

JAN 03 2008

BY JOHN C. MIDDLETON D.C.

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
III DIVISION

CASE NO. 08 CT 00033

KENTON COUNTY FISCAL COURT

PETITIONER/
APPELLANT

v.

THE KENTUCKY ENQUIRER

RESPONDENT/
APPELLEE

Serve: Managing Officer
226 Grandview Dr.
Ft. Mitchell, KY 41017

Serve by: Certified Mail

PETITION FOR JUDICIAL REVIEW OF KENTUCKY ATTORNEY
GENERAL'S DECISION NO. 07-ORD-255

Comes now the Kenton County Fiscal Court, by Counsel, and for its Appeal and
Petition for Judicial Review states as follows:

INTRODUCTION

1. This is an appellate action, requesting a review of the Decision of the
Attorney General, 07-ORD-255, finding that the Kenton County Fiscal Court's
nondisclosure of a business occupational license application constituted a violation of the
Kentucky Open Records Act.

JURISDICTION

2. The within action arises under the laws of the Commonwealth of
Kentucky. This Court has jurisdiction of the matter pursuant to KRS 61.880, and KRS

61.882. The Petitioner/Appellant has filed this action within thirty days of the issuance of the decision and is properly before this Court.

PARTIES

3. That Petitioner and Appellant, Kenton County Fiscal Court (hereinafter "Fiscal Court"), is a constitutional governmental entity established pursuant to Ky. Const. §144, its members being duly elected by the citizens of Kenton County, Commonwealth of Kentucky.

4. That Defendant and Appellee, the Kentucky Enquirer, is a newspaper doing business in and having its principal office in the County of Kenton, Commonwealth of Kentucky.

JUDICIAL REVIEW OF ATTORNEY GENERAL'S DECISION

5. Under the provisions of Kentucky's Open Records Act, opinions of the Attorney General are subject to judicial review. KRS 661.880, 61.882. The decision under review, 07-ORD-255, is attached as Exhibit "A."

6. This Court is asked under KRS 61.882(3) to review the Attorney General's decision, de novo, in whole, reverse Attorney General Decision 07-ORD-255, and issue an Order upholding Kenton County's denial of the disclosure of the occupational business license application requested by the Defendant.

BACKGROUND

7. On or around October 17, 2007 Jim Hannah, a reporter for the Kentucky Enquirer, sent an open records request to Joe Shriver, open records custodian for the Kenton County Fiscal Court, asking for a copy of the business license application for Empire Buffet, Inc. A copy of this letter is attached as Exhibit "B."

8. On or around October 18, 2007 Mr. Shriver responded to Mr. Hannah's request, stating that the requested records were prohibited from disclosure pursuant to KRS 67.790(8)(a) as defined by KRS 67.790(7), as well as under KRS 61.878(1)(l) which prohibits the disclosure of records made confidential by act of the General Assembly. A copy of this letter is attached as Exhibit "C."

9. On or around October 31, 2007 the Kentucky Enquirer filed an open records appeal with the Kentucky Attorney General.

10. The Kentucky Attorney General issued its decision on December 5, 2007, in opinion number 07-ORD-255. This appeal follows.

COUNT I

11. That the *plain language* of KRS 67.790(8) prohibits the disclosure of any tax schedules, returns, or reports required to be filed with the tax district or other proper officer.

12. That the business whose application was requested was required to file an Occupational License Application with the taxing authority.

13. That the Fiscal Court's refusal to disclose the requested business license application pursuant to KRS 67.790(8) and KRS 61.878(1)(l) was proper.

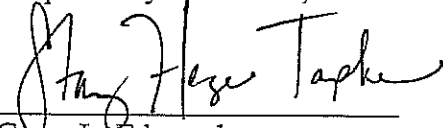
14. That the Kentucky Attorney General's Office applied the incorrect rule of law or misinterpreted the plain language of the statute in question by finding that the Fiscal Court violated Kentucky Open Records Act when it refused to disclose the requested business application.

15. The issue of disclosure or nondisclosure under KRS 67.790(8) has not yet been adjudicated by a Court of law in this Commonwealth.

