



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-491

TAX ANALYSTS,

Petitioner,

v.

**MATTHEW R. IRBY, West Virginia
State Tax Commissioner,**

Respondent.

FILE COPY

**DO NOT REMOVE
FROM FILE**

RESPONSE BRIEF OF THE WEST VIRGINIA STATE TAX COMMISSIONER

Respectfully Submitted By:

WILLIAM C. BALLARD
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar No. 9557
State Capitol
Building 1, Room 435-W
Charleston, WV 25305
Telephone: (304) 558-2522
William.C.Ballard@wvago.gov

*Counsel for Matthew R. Irby,
West Virginia State Tax Commissioner*

TABLE OF CONTENTS

Table of Authorities.....	ii
I. SUMMARY OF ARGUMENT.....	1
II. STATEMENT OF THE CASE.....	2
III. STATEMENT REGARDING ORAL ARGUMENT	3
IV. STANDARD OF REVIEW	3
V. ARGUMENT.....	4
A. The Circuit Court of Kanawha County correctly found that Tax Analysts' Complaint should be dismissed because the information it requested by FOIA is exempt from disclosure as a matter of law pursuant to West Virginia Code § 11-10-5d(b)(5)(B).....	4
B. The Circuit Court's decision is consistent with prior precedent of this Court to reject FOIA requests when information requested from the Tax Department is statutorily protected, without the need for discovery.....	5
C. The Circuit Court of Kanawha County correctly gave deference to the Tax Commissioner's construction of West Virginia Code § 11-10-5d(b)(5)(B).....	9
VI. CONCLUSION.....	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757 (2000).....	3, 4
Security Nat. Bank & Trust Co. v. First W.Va. Bancorp, Inc., 166 W.Va. 775, 277 S.E.2d 613 (1981).....	4
Bowden v. Monroe Cnty. Comm’n, 232 W. Va. 47, 750 S.E.2d 263 (2013).....	4
John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W.Va. 603, 245 S.E.2d 157 (1978).....	4, 5
Harrison v. Davis, 197 W.Va., 651, 478 S.E.2d 104 (1996).....	4
State ex rel. Perdue v. Nationwide Life Ins. Co., 236 W.Va. 1, 777 S.E.2d 11 (2015).....	5
Daily Gazette Co., Inc. v. Caryl, 181 W. Va. 42, 380 S.E.2d 209 (1989).....	6
Daily Gazette Co., Inc. v. West Virginia Development Office, 198 W. Va. 563, 482 S.E.2d 180 (1996).....	8
Trucept v. IRS, 2018 WL 4628366 (S.D. Cal. Sept. 27, 2018).....	9
Goldstein v. IRS, 174 F. Supp. 3d 38 (D.D.C. 2016).....	9
Keener v. Irby, 245 W. Va. 777, 865 S.E.2d 519 (2021).....	13
Appalachian Power v. State Tax Dept. of W. Va., 195 W. Va. 573, 466 S.E.2d 424.....	13
Sniffin v. Cline, 193 W. Va. 370, 456 S.E.2d 451 (1995).....	13
Steager v. Consol Energy, Inc., 242 W.Va. 209, 832 S.E.2d 135 (2019).....	13
W. Va. Emp’rs’ Mut. Ins. v. Bunch Co., 231 W. Va. 321, 745 S.E.2d 212 (2013).....	13
Amedisys W. Va. v. Pers. Touch Home Care of W. Va., 245 W. Va. 398, 859 S.E.2d 341 (2021).....	13
Farley v. Worley, 215 W. Va. 412, 599 S.E.2d 843 (2004).....	13, 14
Aronson v. I.R.S., 973 F.2d 962 (1st Cir. 1992).....	14
Church of Scientology Int’l v. United States Dep’t of Justice, 30 F.3d 224 (1st Cir. 1994).....	14
Katsiaficas v. United States Central Intelligence Agency, 2017 WL 2172437 (D. Mass. May 17, 2017).....	12
St. Mary’s Medical Center, Inc. v. Steel of West Virginia, Inc., 240 W.Va. 238, 809 S.E.2d 708 (2018).....	15

