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November 6, 2013

Opinion No. 13-88

Confidentiality of Audit Information Obtained by the Ethics Commission

QUESTIONS

1. Does Tenn. Code Ann. § 3-6-308(c) restrict the confidentiality of all random audit information and investigatory audit information or just the confidentiality of such information as it relates to tax matters?

2. If the answer to question one is that all random audit information and investigatory audit information is confidential, would the Ethics Commission be prohibited from disclosing any such information in an administrative proceeding?

3. Does Tenn. Code Ann. § 3-6-308(c) require information to remain confidential that was obtained during an audit but is subsequently voluntarily distributed to the Tennessee Ethics Commission members by an audited lobbyist that is a party to an administrative proceeding conducted by the Commission?

   a. Would the answer be the same for all administrative proceedings before the Ethics Commission?

   b. Would the answer be the same if an employer of a lobbyist that was the subject of an audit voluntarily provided copies of the contract between the employer and audited lobbyist?

4. Does Tenn. Code Ann. § 3-6-308(c) require information that is considered public and which can be obtained in the public domain be kept confidential?

5. May a person or entity that is the subject of random or investigatory audit waive the confidentiality provisions of Tenn. Code Ann. § 3-6-308(c) in an administrative contested case proceeding before the Ethics Commission by discussing such random or investigatory audit information during the course of the proceeding?

OPINIONS

1. Tenn. Code Ann. § 3-6-308(c) requires the members and employees of the Ethics Commission to maintain as confidential all random audit information and investigatory audit information.

2. The Ethics Commission is not prohibited by Tenn. Code Ann. § 3-6-308(c) from disclosing random audit information and investigatory audit information concerning an audited lobbyist in an administrative proceeding, provided that the audited lobbyist is a party to the proceeding and the disclosed information is directly related to the resolution of an issue in the proceeding. The Ethics Commission is also not prohibited by Tenn. Code Ann. § 3-6-308(c) from disclosing random audit information and investigatory audit information if disclosure is necessary to assure compliance with Tennessee lobbying disclosure and registration laws.

3. No. Such information does not fall within the definition of random audit information and therefore is not required to be kept confidential pursuant to Tenn. Code Ann. § 3-6-308(c).

a. Yes.

b. Yes.

4. No, because information readily available in the public domain has no expectation of confidentiality.

5. In an administrative contested case hearing conducted by the Ethics Commission, the Commission is required by Tenn. Code Ann. § 4-5-313 to "give effect . . . to agency statutes protecting the confidentiality of certain records." Nonetheless, the Ethics Commission is allowed by Tennessee law to disclose random or investigatory audit information in such a proceeding if the person or entity that is the subject of that information is a party to the proceeding and the information is directly related to the resolution of an issue in that proceeding. A person or entity that is the subject of a random or investigatory audit may also request or consent to the disclosure of random audit information or investigatory audit information in an administrative proceeding before the Ethics Commission; however, such request or consent would need to be in writing.

ANALYSIS

1. The questions posed concern the confidentiality of documents obtained during a random or investigatory audit conducted pursuant to the Tennessee Ethics Commission Act of 2006, codified at Tenn. Code Ann. §§ 3-6-101 to -309 (hereinafter "the Act"). The Act creates the Tennessee Ethics Commission in order "to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct." Tenn. Code Ann. § 3-6-103. The Commission's duties include to investigate any properly alleged violations of the Act as provided in Tenn. Code Ann. § 3-6-201, *see* Tenn. Code Ann. § 3-6-106(a)(11), and to annually audit "the registration statements, amendments to registration statements and reports of no more than four percent (4%) of all lobbyists" pursuant to Tenn. Code Ann. § 3-6-308(a)(7). The Act requires that "random audit information and investigatory audit information" be maintained as confidential, specifically stating:

> Notwithstanding the provisions of any law to the contrary, random audit information and investigatory audit information shall be confidential and shall be maintained as such by the members and

> employees of the ethics commission and by the officers and employees of the state, in the manner and to the extent that the confidentiality of tax information is maintained by the officers and employees of the department of revenue and the state under the provisions of title 67, chapter 1, part 17.