WHEREFORE, the Petitioner and Appellant the Kenton County Fiscal Court hereby requests the following relief be granted:

1. That the Court reverse the decision of the Kentucky Attorney General, 07-ORD-255;
2. That the Court establish a briefing schedule for both parties;
3. The Court grant the parties oral argument to review all properly briefed matters with the Court; and
4. For such other and further relief now and in the future as proper.

Respectfully Submitted,



Garry L. Edmondson
Kenton County Attorney
Stacy Hege Tapke
Assistant Kenton County Attorney
303 Court Street, Room 307
Covington, KY 41011
Phone: 859-491-0600 ext. 41

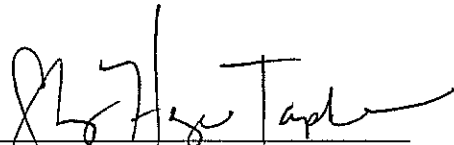
CERTIFICATION

I hereby certify that a copy of the foregoing was sent by regular US Mail, postage prepaid, this 3rd day of January, 2008 upon the following:

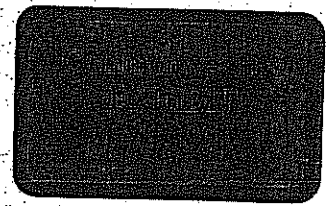
Paul Alley, Esq.
Graydon, Head & Ritchey LLP
P.O. Box 17070
Ft. Mitchell, KY 41017
Hon. Jack Conway
Kentucky Attorney General
700 Capitol Ave. Suite 118
Frankfort, KY 40601

Hon. Jack Conway
Kentucky Attorney General
700 Capitol Ave. Suite 118
Frankfort, KY 40601

Hon. Amye Bensenhaver
Attorney General's Office
700 Capitol Ave. Suite 118
Frankfort, KY 40601



Stacy Hege Tapke



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

GREGORY D. STUMBO
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601-3449
(502) 695-5300
FAX: (502) 564-2894

07-ORD-255

December 5, 2007

In re: *The Kentucky Enquirer* / Kenton County Fiscal Court

Summary: Kenton County Fiscal Court's reliance on KRS 67.790(8) to support nondisclosure of business license application was misplaced. Like KRS 131.190(1), KRS 67.790(8) only authorizes nondisclosure of those portions of the application that reveal "the affairs" of the business and are not otherwise made a matter of public record. Fiscal Court's blanket denial of request therefore constituted a violation of the Open Records Act.

Open Records Decision

The question presented in this appeal is whether the Kenton County Fiscal Court properly relied on "KRS 67.790(8)(a) as defined by KRS 67.790(7)," and incorporated into the Open Records Act by KRS 61.878(1)(l), in issuing a blanket denial of *Kentucky Enquirer* reporter Jim Hannah's October 17, 2007, request for access to, and a copy of, "the application for a business license for Empire Buffet of Kentucky Inc., located at 770 Clock Tower Parkway in Crescent Springs." For the reasons that follow, and upon the authorities cited, we find that the Fiscal Court's reliance on the cited provision was misplaced.

Shortly after the Fiscal Court denied Mr. Hannah's request, *The Kentucky Enquirer* initiated this appeal, questioning the agency's reliance on KRS 67.790(8) as the basis for blanket denial. It was *The Enquirer's* position that KRS 67.790(8) "specifically states it only applies to information having to do with the 'affairs' of

the person's business and 'does not extend to information . . . in any way made a matter of public record" Continuing, *The Enquirer* observed:

[T]he application requested contains only basic entity information about a business and does not implicate proprietary documents or information relating to the 'affairs' of the applicant. . . . The category of protected documents and information is tax returns and other documents that might reveal the internal workings and finances of an active business. The mere existence of a business and basic information about its legal nature as contained in a business license application in no way reveals the private "affairs of the business."

