

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0217

**ROGER W. HURLBERT, and
SAGE INFORMATION SERVICES,**

Plaintiffs below, Petitioners,

v.

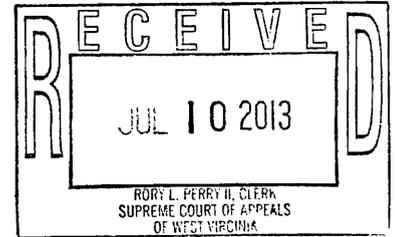
**CRAIG A. GRIFFITH, Tax Commissioner,
West Virginia State Tax Department,**

Defendant below, Respondent,

and

PHYLLIS GATSON, Kanawha County Assessor,

Intervenor.



***AMICUS CURIAE BRIEF*
ON BEHALF OF THE
WEST VIRGINIA MANUFACTURERS' ASSOCIATION**

Supporting the Respondent and Intervenor, and Affirmance of the Circuit Court

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The West Virginia Manufacturers' Association ("WVMA") is a trade association which has represented the interests of companies engaged in manufacturing across West Virginia for almost a hundred years. WVMA currently has approximately one hundred fifty members, which include most of the State's chemical and industrial manufacturing companies.¹

WVMA is greatly interested in the outcome of this case because its members, as manufacturers engaged in business in West Virginia, desire to maintain the confidentiality of certain information which they supply to, and which is gathered by, county assessors and the State Tax Department as part of the *ad valorem* tax assessment process. More specifically, according to the record in this matter, the Petitioners submitted a written Freedom of Information Act ("FOIA") request asking the State Tax Department to provide Computer-Assisted Mass Appraisal ("CAMA") files as well as the "assessment files" for all real property located in all counties of West Virginia.² The CAMA files and assessment files contain information either supplied or gathered during the *ad valorem* property tax assessment process which includes blueprints of chemical and manufacturing plants and other information which, if disclosed, presents a threat to public safety and homeland security, as well as trade secrets and financial information including profit and loss statements which are private and confidential in nature. This information is often solicited by county and State authorities from taxpayers such as members of WVMA under the promise of confidentiality. In addition, this information is clearly

¹ Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, the undersigned hereby advises that this brief was authored by WVMA's counsel, namely David K. Higgins and Paul G. Papadopoulos of Robinson & McElwee PLLC, and that no individual or entity other than WVMA or its members made a monetary contribution specifically intended to fund the preparation or submission of this brief.

² Order Granting Defendant's and Intervenor's Motions for Summary Judgment and Denying Plaintiff's Motion for Injunction, Declaratory Judgment and/or Summary Judgment dated January 16, 2013, at p. 2 (hereinafter Final Order).

confidential under applicable West Virginia law and is not subject to disclosure pursuant to the FOIA request of the Petitioners nor any other FOIA request.

II. ARGUMENT

A. Proprietary and Sensitive Information is Confidential pursuant to W. Va. Code § 11-1A-23(a). The Petitioners submitted a FOIA request to the State Tax Department seeking CAMA and assessment files for all real property in West Virginia. Final Order at 2. It is the concern of WVMA and its members that such files contain or may contain proprietary and sensitive information about manufacturing businesses, such as photographs and blueprints of chemical and industrial plants, information as to chemicals produced and stored in a facility, other information presenting a homeland security or public safety risk, trade secrets, financial information including profit and loss statements, and other similar information (collectively sometimes “proprietary and sensitive information”). Such information is often provided on real property tax returns or is obtained by county assessors or State Tax Department representatives during inspections and reviews of commercial properties during the appraisal process.

Under West Virginia’s Freedom of Information statute, namely W. Va. Code §§ 29B-1-1 *et seq.*, “information specifically exempted from disclosure by statute” is exempt from disclosure and is not properly subject to a FOIA request. W. Va. Code § 29B-1-4(a)(5). As such, information identified as confidential by a state statute is exempt from disclosure under FOIA. The proprietary and sensitive information of concern to WVMA and its members is clearly, through the operation of the State’s tax statutes, deemed confidential and exempt from disclosure to the public. Therefore, this information cannot properly be obtained via a FOIA request.

More specifically, W. Va. Code § 11-1A-23(a) provides that, with one minor exception, property tax returns as well as all information supplied or gathered pursuant to the appraisal

process are confidential and not subject to disclosure by any State or county official. W. Va.

