that the Commissioners had waived any privilege or confidentiality by releasing a blank copy of the scoring matrix and by announcing that the ten finalists were the entities that had scored the highest on the matrices. Mr. Coleman also asserted that the privileges claimed and confidentiality exceptions asserted by the Commissioners were inapplicable.

On February 12, 2010, the Commissioners filed a reply. In this reply, the Commissioners asserted that they had not waived the exception as (1) they had not voluntarily disclosed the withheld documents and then sought to gain an advantage through selective disclosure and (2) the exception is not a qualified, equitable privilege that is subject to waiver. Further, the Commissioners asserted the Deliberative Process Privilege, the "tax information" and "tax administration information" exceptions, and the ECD exception. Moreover, the Commissioners submitted that redaction was not required.

A hearing was held on February 16, 2010 at which each side presented its arguments to the trial court, relying on the affidavits submitted. Following the hearing, Mr. Coleman filed a "Post Hearing Brief." Attached to this brief were affidavits from several of the TNInvestcos which were not among the ten finalists. Each affidavit asserts that the respective TNInvestco does not object to the State releasing the scored evaluation matrices reflecting the firm's scores and ranking.

On March 2, 2010, the trial court filed a memorandum containing its decision. First, the trial court found that the "tax administration information" and "tax information" exceptions provided in Tenn.Code Ann. § 67-1-1702 do not apply to the documents in question. The trial court explained that the documents were not submitted "as part of a past or current tax review by the Department of Revenue" and also that "no past or current need to apply the Tennessee tax law exists and no need to invoke Tennessee's tax administrative mechanisms is present." As to the ECD exception, pursuant to Tenn.Code Ann. § 4-3-730, the trial court found, after reviewing the documents at issue, "that the records could reasonably be characterized as sensitive documents that 'disclosure or release would seriously harm the ability of our State to compete or conclude agreements or contracts for economic or community development,' " and that therefore the exception applied. Next, the trial court found that the Deliberative Process Privilege has not been adopted in Tennessee and declined to adopt the privilege in this case. The trial court also declined to find that the Commissioners waived the confidentiality of the documents. The trial court based this decision on two reasons: (1) that the authorities supplied by Mr. Coleman do not apply to the statutory exceptions and that there must be an intentional waiver of the statutory exceptions and (2) that even if the authorities provided by Mr. Coleman apply, the conduct of the Commissioners did not amount to a waiver. The trial court declined to rule on the argument that the statutory exceptions could not be waived. Finally, the trial court found that the Commissioners failure to produce the requested documents was not willful, and therefore did not award Mr. Coleman attorney's fees.

*7 On March 4, 2010, the trial court entered an order reflecting its decision. This order incorporates the trial court's memorandum by reference and denies Mr. Coleman's petition. Also, the trial court ordered that the four documents at issue remain confidential and under seal for a period of five years.

Mr. Coleman filed a notice of appeal on March 9, 2010. He raises five issues for our review. We restate them as follows:

1. Whether the trial court erred in finding that the Commissioners were entitled, pursuant to Tenn.Code Ann. § 4-3-730(c), to withhold the documents in their entirety as opposed to redacting the portions of the information identified by Commissioner Kisber as harmful?

2. Whether the trial court erred in finding that Commissioner Kisber was entitled to withhold the requested documents pursuant to Tenn.Code Ann. § 4-3-730(c)?

3. Whether Commissioner Kisber's withholding of the evaluation matrices pursuant to Tenn.Code Ann. § 4-3-730(c) was reasonable?

4. Whether the trial court erred in finding that the Commissioners did not waive any right they had to withhold the evaluation matrices from disclosure?

5. Whether the trial court erred in finding that Mr. Coleman was not entitled to his attorney's fees?

On Appeal, the Commissioners also raise two issues for our review. We restate them as follows:

1. Whether the trial court erred by not finding that the documents requested were "tax information" or

"tax administration information" confidential pursuant to Tenn.Code Ann. § 67-1-1702?

2. Whether the trial court erred in finding that the Deliberative Process Privilege did not apply in this case to exempt the scored matrices from public disclosure?

Standard of Review

We review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R.App. P. 13(d). No presumption of correctness, however, attaches to the trial court's conclusions of law and our review is *de novo*. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn.2000).

The construction of a statute is a question of law which we will review *de novo* with no presumption of correctness as to the trial court's conclusions. *Ivey v. Trans. Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn.1999). When interpreting a statute, we are "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn.1995). "Courts must restrict their review 'to the natural and ordinary meaning of the language used by the legislature in the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent.' " *Ardoin v. Laverty*, M2001-03150-COA-R3-JV, 2003 WL 21634419, at *4 (Tenn.Ct.App. July 11, 2003) (quoting *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn.1998) (citations omitted)).

Analysis

The Public Records Act creates a presumption of openness as to government documents. As provided in Tennessee Code Annotated section 10-7-503(a)(2)(A):

> *8 All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

However, the final clause of Tenn.Code Ann. § 10-7-503(a)(2)(A) states that documents are open to inspection by the public "*unless otherwise provided by state law,*" qualifying the presumption of openness by creating an exception for any document which another state law designates as protected or privileged. *See also Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn.Ct.App.2000). "It was the legislature that opened the door making records public in the first place. Certainly, ... the legislature could decide that its policy was too broad and close the door on certain records." *Thompson v. Reynolds*, 858 S.W.2d 328, 329 (Tenn.Ct.App.1993).

One such exception is provided in Tennessee Code Annotated § 67-1-1702(a) which provides:

> Notwithstanding any provision of law to the contrary, returns, *tax information and tax administration information shall be confidential* and, except as authorized by this part, no officer or employee of the department and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer's or employee's service as an officer or employee, or obtained pursuant to the provisions of this part, or obtained otherwise.

(emphasis added). However, "tax information" is "subject to disclosure to the taxpayer who is the subject of that information." *Bridgestone v. Chumley*, No. M2007-00813-COA-R9-CV, 2008 WL 2415483, at *6 (Tenn. Ct.App. June 11, 2008) (citing Tenn.Code Ann. § 67-1-1703(a)).[2] Although, "[t]ax information shall not ... be disclosed to such person or persons if the commissioner determines that such disclosure would be seriously burdensome to tax administration." Tenn.Code Ann. § 67-1-1703. Tax administration information is not subject to disclosure upon demand of a taxpayer. *Bridgestone*, 2008 WL 2415483, at *6. However, the Commissioner of the Department of Revenue is authorized to disclose tax administration information "if the commissioner determines that such disclosure is in the best interest of the state...." Tenn.Code. Ann. § 67-1-1711.[3] Further, the code provides that it is a Class E felony for any person to disclose, except as authorized by law, tax information. Tenn.Code Ann. § 67-1-1709; see also *Bridgestone*, 2008 WL 2415483, at *6.

2 Tenn.Code Ann. § 67-1-1703(a) provides:
The commissioner shall, subject to such requirements and conditions as may be prescribed by rules, disclose the return of any taxpayer, or *tax information with*

> *respect to such taxpayer, to such person or persons as the taxpayer may designate* in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. *Tax information shall not, however, be disclosed to such person or persons if the commissioner determines that such disclosure would be seriously burdensome to tax administration.* (emphasis added).

3 Tenn.Code Ann. § 67-1-1711 provides:

> The commissioner is authorized to disclose tax administration information, other than returns and tax information, if the commissioner determines that such disclosure is in the best interests of the state; provided, that no provision of law shall be construed to require disclosure of criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards, if the commissioner determines that such disclosure will impair assessment, collection, or enforcement under state tax laws.