In support, *The Enquirer* cited a line of decisions issued by this office recognizing the public's right of access to business license applications for the purpose of 'monitor[ing] the functions of licensing entities . . .,' and, in particular, OAG 87-57, in which we held that "the basic information contained in a business application is 'not . . . information which reveals the affairs of a person's business and is not the type of information protected by KRS 131.190(1).'" *The Enquirer* focused on 07-ORD-169, a recent decision in which the Attorney General noted the similarity between the language found in KRS 131.190(1) and KRS 67.790(8), and cautioned against an overly broad interpretation of the latter provision. Based on this analysis, *The Enquirer* asserted, "[t]he only sensitive information contained on the application may be the social security number which could easily be redacted in accord with the usual open records requirements and practices."

In supplemental correspondence directed to this office following commencement of *The Enquirer's* appeal, the Kenton County Fiscal Court reaffirmed its position, observing:

Most if not all of [the] . . . authority [cited by *The Enquirer*] dealt with denials based on KRS 61.878(1)(a) or KRS 131.190(1). This denial is supported by the plain language of KRS 67.790(8) as defined by 67.790(7) specifically what is a return, "A return . . . shall mean and include any return . . . or form prescribed by the tax district and required to be filed with the tax district" The

statute is on point and prohibits disclosure with no need for interpretation. [The *Enquirer*] cited no case law where a Commonwealth Court of Justice declared the license application to be an open record under KRS 67.790.

Because the Fiscal Court's position reflects a fundamental *misconception* that records are presumed to be closed unless expressly declared by the legislature or the courts to be open, indeed, that the public has the burden of proving that a record is open, and because this office has previously determined that KRS 67.790(8) cannot be construed so broadly as to authorize blanket nondisclosure of applications for business licenses, we find that the Fiscal Court's reliance on KRS 67.790(8) was misplaced.

We begin with the presumption of openness that informs the Open Records Act and that is found at KRS 61.872, providing that "[a]ll public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884." This presumption of openness is mirrored in the statement of policy codified at KRS 61.871, declaring that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed," and the statutory assignment of the burden of proof to public agencies resisting disclosure reflected in KRS 61.880(2)(c). The presumption of openness finds clear support in the judicial determination that the Open Records Act "exhibits a bias favoring disclosure,"¹ and that the "unambiguous purpose of the . . . Act is the disclosure of public records even though such disclosure may cause inconvenience or embarrassment."² Thus, "all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation, regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency,"³ including applications for a business license, are presumed open *unless* expressly exempted by KRS 61.878(1)(a) through (n), or a separately enacted confidentiality

¹ *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 327 (Ky. 1992).

² *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994), characterizing the Act as "a disclosure statute."

³ KRS 61.870(2).

provision, and the public agency resisting disclosure "bears the burden of proving their exempt status." *Board of Examiners* at 327.

The Fiscal Court invokes KRS 67.790(8) in support of its denial, asserting that there is "no need for interpretation," of that statute and shifting the burden to *The Enquirer* to establish that the record is open. The Fiscal Court's position is legally untenable. The Attorney General is statutorily charged with the duty to interpret and apply the Act,⁴ and related confidentiality provisions, and public agencies are statutorily assigned the burden of proof.⁵ It is therefore not incumbent on *The Enquirer*, or any other requester, to establish that the record sought is open. It is incumbent on the Attorney General to discharge his statutory duty by interpreting and applying the provisions of the Act and related confidentiality provisions. As the Franklin Circuit Court recently observed in a nonfinal, nonbinding, but nevertheless instructive opinion, "the Attorney General has an ethical obligation . . . to apply the law that he believes in good faith is correct until directed to do otherwise by a court of competent jurisdiction, or until that position has been rejected by a published opinion of an appellate court." *Justice and Public Safety Cabinet v. Stephen Malmer and Gregory Stumbo, Attorney General*, No. 06-CI-1372 at 9 (Franklin Circuit Court, Division 1, November 19, 2007); accord, 06-ORD-184; 06-ORD-230; 07-ORD-132.

This office has long recognized that business license records are "open to public inspection to obtain the names and addresses of licensees."⁶ Because a business license is "a temporary grant of special privilege by the local government," the Attorney General reasoned, "the public is entitled to know what businesses and professions have been licensed to . . . operate within the boundaries of the governmental unit." OAG 84-93, p. 2. Stated alternatively:

The very purpose of a license is to regulate businesses and professions in the interest of the public. We believe that the public is entitled to know what businesses and professions have been licensed to exist and operate within a local government unit.