Statutes:

West Virginia

W. Va. Code § 11-10-5d.....	<i>passim</i>
W. Va. Code § 29B-1-3(a).....	6
W. Va. Code § 11-10-1	6
W. Va. Code § 11-10-5q.....	7
W. Va. Code § 29B-1-1, <i>et seq.</i>	2, 8
W. Va. Code § 29B-1-4(a)(4)(A).....	9, 14
W. Va. Code § 47-18-7(d).....	14

Rules:

West Virginia Rule of Civil Procedure 12.....	4
West Virginia Rule of Appellate Procedure 20.....	3

I. SUMMARY OF ARGUMENT

Despite Petitioner Tax Analysts' (herein "**Tax Analysts**") arguments to the contrary, the sole issue on appeal is purely a matter of law: whether the West Virginia State Tax Department's (herein "**Tax Department**") "audit manuals" are protected from disclosure under the West Virginia Freedom of Information Act (herein "**FOIA**") pursuant to West Virginia Code §§ 29B-1-4(a)(5) and 11-10-5d(b)(5)(B). In its *Brief*, Tax Analysts argue that the Circuit Court incorrectly dismissed its Complaint because issues of fact remained to be decided. [Pet. Br. at 5.] This argument is simply a red herring because it fundamentally misstates the sole basis for the Dismissal Order: that the Tax Department's "field audit manuals and audit training manuals" are exempt from disclosure as a matter of law. In other words, because Tax Analysts **only** requested documents which the Tax Department is statutorily protected from disclosing, there were no issues of fact to be decided by the Circuit Court, and Complaint was properly dismissed.

In addition to the statutory basis, the Tax Department has a longstanding policy reason for not disclosing its audit manuals. The Tax Department believes that disclosure of its audit manuals would educate potential tax evaders on how to circumvent state tax laws by revealing the techniques and procedures used by the Tax Department to determine whether tax returns should be selected for audit and how its return examiners conduct audits. The Tax Department does not disclosure its tax return audit manuals because doing so would be against the public interest.

II. STATEMENT OF THE CASE

On July 29, 2021, pursuant to the West Virginia Freedom of Information Act, West Virginia Code §§ 29B-1-1, *et seq.*, Tax Analysts sent a letter to the Tax Department requesting:

The current version of all field audit manuals and audit training manuals in the formats (electronic or otherwise) in which they are maintained. The request covers not only manuals that are designated as such, but also training materials or continuing education materials related to audits.

[J.A. 13.] On November 1, 2021, the Tax Department denied Tax Analysts' FOIA Request based on the specific exemption for the disclosure of the Tax Department audit materials under West Virginia Code § 11-10-5d(b)(5)(B). [J.A. 16-17.] In its response to Tax Analysts' FOIA Request, in addition to the statutory exemption for public disclosure of audit materials, the Tax Department stated that:

Disclosure of the information contained in the records could reasonably expected to educate potential tax evaders on how to circumvent state tax laws by revealing the techniques and procedures used by auditors in reviewing taxpayer records to verify if a taxpayer has remitted the proper amount of tax to the Tax Department.

[J.A. 17.]

On March 3, 2022, Plaintiff filed the underlying Complaint in the Circuit Court of Kanawha County, alleging that “the exemptions cited by the Department provides no basis to withhold the requested records” and the “Defendant’s denial to produce the requested records violates FOIA.” [J.A. 10 (Compl. at ¶¶ 17-18.)]

On March 29, 2022, the Tax Department filed a *Motion to Dismiss* Tax Analysts' Complaint pursuant to West Virginia Rule of Civil Procedure 12(b)(6). The Circuit Court held a hearing on the motion to dismiss on May 11, 2022. On June 22, 2022, the Circuit Court dismissed the Complaint, finding that the “Legislature has specifically exempted from disclosure the Tax Department’s ‘standards used or to be used for the selection of returns for examination

or data used or to be used for determining such standards’” (citing W. Va. Code § 11-10-5d(b)(5)(B)) and the “Tax Department has reasonably interpreted West Virginia Code § 11-10-5d(b)(5)(B) to mean that the methodologies by which it selects returns for auditing is within the same category of information as the methodologies by which the Tax Department carries out its audits (*i.e.*, the requested audit manuals) – and therefore protects from disclosure all documents related to the Tax Department’s auditing processes, including those requested by Plaintiff.” [J.A. 5.] The instant appeal followed.