Tenn. Code Ann. § 3-6-308(c). Investigatory audit information is defined as

> data obtained pursuant to a finding of probable cause to believe that an employer or lobbyist has violated this part, including information pertaining to the source or amount of employer or lobbyist income, expenditures, receipts, assets, liabilities, net worth, or related financial or proprietary information that is received by, recorded by, prepared by, or collected by or on behalf of the ethics commission during the course of any audit, investigation or other examination undertaken for the purpose of ensuring compliance with, or imposing civil or criminal sanctions for violation of, this part.

Tenn. Code Ann. § 3-6-301(14). Random audit information is defined as

> information obtained pursuant to an examination of a lobbyist's employment contract, job description or other documentation in order to determine that no contingency fee arrangement prohibited under § 3-6-304(k) is included and that the date of employment as a lobbyist is consistent with the registration statement filed by both the lobbyist and employer. "Random audit information" also means information obtained pursuant to a review of the total lobbying and lobbying-related compensation and expenses paid to the lobbyist by an employer that will be checked against the range of expenditures reported by the employer in a random audit. As provided in § 3-6-105(a)(5), information contained in statements filed with the commission for more than two (2) years shall not serve as the basis for a random audit.

Tenn. Code Ann. § 3-6-301(23).

The initial question posed is whether these statutory provisions render all random and investigatory audit information confidential or just such information relating to tax matters. "The cardinal rule of statutory construction is to follow the plain meaning of the statute where the language is clear and unambiguous on its face." *Jackson v. General Motors Corp.*, 60 S.W.3d 800, 804 (Tenn. 2001). The provisions of Tenn. Code Ann. § 3-6-308(c) require that random audit information and investigatory audit information be confidential and maintained "in the manner and to the extent that the confidentiality of tax information is maintained . . . under the provisions of title 67, chapter 1, part 17." This language is clear and unambiguous and requires the members and employees of the Ethics Commission to maintain as confidential all random and investigatory audit information, and not just such information related to tax matters.

2. The Ethics Commission is not prohibited from disclosing any random or investigatory audit information with respect to an audited lobbyist in an administrative proceeding, provided that the audited lobbyist is a party to the proceeding and the disclosed information is directly related to the resolution of an issue in the proceeding. The Ethics Commission is required to maintain random and investigatory audit information in the same manner that tax information is maintained by the Department of Revenue "under title 67, chapter 1, part 17." Tenn. Code Ann. § 3-6-308(c). The Title 67 provisions referenced by Tenn. Code Ann. § 3-6-308(c) include Tenn. Code Ann. § 67-1-1702(a), which contains a general prohibition on the disclosure of tax information and provides as follows:

> Notwithstanding any 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 or of any office of a district attorney general or any state or local law enforcement agency, 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 this part, or obtained otherwise.

Title 67 nonetheless lists a number of exceptions to this general prohibition and provides for the disclosure of tax information in certain specified circumstances. *See* Tenn. Code Ann. §§ 67-1-1703 to -1707. Specifically, Tenn. Code Ann. § 67-1-1704(b)(1) provides that tax information may be disclosed in a federal or state judicial or administrative proceeding pertaining to tax administration, but only if:

> (A) The taxpayer is a party to such proceeding;
> (B) The treatment of an item reflected on such return is directly related to the resolution of an issue in the proceedings; or
> (C) Such return or tax information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer that directly affects the resolution of an issue in the proceeding.

Furthermore, Tenn. Code Ann. § 67-1-1705(b) authorizes disclosure for purposes of administration and compliance with the tax laws and specifically authorizes disclosure of information relating to an audit, stating:

> An officer or employee of the department may, in connection with the officer's or employee's official duties relating to an audit, collection activity, or civil or criminal tax investigation or the investigation of any offense or matter under the tax laws of this state, disclose tax information to the extent that such disclosure is necessary in obtaining information, that is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected. Such officer or employee may also disclose tax information when disclosure is required to assure compliance with the tax laws of this state through:

> (1) The release of specific tax information; or
> (2) Publishing of a bulletin or list identifying persons recognized by the department as qualified sellers, limited users, dealers, and distributors qualified to receive taxable substances, indicating the extent to which they are bonded, or listing similar categories of persons and kinds of data.