⁴ KRS 61.880(2).

⁵ KRS 61.880(2)(c).

⁶ See, e.g., OAG 81-309; OAG 82-435; OAG 84-93; OAG 85-1; OAG 87-57; 92-ORD-1119; 00-ORD-117; 01-ORD-63; 04-ORD-010; 07-ORD-169.

78-809, p. 2. Nevertheless, we have also recognized that the public's right of inspection is not unlimited, but is circumscribed by KRS 61.878(1)(a) and KRS 131.190(1). The weight of recent authority has turned on interpretation of the latter provision. KRS 131.190(1) provides, in relevant part:

No present or former commissioner or employee of the Department of Revenue, present or former members of a county board of assessment appeals, present or former property valuation administrator or employee, present or former secretary or employee of the Finance and Administration Cabinet, former secretary or employee of the Revenue Cabinet, or any other person, shall intentionally and without authorization inspect or divulge any information acquired by him of the affairs of any person, or information regarding the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by a hearing or investigation, *insofar as the information may have to do with the affairs of the person's business. This prohibition does not extend to information . . . in any way made a matter of public record*

(Emphasis added.) In applying this provision to business licensing records, this office has held:

Records disclosed to the City to obtain an occupational license or collect a license fee, such as social security number and federal identification numbers, remain confidential, and are exempt from public inspection. OAG 82-2; OAG 84-93. Information which reveals the affairs of the business, such as profits, taxes, deductions, and salaries, is also exempt. To the extent that disclosure of the amount of tax paid or owing, or the penalty assessed reveals the private details of the taxpayer's business, it is not subject to disclosure.

01-ORD-63, p. 3, citing, *inter alia*, 94-ORD-64; 96-ORD-96; 97-ORD-22; 00-ORD-117. Thus, KRS 131.190(1) does not erect an impenetrable barrier to disclosure of business licensing records, but is, instead, limited to information that "may have

to do with the affairs of a person's business" and is not otherwise made a matter of public record.

KRS 67.790(8)(a), a more recent enactment of the General Assembly, contains nearly identical language, providing:

No present or former employee of any tax district shall intentionally and without authorization inspect or divulge any information acquired by him or her of the affairs of any person, or information regarding the tax schedules, returns, or reports required to be filed with the tax district or other proper officer, or any information produced by a hearing or investigation, *insofar as the information may have to do with the affairs of the person's business. This prohibition does not extend to information . . . in any way made a matter of public record*

(Emphasis added.) Just as KRS 131.190(1) cannot properly be construed to erect an impenetrable barrier to disclosure of business licensing records, KRS 67.790(8)(a) cannot properly be so construed. The qualifying language in each provision, "insofar as the information may have to do with the affairs of a person's business," is identical, and our analysis is therefore the same.⁷ It is incumbent on the Kenton County Fiscal Court to disclose any and all information appearing on the business license application submitted by Empire Buffet of Kentucky, Inc., that does not disclose the affairs of the business, and KRS 67.790(7), defining the term "return" to include "forms prescribed by the tax district and required to be filed with the tax district" does not alter our conclusion.

Our review of the unexecuted business license application form furnished to this office by *The Kentucky Enquirer* confirms *The Enquirer's* view that the only confidential information the Fiscal Court may properly withhold consists of personal information relating to the sole proprietor, namely, his or her social security number and date of birth. The form does not require disclosure of the

⁷ In addition, we note the presence of the same qualifying language relative to "information . . . made a matter of public record" in both provisions. Much of the information found on the business license application is "made a matter of public record" on the Secretary of State's website located at <http://www.sos.kv.gov/business/filings/online/>.