III. STATEMENT REGARDING ORAL ARGUMENT

If the Supreme Court of Appeals determines that this appeal is appropriate for oral argument, the Tax Commissioner requests a Rule 20 Oral Argument because it involves an issue of first impression regarding whether the Tax Department is required to disclose its taxpayer auditing methodologies. *See* W. Va. R. App. P. 20(a)(1). Additionally, this case involves a matter of fundamental public importance because disclosure of the requested information could reasonably be expected to educate potential tax evaders on how to circumvent state tax laws by revealing the techniques and procedures used by auditors in reviewing taxpayer records to verify if a taxpayer has remitted the proper amount of tax to the Tax Department. *See* W. Va. R. App. P. 20(a)(2).

Tax Analysts has requested a Rule 19 argument, which is only appropriate in cases of settled issue of law. Thus, if oral argument is necessary, the argument should be held under Rule 20.

IV. STANDARD OF REVIEW

The standard of review on appeal is well-settled. The issue before this Court is a legal question, which is subject to *de novo* review. *See* Syl. pt. 1, *In re Tax Assessment Against*

American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757 (2000). However, “[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Id.* at 582. Furthermore, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. pt. 4, *Security Nat. Bank & Trust Co. v. First W.Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981).

V. ARGUMENT

A. **The Circuit Court of Kanawha County correctly found that Tax Analysts’ Complaint should be dismissed because the information it requested by FOIA is exempt from disclosure as a matter of law pursuant to West Virginia Code § 11-10-5d(b)(5)(B).**

Tax Analysts’ first assignment of error is that the Circuit Court “never mentioned th[e] standard [for motions to dismiss] or attempted to explain why Tax Analysts’ complaint failed to satisfy this minimal standard.” [Pet. Br. at 7.] Simply put, the Circuit Court did consider the legal standard for motions to dismiss.

The Circuit Court stated that under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, complaints “should be dismissed if it appears that Plaintiff can prove no set of facts in support of its claim which would entitle it to relief.” [J.A. 2 (citing Syl. pt. 3, *Bowden v. Monroe Cnty. Comm’n*, 232 W. Va. 47, 750 S.E.2d 263 (2013)).] The Circuit Court also stated that “the ultimate test under Rule 12(b)(6) is whether the plaintiff can prove any set of facts that would entitle him or her to the relief requested.” [*Id.* (citing *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996)).] Finally, the Circuit Court stated that under Rule 12(b)(6), “the factual allegations of the Complaint must be taken as true.” [*Id.* (citing *John W. Lodge Distrib. Co.* at 603).]

Tax Analysts are, of course, aware that the Circuit Court considered the legal standard for motions to dismiss, but simply disagree that the information it requested under FOIA (*i.e.*, the Tax Department’s audit manuals) are exempt from disclosure under West Virginia Code § 11-10-5d(b)(5)(B). In other words, the real issue on appeal is not whether sufficient facts were alleged by Tax Analysts; it is whether the Circuit Court’s legal conclusion that West Virginia Code § 29B-1-4(a)(5) protects the audit manuals from disclosure is correct. [See J.A. 5.] The Circuit Court specifically noted that it was not “bound [] to accept any party’s posited statutory interpretations or proffered conclusions of law.” [J.A. 2 (citing *State ex rel. Perdue v. Nationwide Life Ins. Co.*, 236 W.Va. 1, 5-6, 777 S.E.2d 11, 15-16 (2015).] Thus, simply because Tax Analysts disagree with the Circuit Court’s legal conclusion does not give rise to an issue of fact.

In conclusion, because the Circuit Court properly considered the Rule 12(b)(6) legal standard and found that Plaintiff’s Complaint failed as a matter of law – Tax Analysts’ Assignment of Error 1(A) should be rejected.