The terms tax information, tax administration, and tax administration information are all specifically defined by the code. Tax information:

> means a *taxpayer's identity,* the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, *credits,* assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, *or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner* with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

*9 Tenn.Code Ann. § 67-1-1701(8) (emphasis added). Tax administration information:

> means criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; *and any other information relating to tax administration* [.]

Tenn.Code Ann. § 67-1-1701(7) (emphasis added). Tax administration is defined in the code as:

> the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party. "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]

Tenn.Code Ann. § 67-1-1701(6).

The courts of this State have only had a couple of opportunities to review the application of the "tax information" and "tax administration information" exceptions to the Public Records Act. In *McLane Co. v. State*, 115 S.W.3d 925 (Tenn.Ct.App.2003), this Court reviewed a trial court's decision to grant a licensed wholesale tobacco distributor's petition, under the Tennessee Public Records Act, seeking disclosure of the identities of all licensed wholesale tobacco distributors in Tennessee. This Court reversed the trial court, finding that the tax information exception as provided in Tenn.Code Ann. § 67-1-1702 applied and therefore, the identities of the licensed wholesale tobacco distributors must remain confidential. *Id.* at 931. This Court recognized that "the licensing and taxing functions performed by the Department [of Revenue] are separate and distinct in nature," but found that the confidentiality provisions of Tenn.Code Ann. § 67-1-1702 apply to the information collected by the Department of Revenue during

the licensing procedure. *Id.* at 930. This Court reasoned that the licensed wholesale tobacco distributors were required to pay a tax to the Department of Revenue under Tenn.Code Ann. § 67-4-1002, for the privilege of selling tobacco in Tennessee, and that therefore, the identity of all of the licensed wholesale tobacco distributors was confidential "tax information" pursuant to Tenn.Code. Ann. § 67-1-1702. *Id.* In making this decision, the Court compared the laws regarding the licensed wholesale tobacco distributors to the laws governing the taxation of petroleum products. *Id.* at 931. This Court noted that the legislature specifically provided in Tenn.Code Ann. § 67-3-2011 that the Commissioner of the Department of Revenue, as he deemed necessary, could release a list of all current licensees of petroleum products. *Id.* The Court explained, that the legislature could have provided the same exception for the identities of those licensed as wholesale tobacco distributors. *Id* . However, since the General Assembly chose not to provide such an exception, the identities must remain confidential as provided in Tenn.Code Ann. § 67-1-1702.

***10** This Court again had the opportunity to discuss the application of the tax administration information and the tax information exceptions in *Bridgestone v. Chumley*, No. M2007-00813-COA-R9-CV, 2008 WL 2415483, at *6 (Tenn. Ct.App. June 11, 2008). The documents Bridgestone sought related to its audit and its claim for a tax refund. *Id.* at *3. In *Bridgestone,* the issue revolved around whether the documents sought constituted tax administration information or tax information. *Id.* at *4-5. This distinction was important because if the documents at issue constituted tax administration information they would be confidential pursuant to Tenn.Code Ann. § 67-1-1702. However, if the documents at issue were tax information, they must be disclosed to the taxpayer to which they pertained, unless disclosure was "seriously burdensome." *Id.* at *6. In considering this issue, the Court found that there are two purposes of the "Confidentiality Act": "(1) to protect the confidentiality of taxpayer information from third parties and (2) to further the Department's ability to formulate tax policy; develop standards, criteria and audit procedures; and administer, manage, and enforce the tax laws." *Id* . at *13.

This Court found that "insofar as the documents withheld by the Department ... reflect on the Department's consideration or internal discussion of the question of law [or policy] presented by Bridgestone"-whether it can be subjected to more than one audit-the documents are tax administration information even though they refer to a specific taxpayer. Further, the trial court found that "[t]o the extent ... the documents reflect on the Department's determination of a factual matter relating to an audit of a taxpayer, they are taxpayer specific and not excluded from disclosure as 'tax information that does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise used to identify, directly or indirectly, a particular taxpayer.' " *Id.* at * 12. The "touchstone" in this analysis, as noted by the Court, was the term "data." *Id.* This Court defined "data" as " 'factual information (as measurements or statistics) used as a basis for reasoning, discussion, or calculation.' ", *id.* (citing Webster's Ninth New Collegiate Dictionary 325 (1986)), and also as " 'organized information generally used as the basis for an adjudication or decision. Commonly, organized information, collected for a specific purpose.' " *Id.* (citing Black's Law Dictionary 395 (6th ed.1990)). Using these definitions, this Court held that "to the extent to which the withheld documents reflect the Department's recording or preparation of information used to determine the existence or amount of Bridgestone's tax liability, they are tax information as defined by the code." *Id.*

In the present case, the trial court found that the withheld documents did not constitute tax information or tax administration information. As provided in its order, the trial court reasoned that the documents "were not submitted to Commissioner Farr as part of a past or current tax review by the Department of Revenue." Further, the trial court stated in its order that it "is reluctant to rule that the foregoing tax law exceptions clearly apply to exclude from public disclosure documents gathered under the TNInvestco Act where, as here, no past or current need to apply the Tennessee tax law exists and no need to invoke Tennessee's tax administrative mechanisms is present."

***11** The Commissioners assert on appeal that the trial court erred. Specifically, they assert that the TNInvestco Act is a state tax law or related statute, that the documents at issue were used to award, issue, and administer the tax credits provided by the TNInvestco Act and therefore, the documents are confidential under the tax administration information exception. Additionally, the Commissioners assert that the Letter of Understanding also constitutes confidential tax information.

After thoroughly reviewing the record, including the withheld documents, we find that the trial court erred in not finding the tax administration information and tax information exceptions applicable in this case. First, we find the trial court's interpretation of tax administration as only involving a past or present tax review to be too narrow. As defined

in Tenn.Code Ann. § 67-1-1701, tax administration includes the "administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes ... [and] also means the development and formulation of state tax policy relating to existing ... tax laws, [or] related statutes." The TNInvestco Act provides for up to $120 million in tax credits to be distributed to up to six businesses as qualified and chosen solely by the Commissioner of the Department of Revenue and the Commissioner of the Department of Economic and Community Development. Moreover, the TNInvestco Act provides for the method for determining the amount of tax credit a chosen investor may take each year. Further, the TNInvestco Act provides the qualifications necessary and the criteria to be considered by the Commissioners in determining which applicants will receive the tax credits. While not located within Title 67 of the code, the title involving taxes, the TNInvestco Act is clearly related to the administration of taxes and the determination of tax liability in Tennessee. It would be illogical for this Court to conclude that the statute which creates and provides the mechanism for awarding $120 million in tax credits to be unrelated to the tax laws and policy of this State.

Even if we assume that the TNInvestco Act is not directly related the Department of Revenue's taxing function, under the reasoning in *McLane* the documents are still protected. In *McLane,* this Court held that the identities of all the licensed wholesale tobacco distributors was confidential tax information after recognizing that the Department of Revenue's taxing function was entirely separate from its licensing function. *McLane,* 115 S.W.3d at 930. Additionally, Tenn.Code Ann. § 67-1-1702 provides that no officer or employee of the Department shall disclose tax information or tax administration information "obtained by such officer or employee in *any* manner in connection with such officer's or employee's service as an officer or employee ...." (emphasis added). The withheld documents were obtained by Commissioner Farr as part of his duties as Commissioner of the Department of Revenue. Consequently, they will be protected if they constitute tax administration information or tax information.