07-ORD-255

Page 7

affairs of the business, as that phrase has consistently been construed, such as profits, taxes, deductions, and salaries. Here, as in 07-ORD-169, we find that the Kenton County Fiscal Court's interpretation of KRS 67.790(8)(a) is "overly broad" and therefore "inconsistent with the [Open Records] Act." 07-ORD-169, p. 10.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Gregory D. Stumbo
Attorney General



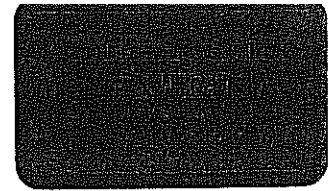
Amye L. Bensenhaver
Assistant Attorney General

#589

Distributed to:

Paul Alley
Graydon Head & Ritchey LLP
P.O. Box 17070
Ft. Mitchell, KY 41017-0070

Joe Shriver
Human Resources Director
& Deputy Chief of Staff
Kenton County Fiscal Court
P.O. Box 792
Covington, KY 41012-0792



**THE
KENTUCKY
ENQUIRER**
NKY.com

226 GRANDVIEW DRIVE
FORT MITCHELL, KY 41017
(859) 578-5555
FAX (859) 578-5565
Kynews@NKY.com

Wednesday, October 17, 2007

Joe Shriver
Kenton County's director of human resources
(859) 392-1409 fax

Dear Mr. Shriver:

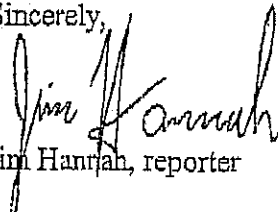
Pursuant to the state open records law, KRS 61.872 to 61.884, I write to request access to and a copy of the application for a business license for Empire Buffet of Kentucky Inc., located at 770 Clock Tower Parkway in Crescent Springs.

If you choose to deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemptions upon which you rely. Also, please provide all segregable portions of otherwise exempt material.

Please be advised that I am prepared to pursue whatever legal remedy necessary to obtain access to the requested records. I would note that willful violation of the open records law could result in a fine of up to \$25 for each day that I am denied access and the award of attorney fees and costs.

Thank you for your assistance, if you have any question, feel free to call me at (859) 578-5573.

Sincerely,

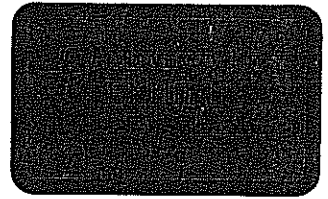

Jim Hanrahan, reporter

Cc: Dianne Gebhardt-French, Kentucky bureau chief





KENTON COUNTY FISCAL COURT



RALPH A. DREES, Judge/Executive
SARA REEDER VOELKER, Commissioner
DAN HUMPERT, Commissioner
KRIS KNOCHELMANN, Commissioner

R. SCOTT KIMMICH, Deputy Judge/Executive
JERRY KNOCHELMANN, County Treasurer
GARRY EDMONDSON, County Attorney
BILL DORSEY, Public Safety Dir. & HS/EMA
ED BUTLER, Chief of Police

JOE SHRIVER, Human Resource Director
JOE MURPHY, Supt. Public Works
SCOTT GUNNING, Parks & Recreation Dir.
ROGER WELLS, Fleet Management Dir.
GARY SINCLAIR, Buildings & Grounds Dir.

October 18, 2007

SENT VIA ORDINARY MAIL

Jim Hannah
The Kentucky Enquirer
226 Grandview Drive
Ft. Mitchell, KY 41017
Phone: (859) 578-5555
Fax: (859) 578-5585

Re: Open Records Request dated October 17, 2007

Dear Mr. Hannah:

Pursuant to the above-referenced Open Records request dated October 17, 2007, I am responding to you as the Kenton County Fiscal Court Official Records Custodian. Unfortunately, after consultation with the County Attorney, the your requested records in the possession and control of the Kenton County Fiscal Court are prohibited from distribution by KRS 67.790(8)(a) as defined by KRS 67.790(7). Since the aforementioned statute prohibits disclosure I must deny your request under KRS 61.878(1)(I) *Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.* If you have any questions or concerns pertaining to your request or this denial, please do not hesitate to contact my office at (859) 392-1400.

Sincerely,

Joe Shriver
Human Resource Director
& Deputy Chief of Staff

ity Fiscal Court
Box 792
Kentucky 41012

Mr. Jim Hannah
The Kentucky Enquirer
226 Grandview Drive
Ft. Mitchell, KY 41017

US POSTAGE \$ 00.41
Mailed From 41012
10/18/2007
031A 0005180107