B. The Circuit Court’s decision is consistent with prior precedent of this Court to reject FOIA requests when information requested from the Tax Department is statutorily protected, without the need for discovery.

Tax Analysts next argue that the Circuit Court erred in failing to consider FOIA case law, which it argues “requires” the Tax Department to submit a “*Vaughn* index” to justify not disclosing its audit manuals. [See Pet. Br. at 8-10.] More specifically, Tax Analysts argue that – **in all FOIA cases** – the government agency is required to explain whether any of the requested documents can be segregated into exempt and non-exempt categories. [Pet. Br. at 10.] Neither FOIA nor case law interpreting FOIA supports Tax Analysts’ blanket argument.

Beginning with the statute itself, the West Virginia Freedom of Information Act states that “[e]very person has a right to inspect or copy any public record of a public body in this state, **except as otherwise expressly provided by section four of this article.**” W. Va. Code § 29B-1-3(a) (emphasis added). Section Four states that “[t]here is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article: ... **Information specifically exempted from disclosure by statute[.]**” W. Va. Code § 29B-1-4(a)(5) (emphasis added). Thus, if the information requested under FOIA is, as a matter of law, exempt from disclosure by statute, the inquiry ends. This is the analysis adopted by this Court in *Daily Gazette Company, Inc. v. Caryl*, 181 W. Va. 42, 380 S.E.2d 209 (1989).

In *Caryl*, the Gazette requested “tax compromise records” from the Attorney General. The Tax Commissioner thereupon filed a declaratory judgment action seeking a determination that the tax compromise records were, as a matter of law, confidential and could not be disclosed. The Court noted that while FOIA is to be liberally construed, it “directs [the Court] to W. Va. Code § 11-10-1 *et seq.* (1987), the West Virginia Tax Procedure and Administration Act, to determine whether there are specific statutory provisions which classify tax compromise records as confidential.” *Id.* at 44, 380 S.E.2d at 211. The Court further noted that under the rules of statutory construction it was necessary to “examine W. Va. Code § 11-10-1 *et seq.* in its entirety in order to determine the purpose of the Legislature in enacting this statute.” The *Caryl* court proceeded to reconcile apparently inconsistent language in West Virginia Code §§ 11-10-5d(a) and 11-10-5q(d) and (e) with regard to the confidentiality of tax compromise records. The court held that:

While we acknowledge that confidentiality is not specifically addressed in W. Va. Code § 11-10-5q(d), section (e) directs that the report to the Legislature be made

in such a manner so as to preserve the confidentiality of the taxpayer involved in the compromise. For the Legislature's specific finding of confidentiality in W. Va. Code § 11–10–5q(e) to have any force and effect, then W. Va. Code § 11–10–5q(d) must also be read to require the confidentiality of the taxpayer's identity. We believe the Legislature's intent was that information related to tax compromises be exempt from disclosure in order to protect the taxpayer's right to privacy.

Id. at 45, 380 S.E.2d at 212.

The *Caryl* court thus acknowledged that when the Tax Department asserts a statutory confidentiality defense (under West Virginia Code § 29B-1-4(a)(5)), the first step is to determine whether a particular statute exempts the requested materials. *See id.* at 48, 380 S.E.2d at 215 (“[W]e hold that tax compromise information made and maintained pursuant to W. Va. Code § 11–10–5q (1987) is exempted from disclosure under the provisions of W. Va. Code §§ 11–10–5q and 29B–1–4(5).”). The Court also construed the statute at issue to protect tax compromise records, despite their not being explicitly confidential under the statutes. Because the very information (*i.e.*, tax compromise records) requested by the Gazette was exempt from disclosure, there were no possible issues of fact to be decided by the Circuit Court. Thus, the Court did not require a *Vaughan* index be prepared for a factual analysis of whether some information could be disclosed by the Tax Department.

Similar to *Caryl*, the only information requested by Tax Analysts is exempt from disclosure pursuant to the clear intent of the Legislature as expressed in West Virginia Code § 29B-1-4(a)(5): that the Tax Department’s auditing methodology is exempt from disclosure. No *Vaughan* index or factual development needed to be undertaken the by Circuit Court prior to dismissal of Tax Analysts’ Complaint.