***12** The trial court reviewed the documents at issue and held that the tax administration information and tax information exceptions did not apply. On appeal, we have conducted our own independent review of the documents. After reviewing the withheld documents, we have determined that all of the information contained within these documents constitutes tax administration information. The Tax Credit Purchase Agreement and the Side Letter set forth the terms and conditions controlling the placement, purchase and use of the investment tax credits by detailing the terms and conditions for brokering the tax credits to taxpayers, setting forth the procedures for issuing the tax credits and for the redemption of the tax credits. The Letter of Understanding provides the terms and conditions for the purchase of the tax credit by a particular taxpayer, who is identified in the letter. It also provides the amount of the named taxpayer's tax credit, names the TNInvestco that sold the credit to the named taxpayer and states how much the taxpayer paid for the tax credit. The scored evaluation matrices provide the Commissioners' thoughts and mental processes behind their decision regarding which TNInvestcos would be awarded the tax credits. The withheld documents clearly relate to the Department of Revenue's administration, execution, and supervision of the TNInvestco Act and its effect on the administration of the tax laws of this State. Further, the documents evidence the development and formulation of the tax policy behind the TNInvestco Act as developed by the Commissioners. As stated by this Court in *Bridgestone,* part of the purpose behind the "Confidentiality Act" is to "further the Department's ability to formulate tax policy ... and administer, manage and enforce the tax laws." *Bridgestone,* 2008 WL 2415483, at * 13. Withholding these documents furthers that purpose by allowing the Department of Revenue to develop and implement the TNInvestco Act in a manner which will further the goals of the legislature in enacting the TNInvestco Act-spurring economic development and raising capital.

Because all of the information contained within the withheld documents constitutes tax administration information, absent a decision by the Commissioner of Revenue that disclosure is in the best interests of the State, the documents cannot be disclosed. Tenn.Code Ann. § 67-1-1711. The decision to disclose tax administration information lies solely within the discretion of the Commissioner of the Department of Revenue. Tenn.Code Ann. § 67-1-1711. As provided in his affidavit, the Commissioner has determined that it is not in the best interests of the State to release the withheld documents.

Further, to the extent to which the documents identify a taxpayer, the amount of a taxpayer's tax credit, and/or a taxpayer's tax liability, the documents constitute tax information and are confidential tax information pursuant to Tenn.Code Ann. §§ 67-1-1701(8) and -1702(a). Also, to the extent that the documents contain "data" used by the Department of Revenue to determine a taxpayer's tax liability, which includes the amount of tax credit the taxpayer will

receive, the documents are tax information. *Bridgestone*, 2008 WL 2415483, at *12. Pursuant to Tenn.Code Ann. § 67-1-1702 tax information is confidential unless requested by the particular taxpayer in accordance with Tenn.Code Ann. § 67-1-1703.

*13 As discussed above, we have determined that all of the information contained in the documents constitutes tax administration information. Furthermore, portions of the documents also constitute tax information. Because both tax administration information and tax information is excepted from disclosure pursuant to the Tennessee Public Records Act, all other issues are pretermitted. [4] Mr. Coleman contends that the requested documents should be released and that the Commissioners should merely redact the confidential portions. However, because of our determination that the documents, in their entirety, constitute tax administration information, and are therefore confidential, redaction, even if required, is not a viable alternative. [5] We note that Mr. Coleman asserted on appeal that the trial court erred in not finding waiver. However, as set forth in his brief, he only argues that the trial court erred in not finding waiver of the ECD exception. At no point in his briefs does he address or assert waiver of the tax exceptions. Accordingly, this issue is waived on appeal. *Osborne v. Mountain Life Ins. Co.*, 130 S.W.3d 769, n. 6 (Tenn.2004) ("It is true that not raising or briefing the issue before the trial court or the Court of Appeals is grounds for waiver of review") (citing *Alexander v. Armentrout*, 24 S.W.3d 267 (Tenn.2000). Also, we note that the trial court found that Tennessee had not adopted the Deliberative Process Privilege and that the Commissioners raised this as an issue on appeal. Because we have decided this case on another ground, we do not find it necessary to address this issue. However, our opinion should not be interpreted as an affirmance of the trial court's finding on this issue.

4 The trial court determined that the requested documents were outside of the tax information and tax administration information exceptions, but that the documents were confidential and not subject to public disclosure under the ECD exception. "This Court will affirm a decree correct in result but rendered upon different, incomplete, or erroneous grounds." *Hutcherson v. Criner*, 11 S.W .3d 126, 136 (Tenn.Ct.App.1999) (citing *Gamblin v. Town of Bruceton*, 803 S.W.2d 690, 693 (Tenn.Ct.App.1990).

5 Tenn.Code Ann. § 67-1-1702(a). Because we have found that redaction, even if required, would not be possible, we have not addressed whether the redaction statute, Tenn.Code Ann. § 10-7-503(c)(2), is applicable to the tax exceptions found in Tenn.Code Ann. § 67-1-1702(a).

Conclusion

For the foregoing reasons, we affirm the trial court's denial of Mr. Coleman's petition. We reverse the trial court's finding that the tax administration information and tax information exceptions do not apply. All other issues are pretermitted. Costs of this appeal are taxed to the Appellant, Larry H. Coleman and his surety for which execution may issue if necessary.

SEPARATE CONCURRENCE

Judge HOLLY M. KIRBY, concurring separately.

I concur with nearly all of the majority opinion, but disagree with one aspect of it. However, I would reach the same result with different reasoning, and so file this separate concurrence.

I concur fully with the majority's conclusion that the documents sought by Coleman contain tax administration information and tax information deemed confidential under Tennessee Code Annotated § 67-1-1702(a).

Coleman asserts that even if the documents in question contain confidential information, under Tennessee Code Annotated § 10-7-503(c)(2), the documents must nevertheless be disclosed under the Opens Records Act with the confidential information redacted "whenever possible." T.C.A. § 10-7-503(c)(2) (2009 Supp.). The trial court was not required to address this issue, because the trial court relied on the ECD exception to the Open Records requirements. As explained below, the ECD exception expressly permits the Commissioner of Economic and Community Development to declare the "document" confidential. This obviated the need to address the redaction issue.

*14 However, the majority in this appeal relies on Section 67-1-1702(a), the exception for tax information and tax administration information. In contrast to the ECD exception, Section 67-1-1702(a) declares the "information" confidential, and does not state that the "document" is confidential. Therefore, under the majority's analysis, the issue of redaction must be addressed. Specifically, redaction must be addressed by determining either that Section 10-7-503(c)(2) is not applicable to the documents at issue in this case, or even if Section 10-7-503(c)(2) is applicable, none of the documents

need to be disclosed because redaction is not "possible" as to any of them.

The majority opinion does not address whether the redaction statute, Section 10-7-503(c)(2), is applicable under these circumstances. Instead, assuming *arguendo* that the redaction statute is applicable, the majority conducts its "own independent review" of the documents, and determines that "all of the information contained within these documents constitutes tax administration information." [1]

1 In *McLane Co. v. State*, 115 S.W.3d 925 (Tenn.Ct.App.2003), relied upon in the majority analysis of T.C.A. § 67-1-1702(a), the issue of redaction was neither raised nor addressed.

I must respectfully disagree with the majority's approach. Also assuming *arguendo* that the redaction statute is applicable, the majority's holding amounts to a conclusion that redaction is not "possible" under the Section 10-7-503(c)(2). If indeed the redaction statute applies, [2] I believe that such a finding must be made in the first instance by a trial court, not by an appellate court. [3] While this Court can certainly review a trial court's finding on whether redaction of confidential information is possible, I believe it is inappropriate for an appellate court to conduct an "independent review" and issue such a finding itself.