Code § 11-1A-23(a) states as follows:

(a) Secrecy of returns and return information – Property tax returns and return information filed or supplied pursuant to this article and articles three [§§ 11-3-1 et seq.], four [§§ 11-4-1 et seq.], five [§§ 11-5-1 et seq.] and six §§ 11-6-1 et seq.] of this chapter and information obtained by subpoena or subpoena duces tecum issued under the provisions of this article shall be confidential and except as authorized in this section, no officer or employee of the State Tax Department, county assessor, county commissions and the Board of Public Works shall disclose any return or return information obtained by him or her, including such return information obtained by subpoena, in any manner in connection with his or her service as such an officer, member or employee: Provided, That nothing herein shall make confidential the itemized description of the property listed, in order to ascertain that all property subject to assessment has been subject to appraisal: Provided, however, That the commissioner and the assessors shall withhold from public disclosure the specific description of burglar alarms and other similar security systems held by any person, stocks, bonds and other personal property held by a natural person, except motor vehicles and other tangible property utilized publicly, and shall withhold from public disclosure information claimed by any taxpayer to constitute a trade secret or confidential patent information: Provided further, That such property descriptions withheld from public disclosure shall be subject to production and inspection in connection with any review, protest or intervention in the appraisal or assessment process, under such reasonable limitations as the board of review, board of equalization and review or court shall require. The term officer or employee includes a former officer, member of employee.

As noted in the above language of the statute, the only exception to confidentiality for property tax return and assessment information is “the itemized description of the property listed, in order to ascertain that all property subject to assessment has been subject to appraisal.” *Id.* In other words, the statute operates to require county and State officials to keep confidential all property tax return and assessment information except that an “itemized description of the property listed” is to be disclosed and made publicly available for the limited purpose of making it apparent to all that “all property subject to assessment has been subject to appraisal.” *Id.* For example, with respect to a chemical plant located in this State, the statute provides that the public is entitled to know through available information the owner of the plant, the size and location of the lot upon

which the plant sits, a general description of the buildings and improvements (for identification purposes) on the lot which comprise the plant, and the value of each as set by the county³ so that the public can be sure that the plant has indeed been assessed. The statute does not allow, however, that the public be given access to blueprints of the chemical plant in the assessor's file, a list of the chemicals made there, information on where and how the chemicals are stored, and other proprietary and sensitive information. Further, the statute does not allow the public to have access to a copy of the plant owner's profit-loss statement or balance sheet which is attached to the property tax return so that the assessor can have enough data to use the income approach when valuing the plant. Such information is obviously used as part of the appraisal process and may find its way into the CAMA and/or assessment files, but such information is also clearly and unequivocally required by statute to be kept confidential and not disclosed by government officials to the public. As such, this information, which has been cloaked with confidentiality by statute, is not obtainable via a FOIA request.⁴

B. CAMA Files Are Not “Itemized Description of the Property Listed” Pursuant to W.Va. Code § 11-1A-23(a). Interestingly, the Petitioners in their Appeal Brief assert that, because W. Va. Code § 11-1A-23(a) provides that “the itemized description of the property listed” is not confidential, this Court should find that the CAMA files are available to the Petitioners. In fact, the Petitioners assert that the CAMA files are precisely “the itemized

³ In fact, the statutes provide that, with respect to all real estate assessments, “land and the buildings or structures erected thereon shall be assessed separately” with the value of the land and the buildings separately noted on the land books. W. Va. Code § 11-4-10.

⁴ See also W. Va. Code § 11-1-4a which provides that the Tax Commissioner may publicize group statistics regarding taxation in the State but in doing so “shall not make public the tax return, or any part thereof, of any individual, firm, or corporation, nor disclose in any manner statistics or information concerning the personal affairs of any individual or the business of any single firm or corporation.” This statute further evidences the Legislature's intent to keep tax returns and related information confidential.

description of the property listed” in this State. Petitioners’ Appeal Brief at 14-15. At the same time, though, the Petitioners describe the CAMA files as containing “hundreds of fields of information” with each field containing separate and distinct kinds of information such as the number of rooms in a building, the square footage, and other information. *Id.* at 24, 27. Additionally, the Petitioners admit that some of the “hundreds of fields of information” contained in the CAMA files contain “personal” and trade secret information which should be redacted before disclosure to the Petitioners and which the Petitioners, in fact, do not want. *Id.* It can only follow, then, that the CAMA files in their entirety constitute much more than “the itemized description of the property listed” in this State which is made available to the public via W. Va. Code § 11-1A-23(a).⁵ Rather, the CAMA files and their “hundreds of fields” of information clearly contain detailed information which has most definitely been supplied by a taxpayer or gathered by a government official pursuant to the property appraisal process which is, pursuant to the mandate of W. Va. Code § 11-1A-23(a), confidential, not subject to disclosure by any State or county official, and not obtainable by a FOIA request.