In support of their argument that factual development was necessary, Tax Analysts cite *Daily Gazette Co., Inc. v. West Virginia Development Office*, 198 W. Va. 563, 482 S.E.2d 180

(1996), which stated that “[t]he disclosure provision of this State's Freedom of Information Act, W. Va. Code, 29B–1–1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed[]” and “[t]he party claiming exemption from the general disclosure requirement under West Virginia Code § 29B–1–4 has the burden of showing the express applicability of such exemption to the material requested.” Syl. pts. 1 & 2, *Id.* In *Daily Gazette*, the West Virginia Development Office relied on West Virginia Code § 29B-1-4(a)(8), which protects from disclosure “internal memoranda or letters received or prepared by any public body[.]” The Court ultimately held that “Exemption 8” exempts from disclosure “only those written internal government communications consisting of advice, opinions and recommendations which reflect a public body’s deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body’s deliberative, decision-making process.” *Id.* at 575, 482 S.E.2d 192. The Court remanded the case to the Circuit Court to consider, as a factual matter, which documents fell into this category. *Id.* *Daily Gazette* did not, of course, involve documents specifically protected by a tax statute.

Tax Analysts also cite cases for the proposition that the IRS has disclosed documents related to its “investigative techniques” by segregating exempt from non-exempt information. [Pet. Br. at 13 & n.4.] These cases are distinguishable because – similar to the “internal memorandum” exception – they do not involve documents specifically exempted from disclosure by statute. Under 5 U.S.C. 552(b)(7)(E), federal agencies may withhold from disclosure “techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could

reasonably be expected to risk circumvention of the law[.]” This statute is similar to West Virginia’s FOIA Exemption 4(A). W. Va. Code § 29B-1-4(a)(4)(A) (“Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement[.]”). As noted in *Trucept v. IRS*, 2018 WL 4628366 (S.D. Cal. 2018) – cited by Tax Analysts in footnote 4 of its Brief – “To establish this exemption, ‘the Government must show that the technique that would be disclosed under the FOIA request is a technique unknown to the general public.’” *Id.* at *7. The IRS supported its withholding of certain information in *Trucept* based on the declaration of its representative stating that a “risk score” is an investigative technique used by the IRS. *Id.* at 8; *see also Goldstein v. IRS*, 174 F. Supp. 3d 38, 51 (D.D.C. 2016).

Unlike the law enforcement investigation exception – which by its nature requires the agency to prove that documents fall into that category – for FOIA requests where the information requested is protected by statute, the agency is under no obligation to “separate the exempt and non-exempt portions of the requested records” – **because all of the requested records are exempt**. [Pet. Br. at 10.] Here, no issues of fact needed to be resolved for the Circuit Court to find that the audit manuals are exempt from disclosure. Thus, the Circuit Court properly dismissed Tax Analysts’ Complaint, and Assignments of Error 1(B) and 1(C) should be rejected.

C. The Circuit Court of Kanawha County correctly gave deference to the Tax Commissioner’s construction of West Virginia Code § 11-10-5d(b)(5)(B).

Tax Analysts final assignment of error is that the Circuit Court improperly gave deference to the Tax Commissioner’s interpretation of West Virginia Code § 11-10-5d(b)(5)(B) in dismissing the Complaint. In its Dismissal Order, the Circuit Court found that the “Tax

Department has reasonably interpreted West Virginia Code § 11-10-5d(b)(5)(B) to mean that the methodologies by which it selects returns for auditing is within the same category of information as the methodologies by which the Tax Department carries out its audits (*i.e.*, the requested audit manuals) – and therefore protects from disclosure all documents related to the Tax Department’s auditing processes, including those requested by Plaintiff.” [J.A. 5.] According to Tax Analysts, however, “[d]eference has no role to play in FOIA cases.” [Pet. Br. at 14.]