2 I likewise do not address whether Section 10-7-503(c)(2) applies under the circumstances of this case.

3 In *Bridgestone v. Chumley*, 2008 WL 2415483 (Tenn. Ct.App. June 11, 2009), T.C.A. § 10-7-503(c)(2) was not an issue. However, the appellate court remanded the case to the trial court for an *in camera* review of the documents at issue, indicating specifically that redaction of the documents would be considered by the trial court on remand. *Id.* at *13.

This is especially true in this case. Nowhere in the lengthy excerpts quoted from the Commissioners' affidavits do either Commissioner Farr or Commission Kisber claim that redaction of the confidential tax administration information in the subject documents is not "possible." Rather, the Commissioners carefully eschew this issue, asserting instead that redaction is not required.

Nevertheless, I concur in the result reached by the majority, using the reasoning utilized by the trial court. The trial court found that the withheld documents were protected under the ECD exception to the Open Records requirements, Tennessee Code Annotated § 4-3-730(c), which provides:

(c)(1) Notwithstanding any other provision of law to the contrary, any record, documentary materials, or other information, including proprietary information, received, produced or maintained by the department shall be considered public unless the commissioner, with the affirmative agreement of the attorney general and reporter, determines that a document or information is of such a sensitive nature that its disclosure or release would seriously harm the ability of this state to compete or conclude agreements or contracts for economic or community development.

*15 (2) If the commissioner, with the agreement of the attorney general and reporter, determines pursuant to subdivision (c)(1) that a document or information should not be released or disclosed because of its sensitive nature, such document or information shall be considered confidential for a period of up to five (5) years from the date such a determination is made. After such period, the document or information made confidential by this subsection (c) shall become a public record and shall be open for inspection.

T.C.A. § 4-3-730(c) (2005). Thus, under this statute, the Commissioner of the Department of Economic and Community Development, with the agreement of the State Attorney General, may determine that a *document* or information should not be disclosed because of its sensitive nature. Here, ECD Commissioner Kisber, with the agreement of the Attorney General, determined that the documents in question were "of such a sensitive nature that [their] disclosure or release would seriously harm the ability of this state to compete or conclude agreements or contracts for economic or community development." Section 4-3-730(c)(1).

After reviewing the documents *in camera,* the trial court found that Commissioner Kisber did not abuse the discretion afforded him under the ECD exception to declare the documents confidential. Because the ECD exception protects the entire document, the trial court was not required to reach the issue of redaction.

I agree with the trial court's conclusion that the ECD exception in Section 4-3-730(c) is applicable to the documents withheld in this case. Contrary to Coleman's assertion on appeal, the ECD exception statute clearly authorizes the Commission to declare the documents confidential, and not just certain information contained in the

documents, and that is precisely what the ECD Commissioner did in this case.

Coleman also argues that Commissioner Kisber waived any protection under the ECD exception by publicly posting unscored evaluation matrices and referring to the scoring matrices in press releases, citing *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn.Ct.App.1999). The trial court found that the Commissioner's references to the scoring matrices did not amount to a waiver of the confidentiality of the documents. Assuming, without deciding, that such a waiver could be applicable to the discretion given to the ECD Commissioner under Section 4-3-730(c), I agree with the trial court's finding of no waiver.

Therefore, I would affirm the trial court's holding that Commissioner Kisber appropriately deemed the documents confidential and not subject to disclosure, pursuant to Section 4-3-730(c), the ECD exception to the Open Records requirements. This holding would obviate the need to address the issue of redaction.

On this basis, I concur.

End of Document

2008 WL 2415483
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

BRIDGESTONE/FIRESTONE, INC.
v.
Loren L. CHUMLEY, Commissioner of Revenue for the State of Tennessee.

No. M2007-00813-COA-R9-CV. March 25, 2008 Session. June 11, 2008.

Appeal from the Chancery Court for Davidson County, No. 04-1201-III; Ellen Hobbs Lyle, Chancellor.

Attorneys and Law Firms

Michael G. Stewart and Brett R. Carter, Nashville, Tennessee for the appellant, Bridgestone/Firestone, Inc.

Robert E. Cooper, Jr., Attorney General and Reporter and Mary Ellen Knack, Senior Counsel, for the appellee, Loren L. Chumley, Commissioner of Revenue for the State of Tennessee.

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and FRANK G. CLEMENT, JR., J., joined.

Opinion

OPINION

DAVID R. FARMER, J.

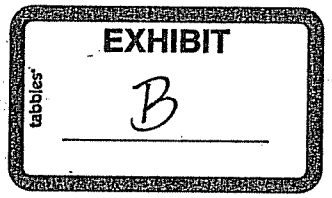
*1 The trial court denied Plaintiff/Taxpayer's motion to compel discovery of documents that Defendant Department of Revenue asserted were not subject to disclosure under the Taxpayer Confidentiality Act. We granted permission for interlocutory appeal under Rule 9 of the Rules of Appellate Procedure. We vacate the trial court's order and remand for further proceedings.

This interlocutory appeal requires us to construe the extent to which Tennessee Code Annotated § 67-1-1701, *et seq.*, ("the Confidentiality Act") requires the Department of Revenue/the Commissioner of Revenue ("the Department") to disclose documents in its possession in response to a Plaintiff/Taxpayer's discovery request in an action for refund of taxes by the Plaintiff/Taxpayer. Plaintiff/Taxpayer Bridgestone/Firestone, Inc. ("Bridgestone") manufactures tires, tire components, and shock absorbers. Following an audit in 2002 ("the 2002 audit") for the tax period December 1, 1995,[1] through July 31, 1999, the Department assessed sales and use tax, franchise and excise taxes, plus interest, against Bridgestone in an amount exceeding $2,000,000.[2] An informal taxpayer conference was held sometime prior to August 2002. The parties apparently dispute the outcome of that conference. Bridgestone asserts the Department upheld the assessment in its August 2002 decision letter. The Department, however, asserts that as a result of the conference, portions of the audit were adjusted in favor of Bridgestone, and that additional credits were given. In January 2003, Bridgestone paid taxes in the amount of $2,131,373. In October 2003, Bridgestone filed a claim for refund with the Department, seeking a refund in the amount of $3,103,462.

1 In its amended complaint, Bridgestone asserted the audited period was December 1, 1991 though July 31, 1999. In its answer, however, the Department, asserted the audited period was December 1, 1995, through July 31, 1999. Documentation contained in the record indicates the audited tax period was December 1, 1995, through July 31, 1999.

2 We are unable to ascertain the exact amount of the assessment resulting from the audit from the pleadings contained in record transmitted to this Court on appeal. It appears from correspondence included in the record, however, that the audit resulted in an original assessment in the amount of $2,678,684.71.

In its refund claim, Bridgestone asserted that a part of the assessment was barred by the statute of limitations; that a portion of the assessment included services that are exempt from taxation; that one sales account included in the assessment had been subject to a prior audit and, therefore, should not have been subject to an additional assessment; and that a portion of the assessment included sales tax on sales destined for out of state and not subject to Tennessee sales tax. The Department denied Bridgestone's refund claim by letter dated October 20, 2003. In its October letter, the Department stated, "[t]he four issues presented as the basis of the claim for refund were addressed in the conference decision letter dated August 21, 2002. The Department's position as stated in the conference decision letter remains unchanged."