C. West Virginia’s Tax Confidentiality Statutes Govern FOIA Requests for Tax Information. This Court has previously recognized that tax confidentiality statutes govern FOIA requests for tax information. In *Daily Gazette Co., Inc. v. Caryl*, this Court addressed the issue of whether records of a tax compromise and settlement between the State Tax Department and a railroad were subject to disclosure and obtainable pursuant to a FOIA request. 181 W. Va. 42, 380 S.E.2d 209 (1989). Noting that information specifically “exempted from disclosure by statute” is exempt from disclosure and is not properly subject to a FOIA request pursuant to W.

⁵ It is more appropriate that the contents of the “land books” maintained by the counties be deemed as “the itemized description of the property listed” in this State which is made available to the public via W. Va. Code § 11-1A-23(a).

Va. Code § 29B-1-4(a)(5), this Court reasoned that “the Freedom of Information Act directs us to ... the West Virginia Tax Procedure and Administration Act, to determine whether there are specific statutory provisions which classify tax compromise records as confidential.” 380 S.E.2d at 211. Moreover, this Court stated:

We do not need to analyze the State Freedom of Information Act with W. Va. Code § 11-10-5d(a) and 5q (1987), as the statutes are not in conflict. The confidentiality provisions found in W.Va. Code § 11-10-5d and 5q (1987) are the exemptions referred to in W. Va. Code § 29B-2-4 (1986).

Id. at 212 (fn. 9). As such, the Petitioners’ FOIA request is subject to the confidentiality provisions of W. Va. Code § 11-1A-23(a).

D. Case Law Supports Confidentiality of Tax Return Information. This Court has previously supported the confidentiality of tax return information. In *Town of Burnsville v. Cline*, certain taxpayers alleging selective enforcement of the town’s business and occupation tax sought through a FOIA request information regarding taxes paid by other local businesses. 188 W. Va. 510, 425 S.E.2d 186 (1992). This Court applied W. Va. Code §11-10-5(d) which called for confidentiality of tax records, and noted that “the legislative intent to keep confidential the contents of all tax returns, including B & O returns, is clear.” 425 S.E.2d at 190. In order to allow the taxpayers alleging selective enforcement an opportunity to prove that other businesses had not been taxed by the Town, this Court ordered that a list of those who pay B & O taxes to the Town was to be disclosed (albeit confidentially and not allowed to leave the presiding judge’s chambers) but that “the list would contain only the names of the taxpayers, not the actual contents of the tax returns” and that “the amount of tax paid is both private and irrelevant in this case.” *Id.* at 191. This Court noted that “allowing the respondents to peruse the town’s tax returns at will would violate the confidentiality requirements of W. Va. Code § 11-10-5(d)(a).” *Id.* at 190. Therefore, in *Town of Burnsville*, this Court, in effect, applied the same rationale with

regard to confidentiality that WVMA suggests in the instant case. Just as W. Va. Code §11-1A-23(a) declares property tax return and assessment information confidential and only permits the disclosure of “the itemized description of the property listed, in order to ascertain that all property subject to assessment has been subject to appraisal,” this Court in *Town of Burnsville* allowed disclosure of the list of all taxpayers paying B & O taxes to the Town (to verify that such taxpayers were indeed assessed) but kept all other tax return information strictly confidential. *Id.* at 190-91. Although this case involves property taxes and the *Town of Burnsville* case involves municipal business and occupation taxes, the confidentiality provisions and their application require the same result and are based on the same rationale.

E. Trade Secrets Are Specifically Exempt from FOIA. The Circuit Court found that the CAMA and assessment files contain trade secret information. Final Order at 7, 18. In addition to obvious trade secret information, there are not so obvious instances where certain detailed information gathered by an assessor can, if disclosed to a competitor, provide an unfair advantage. For example, disclosure of a very detailed list of a manufacturer’s salvage machinery and equipment, pollution control facilities, leased equipment, vehicles, trailers and rolling stock, when combined with improper disclosure of financial information such as fixed assets and costs, sales data and annual rents, can assist a competitor in discovering more economical ways to acquire similar assets and manufacture similar products. In addition, manufacturers often discuss their actual manufacturing activities with county assessors and State Tax Department representatives. This information would otherwise not be disclosed to the public, and if disclosed, could give competitors an unfair advantage.