Again, in its FOIA request, Tax Analysts seek the Tax Department’s “field audit manuals and audit training manuals[.]” [J.A. 1.] Field audit manuals and related audit training manuals are generally the processes by which the Tax Department carries out its audits. Audits performed by the Tax Department entail matching of account numbers, verification cross checks of transaction records (not only records of the taxpayer under examination but transaction records of the purported recipients or sources of the underlying invoiced transaction), examination of so called “fraud check” information, verification of written, computer and mechanical records to confirm claimed accounting and business billings, and charges or claimed deductions, exemptions or tax credits. [J.A. 1.] As the Tax Department explained in its response to Tax Analysts’ FOIA Request, its audit materials are exempt from disclosure under West Virginia Code § 11-10-5d(b)(5)(B) and:

Disclosure of the information contained in the records could reasonably be expected to educate potential tax evaders on how to circumvent state tax laws by revealing the techniques and procedures used by auditors in reviewing taxpayer records to verify if a taxpayer has remitted the proper amount of tax to the Tax Department.

[J.A. 2.]

By way of further statutory background, Section 5d of the West Virginia Tax Procedure and Administration Act generally protects the confidentiality of taxpayer returns made to the Tax Department. *See* W. Va. Code § 11-10-5d. That section states that:

. . . it shall be unlawful for any officer, employee, or agent of this state or of any county, municipality, or governmental subdivision to divulge or make known in any manner the tax return, or any part thereof, of any person or disclose information concerning the personal affairs of any individual or the business of any single firm or corporation, or disclose the amount of income, or any particulars set forth or disclosed in any report, declaration, or return required to be filed with the Tax Commissioner by any article of this chapter imposing any tax administered under this article or by any rule of the Tax Commissioner issued thereunder, or disclosed in any audit or investigation conducted under this article.

...
Unlawful disclosure of the information by any officer, employee, or agent of any local, municipal, or governmental subdivision is subject to the sanctions set forth in this article.

W. Va. Code § 11-10-5d(a). The term “disclosure” within that statute “means making known to any person in any manner whatsoever a return or return information.” W. Va. Code § 11-10-5d(b)(2). The phrase “return information” generally means a taxpayer’s personal information, as well as “[a]ny part of any written determination or any background file document relating to such written determination.” W. Va. Code § 11-10-5d(b)(5)(A)&(B). The phrase “written determination” means a ruling, determination letter, technical advice memorandum, or letter or administrative decision issued by the Tax Commissioner. W. Va. Code § 11-10-5d(b)(9). In other words, it is illegal for the Tax Department to disclose taxpayers’ personal information, including personal information that is included in any “written determinations” issued by the Tax Department.

As an exception to these disclosure prohibitions, the Legislature has directed that “data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer” is not exempted from disclosure. *See* W. Va. Code § 11-10-5d(b)(5)(B). Thus, the

Tax Department is permitted to disclose any written determinations it issues – so long as those determinations do not contain information that may identify a taxpayer.

Within that subsection of the Tax Procedure and Administration Act (W. Va. Code § 11-10-5d(b)(5)(B)), the Legislature also states that “[n]othing in the preceding sentence, **or in any other provision of this code**, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination or data used or to be used for determining such standards.” *See* W. Va. Code § 11-10-5d(b)(5)(B) (emphasis added). Read in full, Section 11-10-5d(b)(5)(B) requires the Tax Department to disclose its written determinations which do not contain taxpayers’ personal information (*e.g.*, determination letters, technical advice memoranda and administrative decisions), but the Tax Department is not required to disclose its methodology for determining which returns to audit / examine under either Section 11-10-5d(b)(5)(B) or any other part of the West Virginia Code.

While FOIA generally permits the inspection of public records, FOIA exempts from disclosure information protected by statute. W. Va. Code § 29B-1-4(a)(5). Because West Virginia Code § 11-10-5d(b)(5)(B) states that neither that statute nor any other part of the West Virginia Code shall require the Tax Department to disclose its standards for audits – and how the Tax Department selects returns for audit and then carries out its audits are two sides of the same coin – the Tax Department refused Tax Analysts’ request for that information under FOIA and Section 11-10-5d(b)(5)(B).