In April 2004, Bridgestone filed an action for refund against the Commissioner of Revenue in the Chancery Court of Davidson County pursuant to Tennessee Code Annotated § 67-1-1802(c)(1). Bridgestone filed an amended complaint in February 2006, seeking a refund in the amount of $2,105,172, costs, and attorney's fees. In its amended complaint, Bridgestone asserted that its October 2003 claim for refund in the amount of $3,103,462 included the audit assessment "and additional amounts paid to the Department." In Count One of its amended complaint, Bridgestone asserted it was entitled to a refund of sales and use taxes in the amount of $1,162,234 for "sales in interstate commerce," including a credit for taxes collected and remitted to states other than Tennessee. In Count Two of its amended complaint, Bridgestone further asserted it was entitled to a refund in the amount of $2,035 for taxes allegedly assessed on tax-exempt repair services. Finally, in Count Three of its amended complaint, Bridgestone asserted it was entitled to a refund of franchise and excise taxes, plus interest, in the amount of $940,903 assessed against sales and use tax account number 1002545502, which Bridgestone asserted had been subject to a prior audit in October 1997.[3] In Count Three, Bridgestone asserted "[s]ales included in the current audit for the period of December 1, 1995, through October 31, 1997, should have been excluded from the current assessment because these sales are covered by the previous audit." Bridgestone did not indicate whether the alleged previous audit of the account included an assessment of taxes specific to that account or to what extent, if any, it had paid taxes assessed on that account. Additionally, Bridgestone cited no law to substantiate its implicit assertion that the Department was, as a matter of law, prohibited from re-auditing the tax account.

3 In its amended complaint, Bridgestone abandoned its claim for a refund in the amount of $998,290 for a portion of the assessment which it previously had asserted was barred by the statute of limitations.

*2 The Department answered in March 2006. In its answer, the Department admitted that Bridgestone had filed a claim for refund in the amount of $3,103,462, and asserted that Bridgestone had paid taxes in the amount of $2,131,373. The Department asserted it was "without sufficient knowledge to admit or deny what 'additional amounts' plaintiff seeks to have refunded." The Department denied Bridgestone's claim that it was entitled to a refund under any of the counts asserted in Bridgestone's amended complaint. With respect to Count Three of Bridgestone's amended complaint, the Department specifically denied Bridgestone's allegations that account number 1002545502 was included in the Department's October 1997 audit and should have been excluded from the 2002 audit.

In May 2006, the Department responded to Bridgestone's first set of interrogatories, requests for production of documents, and requests for admissions. In its response, the Department asserted that some of the documents requested by Bridgestone were not subject to discovery/disclosure pursuant to the Confidentiality Act. The Department asserted the Confidentiality Act in response to the following requests/interrogatories:

Interrogatory No. 4: Identify internal correspondence of the Department regarding the October 1997 audit of Bridgestone/Firestone, Inc. that is not included in the audit work papers for that audit.

Request for Production No. 3: Please produce copies of all auditor's work papers, not otherwise produced in response to another Request for Production, and all documents in the file of the Department relating to the Plaintiff's liability for any time period.

Request for Production No. 4: Please produce copies of all auditor's work papers and all documents in the file of the Department of Revenue relating to the taxes at issue in this litigation.

Request for Production No. 10: Provide all documents, including notes, relating to any conversation participated in by employees, representatives, or agents of the Department relative to Plaintiff's sales and use tax liability from December 1, 1991 to the present. Additionally, the Department asserted that some documents that potentially would be included in Bridgestone's broad requests, exemplified by interrogatory number five, which sought "every document relevant to this litigation of which you are aware," sought documents protected by the Confidentiality Act. In its response, the Department asserted that "the audit papers from December 1, 1993, through October 31, 1997, audit and the audit at issue in this litigation will show that account # 1002544502 was not audited in the December 1, 1993, through October 31, 1997, audit." In September 2006, the Department produced a "Privilege Log" identifying the nature of 86 documents withheld from its response to Bridgestone's discovery requests. The documents identified by the Department included memos and emails between Department employees discussing Bridgestone's tax returns and invoices; memos and emails discussing meetings between Bridgestone and

the Department and preparation for those meetings; field audit information; drafts of correspondence; internal emails discussing the 1997 and 2002 audits and reviews of those audits; and various letter rulings and technical bulletins.

*3 In January 2007, Bridgestone filed a motion to compel discovery of the documents withheld by the Department. In its motion, Bridgestone asserted it sought to compel discovery of documents "directly related to the audit, informal taxpayer conference or claim for refund of Plaintiff." It further asserted the Department had wrongly identified the documents as "tax administration information" protected from disclosure under Tennessee Code Annotated § 67-1-1701 *et seq,* and that "[a]t most, the information requested is 'tax information' that is subject to disclosure to the Plaintiff/taxpayer in a lawsuit brought by the taxpayer." In its memorandum in support of its motion, Bridgestone asserted:

> Plaintiff merely seeks to discover information that would allow Plaintiff to respond to Defendant's contention that Plaintiff was not impermissibly subjected to multiple audits of the same tax period .... documentation withheld by Defendant pursuant to the tax administration information privilege may be relevant to the claim that there were multiple audits of the same tax period ... it is contrary to the clear import of the taxpayer information privileges for the Defendant to withhold documentation related to a taxpayer under Tennessee Code Annotated § 67-1-1701, *et seq.,* as part of a lawsuit in which that very taxpayer is challenging the amount of tax that it owes.

Bridgestone asserted that the withheld documents constituted "tax information" as defined by Tennessee Code Annotated § 67-1-1701(8), that the information sought pertained specifically to the taxpayer seeking it, and that the Department was required to disclose the information under Tennessee Code Annotated § 67-1-1703(a).

The Department filed its opposition to Bridgestone's motion to compel in January 2007. In its opposition motion, the Department asserted that it had made files consisting of approximately 4,000 pages available to Bridgestone in addition to the privilege log identifying 86 documents it asserted were prohibited from disclosure under section 67-1-1701, *et seq.* The Department further asserted that it had reconsidered the privilege log and voluntarily had produced seven of the 86 documents originally withheld. The Department additionally asserted that five of the withheld documents consisted of conference letters or letter rulings involving unrelated taxpayers that were protected tax information. The Department noted that it appeared from Bridgestone's memorandum that it was not seeking these documents. The Department asserted that the remaining 72 documents were protected from disclosure as tax administration information or protected tax information. The Department classified the documents as belonging to five categories: 1) email discussing the status of the refund claim and/or informal conference; 2) handwritten notes of Department employees; 3) email and memoranda discussing the basis of the assessment, adjustments to the assessment, documents produced in connection with the audit, refund claim, informal conference and issues raised in the conference; 4) forms created or used by the Department in connection with the audit; 5) one email discussing decisions and rulings involving other taxpayers. With respect to the third category, the Department noted that it had produced any documents containing calculations of the amount of tax liability or assessment adjustments. The Department asserted that the first four categories constituted confidential tax administration information, and that email contained in the fifth category was prohibited from disclosure under section 67-1-1702 as tax information concerning another taxpayer.

*4 The trial court issued its order denying Bridgestone's motion to compel in February 2007. In its order, the trial court determined that the documents withheld by the Department come within the definition of tax administration information under section 67-1-1703(a) and were, therefore, prohibited from disclosure. The trial court determined that " 'data' is the touchstone of the meaning or sense of 'tax information' " which the Department was required to produce under the Code, and found that the "underlying data used by the Commissioner to arrive at its position in this case have been produced." The trial court also noted that "[t]he common thread which the Commissioner asserts as the basis for the privilege as to each document is that it contains interdepartmental mental impressions, analyses, and deliberations of the bases of the plaintiff's tax liability."