As previously noted, Tenn. Code Ann. § 3-6-308(c) requires the Ethics Commission to maintain random and investigatory audit information *in the same manner that tax information is maintained by the Department of Revenue under title 67, chapter 1, part 17.* The Title 67 Department of Revenue statutory provisions cited above specifically authorize the disclosure of confidential tax information in an administrative proceeding if the taxpayer is a party to the proceeding and the information is directly related to the resolution of an issue in the proceedings, and they further authorize disclosure in order to assure compliance with the tax laws. In light of these Title 67 provisions, which are incorporated by reference in Tenn. Code Ann. § 3-6-308(c), the Ethics Commission is not prohibited from disclosing random and investigatory audit information concerning an audited lobbyist in an administrative proceeding, provided that the audited lobbyist is a party to the proceeding and the disclosed information is directly related to the resolution of an issue in the proceeding. The Ethics Commission would also not be prohibited from disclosing random and investigatory audit information if it is necessary to assure compliance with the state lobbying disclosure and registration laws.

3. Nor is the Ethics Commission required to keep confidential information about an audited lobbyist that meets the definition of random audit information but that is voluntarily distributed by the audited lobbyist or the employer of the audited lobbyist to the Ethics Commission members during an administrative proceeding, assuming no agreement exists between the parties to the proceeding to maintain such information as confidential. Under the definition of random audit information at Tenn. Code Ann. § 3-6-301(23), information received pursuant to an examination or random audit required by Tenn. Code Ann. § 3-6-308(a)(7) is considered to be "random audit information" and, therefore, required to be kept confidential pursuant to Tenn. Code Ann. § 3-6-308(c) except for certain authorized disclosures. However, if the information is not received pursuant to an examination or random audit but instead is voluntarily provided by an audited lobbyist or the employer of an audited lobbyist during the course of an administrative proceeding before the Ethics Commission, the information would not be protected as confidential by the specific terms of Tenn. Code Ann. § 3-6-301(23). *See, e.g. State v. Hawkins,* 406 S.W.3d 121, 131 (Tenn. 2013) (recognizing the general rule of statutory construction that a court must "ascertain and give effect to the legislature's intent without unduly . . . expanding a statute's coverage beyond its intended scope"). Under these circumstances, the audit has been completed and, therefore, the information was not obtained pursuant to an audit or examination but was presented during the course of the administrative proceeding. Accordingly, such information does not fall within the definition of random audit information and is not required to be kept confidential pursuant to Tenn. Code Ann. § 3-6-308(c), absent an agreement by the parties that such information should be maintained as confidential. This conclusion would be the same for any administrative hearing conducted by the Commission.

4. The Ethics Commission is not required by Tenn. Code Ann. § 3-6-308(c) to keep confidential information that is readily accessible in the public domain. *See Wright Medical Technology, Inc. v. Grison,* 135 S.W.3d 561, 589 (Tenn. Ct. App. 2001) (observing, in determining whether certain information should be considered a trade secret, that "[i]nformation which has become readily available through public sources or is generally well known in the industry cannot be considered confidential"); *Eldridge v. Putnam County,* 86 S.W.3d 572, 574 (Tenn. Ct. App. 2001) (noting, in discussing provisions of Tennessee's Public Records Act, that "the fact that a file or document contains confidential information shall not be used to limit or deny access to otherwise public information").

5. Finally, in contested case administrative hearings conducted by an agency of Tennessee government the agency must "give effect . . . to agency statutes protecting the confidentiality of certain records." Tenn. Code Ann. § 4-5-313(1). However, as previously discussed, the Ethics Commission itself is authorized to disclose random or investigatory audit information in an administrative proceeding if the person or entity that is the subject of that information is a party to the proceeding and the information is directly related to the resolution of an issue in that proceeding.

Additionally, the confidentiality provisions in title 67, chapter 1, part 17 for tax information, which again are applicable to confidential random and investigatory audit information obtained by the Ethics Commission, provide for the disclosure of tax information at the request or with the consent of the taxpayer. Specifically, Tenn. Code Ann. § 67-1-1703(a) provides for the disclosure of tax information with respect to a taxpayer "to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure," subject to limited exceptions. Accordingly, a person or entity that is the subject of a random or investigatory audit may either request or consent to the disclosure of random or investigatory audit information; however, such request or consent would need to be in writing.

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