The Circuit Order correctly gave weight to the Tax Commissioner’s conclusion that the Tax Department’s audit manuals are exempt from disclosure under West Virginia Code § 11-10-5d(b)(5)(B). This Court’s case law is clear that the Tax Department’s interpretations of the parts of the West Virginia Code it is charged with administering are “given great weight unless clearly

erroneous.” Syl. pt. 3, *Keener v. Irby*, 245 W. Va. 777, 865 S.E.2d 519 (2021). In reviewing an agency’s construction of a statute it is charged with administering, courts are to consider two separate questions: whether the Legislature’s intent is clear and whether the agency’s construction of the statute is permissible. *Appalachian Power v. State Tax Dept. of W. Va.*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (quoting *Sniffin v. Cline*, 193 W. Va. 370, 373-74, 456 S.E.2d 451, 454-55 (1995)). Agencies are empowered to perform administrative and executive functions. To do so, they often must construe and interpret their statutory and regulatory authority to fit the circumstances of a particular case. Of course, the Tax Department may not modify or rewrite statutes “under the guise of ‘interpretation.’” Syl. pt. 5, *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 832 S.E.2d 135 (2019). But courts “examine [such] regulatory interpretations” with “appropriate deference to agency expertise and discretion.” *W. Va. Emp’rs’ Mut. Ins. v. Bunch Co.*, 231 W. Va. 321, 332, 745 S.E.2d 212, 223 (2013). As long as the agency has acted “consistent with the plain meaning of [its]” statutes, *id.*, its “longstanding, consistent interpretation[s]” are “entitled to judicial deference.” *Amedisys W. Va. v. Pers. Touch Home Care of W. Va.*, 245 W. Va. 398, 415, 859 S.E.2d 341, 358 (2021).

For Assignment of Error 1(D), Tax Analysts argue that “[j]udicial deference to an agency’s interpretation of a statute has no place in FOIA litigation.” While this Court has not considered agency deference in a FOIA case, it has stated that it looks “to federal FOIA cases for guidance in interpreting the West Virginia Freedom of Information Act.” *Farley v. Worley*, 215 W. Va. 412, 420, 599 S.E.2d 843 (2004). Federal case law is clear that courts are to give deference to agency decisions that records protected by statute are exempt from disclosure under FOIA. See e.g. *Aronson v. I.R.S.*, 973 F.2d 962, 967 (1st Cir. 1992).

In *Aronson*, the plaintiff requested that the IRS disclose undistributed income tax refunds,

the name of each taxpayer due a refund, their mailing address, the taxpayer identification number, and the amount of the refund due. *Id.* at 963. The IRS did not provide the plaintiff with the taxpayers' street addresses because it considered that confidential return information, and the plaintiff brought suit. The First Circuit considered the dueling purposes of the statutes: "sunlight" is brought by the FOIA, while "clouds" of confidentiality are brought by the tax statute at issue. *Id.* at 965-67. The court concluded that some deference was required in analyzing the IRS's decision that the street addresses was return information, holding that "[a]pplying ordinary (not special, FOIA) administrative law principles of review, we must hold that Aronson does not have a legal right to force disclosure of taxpayers' street addresses." *Id.* at 968. The court also stated that "once a court determines that the statute in question is an Exemption 3 statute, and that the information requested at least arguably falls within the statute, FOIA *de novo* review normally ends." *Id.* at 967; *see also Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 235 (1st Cir. 1994) ("unlike actions under other FOIA exemptions, agency decisions to withhold materials under Exemption 3 are entitled to some deference"). Other federal courts to consider the issue have held the same. In *Katsiaficas v. United States Central Intelligence Agency*, 2017 WL 2172437 (D. Mass. May 17, 2017), the court noted that the once the agency establishes "that the information requested at least arguably falls within the statute," the plaintiff must then establish that requested information does not "at least arguably" fall within the statute. *Id.* at * 8-9.