In March 2007, Bridgestone moved for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. In its memorandum in support of its motion for interlocutory appeal, Bridgestone asserted that its discovery demand "attempted to explore, among others, the question of whether Plaintiff had in fact been subjected to multiple audits for the same tax period by the Department of Revenue." It asserted that the documents it sought were not protected

from disclosure as "tax administration information" under Tennessee Code Annotated § 67-1-1701, *et seq.*, and that an interlocutory appeal was necessary and warranted to achieve uniformity of law on the issue of the nature and scope of the information that is protected or prohibited from disclosure under the statute. Although the Department asserted the trial court's denial of Bridgestone's motion to compel discovery was correct, it did not oppose the motion for interlocutory appeal. The trial court granted Bridgestone's motion in April 2007, and we granted permission for interlocutory appeal in May 2007. We now vacate the trial court's order denying Bridgestone's motion to compel discovery and remand for further proceedings.

Issue Presented

This Court's order granting permission for interlocutory appeal did not certify an issue for appeal, but stated that Bridgestone's Rule 9 application

> concern[ed] a discovery dispute between a taxpayer and the Commissioner of Revenue over certain documents which the Commissioner asserts constitute tax administration information and are thus privileged pursuant to Tenn.Code Ann. § 6[7]-1-1702. The taxpayer ... filed a motion to compel [discovery] asserting that the documents do not fall within the definition of tax administration information and, even if they do, production of the documents is mandated by Tenn.Code Ann. § 6[7]-1-1703(a).

In its brief to this Court, Bridgestone presents the issue as:

> Whether the Chancery Court erred in denying Appellant's motion to compel the production of documents withheld by the Commission of Revenue under the guise of the taxpayer confidentiality statutes set forth in Tenn.Code Ann. § 67-1-1701 *et seq.*, where the subject documents were related to the audit, assessment and informal taxpayer conference of the very taxpayer at issue in this case, Bridgestone/Firestone, Inc.

*5 The Department, on the other hand presents the issue as:

> Whether the Chancery Court properly denied Bridgestone/Firestone's motion to compel the discovery of internal Department of Revenue notes, e-mails, memoranda and forms containing tax administration information that is prohibited from disclosure by the Taxpayer Confidentiality Act.

The issue presented by this appeal, as we perceive it, is:

> Whether the trial court erred in denying Plaintiff/Taxpayer's motion to compel discovery where the trial court determined that internal, taxpayer-specific Department of Revenue notes, e-mails, memoranda, and forms did not constitute tax information under Tennessee Code Annotated § 67-1-1701, *et seq.*

Standard of Review

We review a trial court's decision regarding pre-trial discovery matters under an abuse of discretion standard. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn.1992). The appellate courts will find an abuse of discretion "when the trial court applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.' " *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn.2007)(quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn.2006)(citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn.2006))). Moreover, "discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *BMG Music v. Commissioner*, No. M2007-01075-COA-R9-CV, 2008 WL 2165985, at *6 (Tenn.Ct.App. May 16, 2008)(quoting *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn.2007)(quoting Martha S. Davis, Standards of Review: Judicial Review of Discretionary Decisionmaking, 2 J.App. Prac. & Process 47, 58 (2000) (citations and internal quotation marks omitted))). An abuse of discretion may be found " 'when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.' " *Id.* (quoting 2 J.App. Prac. & Process at 59).

This appeal also requires us to review the trial court's construction of the definition and scope of discovery of "tax information" contained in Tennessee Code Annotated §

67-1-1701, *et seq.* The court's role when construing a statute is well-settled. The court's primary purpose when construing a statute is to ascertain and give effect to the intention and purpose of the legislature. *McLane Co., Inc. v. State of Tennessee*, 115 S.W.3d 925, 928 (Tenn.Ct.App.2002) *perm. app. denied* (Tenn. May 27, 2003) (citations omitted). The meaning and intent of a statutory section is to be ascertained in light of the general nature and purpose of the statute as a whole, and not from the special or singular words in a sentence or section. *Id.* Insofar as possible, the legislature's intent is to be ascertained from the natural and ordinary meaning of the language employed by the legislature, without a forced or subtle interpretation that would limit or extend the statute's application or purpose. *Id.* The court should seek to avoid a construction that would result in a conflict between statutes. *Id.* Accordingly, insofar as possible, statutes should be construed so as to provide a harmonious operation of the laws. *Id.* The construction of a statute is a question of law which we review *de novo* with no presumption of correctness attached to the determination of the trial court. *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn.2000).

Analysis

*6 The parties to this interlocutory appeal seek a definitive determination of what constitutes "tax information," which must be disclosed to the taxpayer unless disclosure is "seriously burdensome," as opposed to "tax administration information," which is not subject to disclosure by the Department, as the terms are defined by Tennessee Code Annotated § 67-1-1701(8) & (7), respectively. The code provides, in pertinent part:

> (a) Notwithstanding any provision of law to the contrary, returns, tax information and tax administration information shall be confidential and, except as authorized by this part, no officer or employee of the department and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer's or employee's service as an officer or employee, or obtained pursuant to the provisions of this part, or obtained otherwise.

Tennessee Code Annotated § 67-1-1702(a)(2006 & Supp.2007). However, tax information is subject to disclosure to the taxpayer who is the subject of that information. The code provides:

(a) The commissioner shall, subject to such requirements and conditions as may be prescribed by rules, disclose the return of any taxpayer, or tax information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. Tax information shall not, however, be disclosed to such person or persons if the commissioner determines that such disclosure would be seriously burdensome to tax administration.

....

(b)(6) Tax information with respect to any taxpayer that may otherwise be open to inspection by or disclosure to any person authorized by this subsection (b) to inspect any return of such taxpayer shall not be disclosed if the commissioner determines that such disclosure would seriously impair tax administration.

Tennessee Code Annotated § 67-1-1703(a) & (b)(6)(2006). The code further provides:

> (a) It is a Class E felony for any person who has, or had at any time, access to any return or tax information to disclose to any person, except as authorized by law, any such return or tax information. If such offense is committed by any officer or employee of the state, the officer or employee shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

Tennessee Code Annotated § 67-1-1709 (2006). Thus, although tax information and tax administration information are confidential, tax information must be disclosed to the subject taxpayer unless disclosure would be "seriously burdensome to tax administration" or unless "disclosure would seriously impair tax administration." Tax administration information, on the other hand, it not subject to disclosure upon demand by a taxpayer under section 67-1-1703. Under section 67-1-1711, however,

> *7 [t]he commissioner is authorized to disclose tax administration information, other than returns and tax information, if the

> commissioner determines that such disclosure is in the best interests of the state; provided, that no provision of law shall be construed to require disclosure of criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards, if the commissioner determines that such disclosure will impair assessment, collection, or enforcement under state tax laws.

Tennessee Code Annotated § 67-1-1711.

The code defines "tax information" as:

> (8) "Tax information" means a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

Tennessee Code Annotated § 67-1-1701(8) (2006). The statutory definition of "tax administration information," on the other hand, is:

> (7) "Tax administration information" means criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration[.]

Tennessee Code Annotated § 67-1-1701(7) (2006). "Tax administration," in turn, is defined as:

> (6) "Tax administration" means the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party. "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]

Tennessee Code Annotated § 67-1-1701(6) (2006).

Bridgestone's argument, as we perceive it, is that any document that is "taxpayer specific" or relates to a particular taxpayer is "tax information" as defined by section 67-1-1701(8) and is subject to disclosure under section 67-1-1703. Bridgestone asserts in its brief to this Court, that

> *8 "tax administration information" as used in the taxpayer confidentiality statutes ... neither extends to nor includes information that is specific to a particular taxpayer's audit results, tax assessment and/or informal taxpayer conference, when the subject taxpayer is the person requesting the documents ... "tax administration information" includes 'criteria or standards' used by the Department of Revenue to select returns or persons for audit or examination, or "data" used by the Department of Revenue for determining such criteria or standards.