Trade secret information supplied or gathered during the assessment process is without doubt deemed confidential. W. Va. Code § 11-1A-23(a) specifically directs county and State officials to withhold from public disclosure “trade secret” or “confidential patent information.” In addition, the State’s Freedom of Information Act specifically exempts the following from disclosure:

Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors.

W. Va. Code § 29B-1-4(a)(1). The Circuit Court properly ruled that trade secret information was confidential and not to be disclosed.

F. Information Raising Potential Homeland Security and/or Public Safety Risks is Also Confidential. The Circuit Court found that “the Kanawha County Assessor’s office collects information such as the specific longitude and latitude of commercial properties such as chemical plants, photographs of such plants, blueprints of said plants, etc., that could constitute trade secrets that are exempt under W.Va. Code § 29B-1-4(a)(1) and/or which could raise potential homeland security risks.” Final Order at 7, 18. In addition, the Circuit Court found that some industrial property data gathered by county assessors while appraising industrial property “raises privacy and public safety concerns.” *Id.* For example, the Circuit Court reasoned that the large chemical plants at times name buildings according to what chemical is manufactured inside the building and that “even disclosing the name of the building poses public

safety issues.” *Id.*⁶ The Circuit Court determined that information posing a potential homeland security risk or creating public safety issues was confidential. Apparently, the Circuit Court applied the five factor test in *Child Protection Group v. Cline*, 177 W. Va. 29, 350 S.E.2d 541 (1986), in determining that disclosure of such information was an unreasonable invasion of privacy under W. Va. Code § 29B-1-4(a)(2). Although the WVMA has no issue with the Circuit Court’s determination that this information should be kept confidential and not disclosed under FOIA, the WVMA points out that this information, given that it is supplied or gathered during the property tax appraisal process, is confidential and not to be disclosed pursuant to the mandate of § 11-1A-23(a). In addition, it is noted that the exemptions from disclosure under the Freedom of Information Act include several references to the desire to promote and preserve public safety and public health, and to prevent, mitigate or respond to terrorist acts or the threat of terrorist acts. W. Va. Code § 29B-1-4(a)(9), (10) and (11). Similarly, the statute contains a FOIA exemption for “specific engineering plans and descriptions of existing public utility plants and equipment.” W. Va. Code § 29B-1-4(a)(17). Statutory bars to disclosure of this information exist without the need to undergo an invasion of privacy analysis.

G. Right to Confidentiality Belongs to Taxpayer and Cannot be Waived by Government Custodian. The statutory protections of confidentiality afforded to the proprietary and sensitive information of concern to WVMA and its members cannot be weakened or waived by any previous disclosure of CAMA or assessment records by government officials. Although the Petitioners assert that assessors in certain counties and the State Tax Department have, at times in the past, released or even sold CAMA records to private parties, such fact has no impact

⁶ The CAMA files were also found to include information about burglar alarms and security systems, which information is confidential pursuant to W. Va. Code § 11-1A-23(a). Final Order at 17.

on this case because the right of confidentiality is afforded by law to the taxpayer and not the government custodian of the records. The case of *Daily Gazette Co., Inc. v. Caryl* involved the issue of whether records of a tax compromise and settlement between the State Tax Department and a railroad were subject to disclosure and obtainable pursuant to a FOIA request. 380 S.E.2d at 209. This Court rejected the Gazette’s argument that any right to confidentiality of the compromise and settlement records was waived when the Tax Commissioner disclosed the terms of the deal to the Governor and State Treasurer. *Id.* at 214-15. After noting that the governing confidentiality statute (in that case W. Va. Code § 11-10-5d(d)) provided that “[a]ny person protected by the provisions of this article may, in writing, waive the secrecy provisions of this section ...” and that no written waiver had occurred, this Court found that “it is impossible for the Tax Commissioner to waive a right which belongs solely to the taxpayer” and commented that “we do not treat individual rights so lightly.” *Id.* at 214. The holding in *Daily Gazette* is directly applicable here, as W. Va. Code §11-1A-23 contains identical language to W. Va. Code § 11-10-5d(d). W. Va. Code § 11-1A-23(e) provides that “[a]ny person protected by the provisions of this article may, in writing, waive the secrecy provisions of this section...”. As such, as this Court reasoned in *Daily Gazette*, the statutory rights of a taxpayer to confidentiality of tax return and assessment information belong solely to the taxpayer, and these rights cannot be waived by a government custodian’s previous disclosure of the taxpayer’s confidential information. Although other jurisdictions may support the Petitioners’ premise, the statutory framework in West Virginia as interpreted by this Court dismisses any possibility of waiver.⁷