Even in non-tax cases, this Court's opinions support the same outcome. For example, in *St. Mary's Medical Center, Inc. v. Steel of West Virginia*, this Court upheld a state official's refusal to disclose documents protected by an antitrust investigation exemption. Syl. pt. 1, *St. Mary's Medical Center, Inc. v. Steel of West Virginia, Inc.*, 240 W.Va. 238, 809 S.E.2d 708

(2018) (“The West Virginia Freedom of Information Act, W.Va. Code, 29B-1-4(a)(5) [2015], which excepts from public accessibility ‘information specifically exempted from disclosure by statute,’ incorporates the investigative exemption from disclosure of information set forth in the West Virginia Antitrust Act, W.Va. Code, 47-18-7(d) [1978]. The investigative exemption is mandatory in specifying that the Attorney General ‘shall not’ make public the name or identity of a person whose acts or conduct he investigates or ‘the facts’ disclosed in the investigation.”). Tax Analysts argue that the Tax Commissioner may not withhold the documents pursuant to West Virginia Code § 11-10-5d(b)(5)(B) because exemptions for information protected by statute should be strictly construed. But in *St. Mary’s*, the Court did not analyze the statutory exemption “strictly.” Rather, the Court simply analyzed whether the requested documents (documents collected in the course of an antitrust investigation) were protected from disclosure by statute. *St. Mary’s Medical Center, Inc. v. Steel of West Virginia, Inc.*, 240 W.Va. at 247, 809 S.E.2d at 717. Once the Court found that the investigative exemption covered the requested documents, it held that they were not subject to disclosure under FOIA. *Id.* The *St. Mary’s* court also recognized the Legislature’s policy basis for exempting the relevant antitrust investigation documents from disclosure. 240 W.Va. at 247, 809 S.E.2d at 717 (“A denial of the full import of the Attorney General’s statutory exemption would place investigations of illegal conduct under the Antitrust Act at a disadvantage and would be contrary to the public’s interest in the enforcement of the law.”).

In this case, the statute at issue is clear that the Legislature intended to protect from disclosure the manner by which the Tax Department audits taxpayers. The Tax Department’s audit manuals, if revealed, would by their very nature reveal what the Legislature intended to protect in West Virginia Code § 11-10-5d(b)(5)(B) (*i.e.*, “standards used or to be used for the

selection of returns for examination or data used or to be used for determining such standards.”). Thus, the Tax Department and the Circuit Court correctly concluded that the audit manuals are exempt from disclosure.

In summary, because the Circuit Court gave appropriate deference to the Tax Department’s conclusion that audit manuals are exempt from disclosure, Tax Analysts’ Assignment of Error 1(D) should be rejected.

VI. CONCLUSION

The Circuit Court properly dismissed Tax Analysts’ Complaint because the underlying FOIA request to the Tax Department was solely a request for information exempted from disclosure pursuant to West Virginia Code § 11-10-5d(b)(5)(B). Therefore, the State Tax Commissioner requests that this Honorable Court affirm the decision of the Circuit Court.

Respectfully submitted,

**MATTHEW R. IRBY,
WEST VIRGINIA
STATE TAX COMMISSIONER,**

By Counsel,

**PATRICK MORRISEY
ATTORNEY GENERAL**

A handwritten signature in blue ink, appearing to read "William C. Ballard", is positioned above a horizontal line.

**WILLIAM C. BALLARD (WVSB 9557)
ASSISTANT ATTORNEY GENERAL**

State Capitol
Building 1, Room 435-W
1900 Kanawha Boulevard, East
Charleston, WV 25305
(304) 558-2522

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-491

TAX ANALYSTS,

Petitioner,

v.

MATTHEW R. IRBY, West Virginia
State Tax Commissioner,

Respondent.

CERTIFICATE OF SERVICE

I, William C. Ballard, Assistant Attorney General for Matthew R. Irby, West Virginia State Tax Commissioner, do hereby certify that a true and exact copy of the foregoing "*Response Brief of the West Virginia State Tax Commissioner*" was served by depositing the same, postage prepaid in the United States Mail, this 8th day of December, 2022, addressed as follows:

Zachary J. Rosencrance
BOWLES RICE LLP
600 Quarrier Street
Charleston, WV 25325-1386

Cornish F. Hitchcock
HITCHCOCK LAW FIRM PLLC
5614 Connecticut Avenue, NW No. 304
Washington, DC 20015-2604
Counsels for Petitioner


William C. Ballard