Bridgestone further asserts that although the definition includes "audit procedures," it "does not include the application of those audit procedures to a particular taxpayer." Bridgestone asserts that the trial court erred when it determined that the term "application of state tax laws" included in the statutory definition of tax administration information includes any documents that relate to a specific taxpayer. Bridgestone contends that to construe

tax administration information as including any documents relating to the application of the tax laws to a specific taxpayer potentially converts virtually all information to information that is not subject to disclosure under the statutes. Finally, Bridgestone asserts that it is not seeking "general internal Department communications that involve tax policy or audit criteria," but "merely ... information to determine the basis of the assessment of ... tax" assessed against it.

The Department, on the other hand, asserts the Confidentiality Act has two primary purposes: to protect the confidentiality of taxpayer information from anyone other than the taxpayer and to protect tax administration information that is "created by the Department of Revenue in the course of its administration of the State's revenue laws." It contends that within the statutory provisions, the legislature specifically recognized that tax administration information included a broad spectrum of information, including a "variety of state Revenue procedures and functions, including 'assessments, collections, enforcement, litigation, publication and statistical gathering.' " The Department asserts the documents withheld from Bridgestone were created in the course of the Department's "procedures for assessing taxes, conducting informal conference proceedings, and evaluating the refund claim that gave rise to this litigation." It further asserts that many of the documents "concern the development and formulation of state tax policy relating to existing tax laws." It argues, furthermore, that the formulation of tax policy does not happen in a "theoretical void," but arises within the context of the Department's consideration of facts involving a specific taxpayer. It asserts the Confidentiality Act plainly protects the internal notes, communications and forms at issue in this case, and that to hold otherwise would stifle the ability of its employees to engage in frank, open communication.

***9** In its brief to this Court, the Department additionally asserts that it "disputes Bridgestone/Firestone's claim that an earlier audit of Bridgestone/Firestone somehow precluded the Commissioner from making the assessment that is at issue in this case." It asserts that Bridgestone already has, among the 4000 pages of documents produced by the Department, all of the reports and documentation that relate to the earlier audit. The Department contends that any discussion that may have occurred within the Department with respect to the significance of the prior audit are irrelevant to Bridgestone's claim and are protected from disclosure as tax administration information. The Department cites *Tennessee Farmer Assurance Co. v. Chumley*, 197 S.W.3d 767 (Tenn.Ct.App.2006), for the proposition that, as a matter of law, statements reflecting employees' interpretations of the tax law can have no effect on how the law is interpreted by the courts. It asserts the legal theories that may have been briefly discussed are irrelevant to the determination of Bridgestone's tax liability, and that Bridgestone has been provided with all the data necessary to determine the basis of the liability assessed against it. The Department asserts that trial court correctly held that "[i]nterdepartmental impressions, analyses and deliberations are actions taken in the management and conduct of the execution and application of the state tax law," and that " 'data' is the touchstone meaning or sense of 'tax information' " that is subject to disclosure under the statutes.

As noted above, the trial court denied Bridgestone's motion to compel upon determining that the documents withheld by the Department constitute tax administration information. The trial court determined that all "the underlying data used by the Commissioner to arrive at its position in this case [had] been produced." The court determined that the withheld documents contained interdepartmental mental impressions and deliberations of Bridgestone's tax liability. The trial court concluded that tax administration information is "information dealing with the administration and policies developed by the Department of Revenue in executing and applying the state tax laws." It further concluded that " 'data' is the touchstone of the meaning or sense of 'tax information' " because the legislature used "data" as a "catch-all term ... to refer to the information the section covers." The court stated, "while it is correct, as the plaintiff argues, that section 67-1-1701(8) requires disclosure to the taxpayer of information specific to the taxpayer, the section narrows the scope of the disclosure by adding the limitation that the information, even if taxpayer specific, must be data." The court noted that the documents at issue do not fit neatly into the statutory definition of tax information or tax administration information because they are neither "the kind of general, policy information one envisions as administrative documents developed by the Department" nor "data, the touchstone term contained in the definition of 'tax information.' " The court held that the documents are "more closely aligned with administration policy developed by the Department than they are data concerning the taxpayer and his tax liability," however, where they consist of inter-Departmental deliberations and not the underlying data upon which Bridgestone's tax liability was based.

***10** We begin our analysis of the trial court's order and consideration of the parties' arguments with three observations. First we note that, contrary to Bridgestone's assertion to this Court that the documents withheld by the Department contain information necessary to determine the

basis of the tax assessment against it, Bridgestone appears to possess all the data and information upon which the Department based the 2002 tax assessment. Bridgestone's argument in the trial court, insofar as it pertains to the issue presented by this appeal, was that account number 1002544502 was "impermissibly subjected to multiple audits of the same tax period." Accordingly, the disputed issue that precipitated this interlocutory appeal, as we perceive it, is whether account number 1002544502 was included in the 1997 audit in addition to the 2002 audit.

Second, we note that Bridgestone's argument with respect to this issue potentially raises both a question of law and a question of fact. Bridgestone's argument that it was "impermissibly subject to multiple audits" suggests that, as a matter of law, the Department may not twice audit a tax account for a particular tax period. Although Bridgestone cites neither statutory nor case law to support this contention, its entire argument appears to be predicated on an assertion that if tax account number 1002544502 was included in the 1997 audit, the Department could not lawfully include it in the 2002 audit. We emphasize, moreover, that Bridgestone does not indicate or assert that account number 1002544502 was previously subjected to a tax assessment in 1997; it has not, at this stage of the litigation, asserted that it has been subject to double taxation. This contention presupposes that, as a factual matter, account number 1002544502 was indeed included in the 1997 audit.

The Department's response, as we perceive it, is likewise ambiguous with respect to whether the disputed issue is one of law or fact. On one hand, in its answer and responses to Bridgestone's discovery requests, the Department denies that, as a factual matter, account number 1002544502 was included in the 1997 audit. In its brief to this Court, however, the Department asserts,

> [t]he Commissioner disputes Bridgestone/Firestone's claim that an earlier audit of Bridgestone/Firestone somehow precluded the Commissioner from making the assessment that is at issue in this case. Nevertheless, even if Bridgestone/Firestone has a viable claim, it has in its possession, among the 4000 pages of documents already produced, all of the audit reports and other documents that relate to the earlier audit. Any discussions that may have occurred among Department of Revenue employees as to the significance of the prior audit are irrelevant to Bridgestone/Firestone's claim and are protected from disclosure as tax administration information.

The Department additionally cites *Tennessee Farmers Assurance Co. v. Chumley,* 197 S.W.3d 767 (Tenn.Ct.App.2006), for the proposition that, "[a]s a matter of law, statements or interpretations of tax laws made by auditors or other Department of Revenue employees can have no effect on the outcome of the legal issues to be decided by the courts."

*11 Third, we observe that the parties and the trial court have devoted considerable attention to the question of what constitutes confidential tax administration information. We note, however, that the code provisions recited above begin with the proposition that both tax information and tax administration information are confidential except as disclosure is otherwise authorized. Tennessee Code Annotated § 67-1-1702(a)(2006 & Supp.2007). The code then authorizes and indeed requires disclosure to a taxpayer or his designee of that taxpayer's tax return or tax information, subject to the conditions prescribed by the rules. Tennessee Code Annotated § 67-1-1703(a)(2006). Disclosure is neither required nor authorized, however, if the Commissioner determines that such disclosure would be seriously burdensome to tax administration. *Id.* Thus, the issue presented in this case is not whether the documents withheld by the Department are properly classified by the Department as tax administration information, but whether they constitute tax information as defined by Tennessee Code Annotated § 67-1-1701(a)(8)(2006).