⁷ In addition, the federal courts have often held that FOIA privacy interests are held by the individual, not the agency, and as a result, the agency cannot waive privacy interests. As the Fifth Circuit summarized:

The Supreme Court has explained that the privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information [citation omitted]. Moreover, as noted, the fact that otherwise

H. The Petitioners Do Not Want Proprietary and Sensitive Information. The Petitioners, in their Appeal Brief, clearly state that they advised the Circuit Court and parties that they “do not want” information and records of the type which cause concern to WVMA and its members, namely photographs and sketches of buildings, descriptions of security systems, profit and loss statements, photos and blueprints of commercial property and chemical plants, trade secrets of chemical plants, industrial property data, and similar information. In addition, the Petitioners have renewed this statement of intent for purposes of this appeal. Petitioners’ Appeal Brief at 26, 27. WVMA appreciates the Petitioners’ stated intentions, and respectfully asks this Court to recognize the same. However, for purposes of clarity and to avoid future issues with respect to other similar FOIA requests, the WVMA respectfully prays that this Court find that the proprietary and sensitive information discussed herein is indeed confidential and not subject to disclosure under West Virginia law.

private information at one time or in some way may have been placed the public domain does not mean that a person irretrievably loses his or her privacy interest in the information.

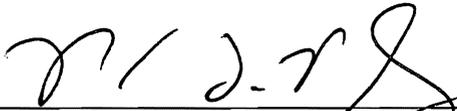
Sherman v. U.S. Dep't of Army, 244 F.3d 357, 363-64 (5th Cir. 2001); see also *Prison Legal News v. Executive Office for U.S. Attorneys*, 628 F.3d 1243, 1249 (10th Cir. 2011) (“the government cannot waive individuals’ privacy interest under FOIA.”); *Jones v. FBI*, 41 F.3d 238, 247 (6th Cir.1994); *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 440 (1st Cir. 2006)(“That information has been released to the public domain, especially where the release is limited, has little bearing on the privacy interest. Indeed, in modern society there is little information that has not been released to another.”). Also, in what are called “reverse FOIA cases,” a submitter can bring litigation to enforce an exemption of its information. See *Acumenics Research & Tech. v. U.S. Dep't of Justice*, 843 F.2d 800, 801 (4th Cir. 1988)(“This is a reverse Freedom of Information Act case in which Acumenics Research and Technology, Inc. seeks to prevent the DOJ from releasing certain pricing information that [it] submitted to the government”); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, fn 1 (D.C. Cir. 1987) (“Reverse-FOIA” actions are now a common species of FOIA litigation. Jurisdiction over these cases is conferred by 28 U.S.C. § 1331(a) (1982), while § 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1982), supplies the cause of action. Typically, a submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request. The agency's decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions”); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (holding that private parties may challenge government agencies’ FOIA decisions under the APA).

III. CONCLUSION

For the reasons set forth herein, the WVMA respectfully prays that this Court affirm the Circuit Court of Kanawha County and determine that the proprietary and sensitive information described above which is of concern to the WVMA and its members is confidential and not subject to disclosure under West Virginia law.

**WEST VIRGINIA MANUFACTURERS'
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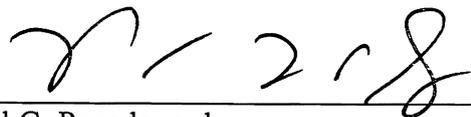
CERTIFICATE OF SERVICE

I, Paul G. Papadopoulos, counsel for West Virginia Manufacturers' Association, do hereby certify that a true and accurate copy of the foregoing "**AMICUS CURIAE BRIEF ON BEHALF OF THE WEST VIRGINIA MANUFACTURERS' ASSOCIATION**" was served July 10, 2013, upon the following counsel of record by depositing a true photocopy thereof addressed as follows, postage pre-paid, in the U. S. mails to:

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