Although slight, this distinction is not without a difference in light of the trial court's observation that the documents described in the Department's privilege log do not fit neatly into the statutory definitions of tax administration information or tax information. Unless the documents sought by Bridgestone are tax returns or tax information, they are not subject to disclosure under section 67-1-1703(a). Thus, whether the documents fit neatly into the definition of tax administration information is less critical to the consideration of whether disclosure is required by section 67-1-1703(a).

As noted above, tax information as defined by the code is

> a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or

> tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

Tennessee Code Annotated 67-1-1701(8)(2006). Clearly, insofar as the documents withheld by the Department in this case reflect on the Department's consideration or internal discussion of the question of law presented by Bridgestone, i.e. whether account number 1002544502 may be subjected to multiple audits for the same tax period, they are not tax information. Although such documents may be taxpayer specific, they are specific only insofar as they provide context for what is clearly a discussion of the application of state tax law or policy. The determination of whether multiple tax audits are permissible under the statutes or as a matter of policy is not a taxpayer specific determination. Indeed, to the extent to which the documents pertain to this question of law or policy, we would agree with the trial court that they constitute tax administration information where they are information relating to the application and execution of the state tax laws under Tennessee Code Annotated § 67-1-1701(6) & (7)(2006). Certainly, insofar as the documents withheld by the Department reflect on whether, as a matter of law, any given tax account may be subject to multiple audits for the same tax period, they are not tax information as defined by section 67-1-1701(8).

***12** The question of whether the documents constitute tax information insofar as they reflect the Department's internal discussions regarding whether account 1002544502 was, as a factual matter, included in the 1997 audit, presents a less clear question. Certainly, such documents do not pertain to the taxpayer/Bridgestone's "identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing[.]" To the extent to which the documents reflect on the Department's determination of a factual matter relating to an audit of a taxpayer, they are taxpayer specific and are not excluded from disclosure as "tax information [that] does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer." Thus, we turn to whether documents that reflect the Department's consideration or analysis of a taxpayer specific factual matter constitute tax information as "other data ... recorded by, prepared by ... the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax ...." under section 67-1-1701(8).

As the trial court noted, the "touchstone" of this element of the definition of tax information is "data." However, data includes more than the mere numbers upon which an assessment is mathematically calculated. Data is "factual information (as measurements or statistics) used as a basis for reasoning, discussion, or calculation." Webster's Ninth New Collegiate Dictionary 325 (1986). Data is also defined as "[o]rganized information generally used as the basis for an adjudication or decision. Commonly, organized information, collected for a specific purpose." Black's Law Dictionary 395 (6th ed.1990). Accordingly, to the extent to which the withheld documents reflect the Department's recording or preparation of information used to determine the existence or amount of Bridgestone's tax liability, they are tax information as defined by the code.

If, as Bridgestone asserts, the Department may not subject a specific account to multiple audits for the same tax period as a matter of law, and if the tax assessed pursuant to the 2002 audit included a tax account that was subject to an audit in 1997, then whether, as a factual matter, tax account 1002544502 was included in the 1997 audit is information which was used to form the basis of the assessment of Bridgestone's tax liability. It is "other data ... recorded by [or] prepared by ... the commissioner with respect to ... the determination of the existence, or possible existence, of liability ...." under section 67-1-1701(8). Thus, insofar as the documents withheld by the Department contain information used as a basis for the Department's factual determination that account 1002544502 was not included in the 1997 audit, they constitute tax information. We believe this information includes interdepartmental discussions to the extent to which they illustrate how the Department arrived at factual, taxpayer

specific determinations necessary to its assessment of the taxpayer's tax liability.

*13 We are not insensitive to the Department's argument in its brief to this Court that its employees must be able to engage in frank and open discussion. Nor do we disagree with the Department's position that the Confidentiality Act seeks to further two important purposes. These purposes, as we perceive them, are 1) to protect the confidentiality of taxpayer information from third parties and 2) to further the Department's ability to formulate tax policy; develop standards, criteria and audit procedures; and administer, manage, and enforce the tax laws. We cannot agree with the Department's position, however, that all internal Departmental communications are protected from disclosure under the Confidentiality Act, including those that reflect the Department's determination of a disputed material factual issue that forms the basis of a tax liability assessment. We also disagree with Bridgestone, however, that all documents that are taxpayer specific in that they refer to a specific taxpayer constitute tax information which must be disclosed to the taxpayer. Documents that reflect interdepartmental consideration of tax policy and the administration or conduct of tax law, in other words, discussions of questions of law or policy or the administration or application thereof, are not taxpayer specific where the application thereof extends beyond the taxpayer who provides the context for that discussion.

We recognize that Departmental employees must engage in open and frank communication, and that internal communication may contain a mixture of policy discussion and factual determinations. However, assuming Bridgestone is correct that a particular account may not be subjected to multiple audits for the same tax period as a matter of law, disclosure of documents reflecting the Department's determination that, as a factual matter, the account was or was not included in a prior audit does not hamper Departmental discussion of policy-related or administrative matters. Moreover, such information is not only taxpayer specific, but is unrelated to any larger matter of tax administration, policy, standards, or the implementation of the tax laws. Further, even assuming the documents reflect differences of opinion among Departmental employees regarding Bridgestone's liability which, according to the Department, may not be relied upon by Bridgestone under *Tennessee Farmers Assurance Co. v. Chumley*, 197 S.W.3d 767 (Tenn.Ct.App.2006), they nonetheless constitute information used as the basis for the Department's determination of liability as defined by section 67-1-1701(8). Thus, it is incumbent upon the Department to demonstrate that disclosure would be seriously burdensome should the Department continue to assert that they are nonetheless protected from disclosure under Tennessee Code Annotated § 67-1-1703(a).

We next turn to Bridgestone's assertion that to permit the Department to merely withhold documents as privileged based upon a privilege log potentially permits the Department to decide whether given documents falls within the statutory definition of tax information. Although we do not believe the present case suggests any impropriety on the part of the Department, but an honest difference with respect to the construction of the statutes, we agree that it is the role of the court to determine, based upon an *in camera* review of documents withheld by the Department, whether a particular document is tax information under the code as construed herein. Moreover, upon *in camera* review, the court may find it necessary to redact certain portions of any particular document to exclude from disclosure those portions that do not constitute tax information as construed in this Opinion.

Holding

*14 As noted above, Bridgestone's argument is predicated upon its assertion that account 1002544502 was "impermissibly" subject to multiple audits. This argument presents, first, a question of law regarding whether the Department may subject a particular account to more than one audit for the same tax period. It then presents a question of fact regarding whether the account was included in the 1997 audit. The question of law has not been addressed in the trial court, and to render an opinion on it here would be advisory. We observe, moreover, that at this stage of the litigation, this is not a question of double taxation, but of multiple audits. We further observe that if, as the Department asserted in the trial court, account 1002544502 was not included in the 1997 audit, the question of whether it may be subjected to multiple audits as a matter of law is rendered moot.

In light of the foregoing, the order of the trial court denying Bridgestone's motion to compel discovery is vacated. This matter is remanded for further proceedings consistent with this Opinion. Upon remand, the trial court is instructed to conduct an *in camera* review of the documents withheld by the Department to determine whether, as a matter of law, the documents, in whole or in part, constitute tax information as the term is construed in this Opinion. Cost of this appeal are taxed to the Appellee, Loren L. Chumley, Commissioner of Revenue.

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