


Memo

To: OAH Hearings Division

From: Chief Judge Donald R. van der Vaart 

Date: November 1, 2021

Re: Confidentiality of Contested Tax Case Records

Last Fall, a transfer of files from the Office of Administrative Hearings (OAH) to the Business Court was delayed due to confusion over the confidentiality of OAH contested tax case records. In a pleading filed with the Business Court to prevent the sealing of the records, a Department of Justice (DOJ) lawyer representing the Department of Revenue (DOR) disclosed the practice of DOJ and DOR of treating all OAH contested tax case records as not confidential following a final OAH decision. Yet, in 2016, OAH stopped releasing contested tax case decisions to the public and sealed all contested tax case records on the OAH internal docket system (CMS).

After learning the DOJ/DOR practice of treating OAH contested tax case records as not confidential, a thorough review of OAH's practice of denying public access to OAH decisions and other contested tax case records was necessary. We have concluded that the DOJ's opinion is correct. OAH contested tax case records not subject to another requirement (e.g., containing information restricted under the NC Public Records Law, or by action of a protective order) are not confidential following a final decision. The following explains the new policy, the reasoning behind it and the implementation of the new policy.

ISSUES

1. **Do OAH contested tax case records lose their confidentiality immediately after the contested case is resolved?**

Yes. The APA provides that contested tax case records are no longer confidential following the issuance of a final decision. Unsealing these records will promote the transparency required of OAH by the APA, return OAH to

compliance with the Public Records Act and conform OAH practice to that of the judicial courts.

As is the case with any OAH contested case records, contested tax case records may contain information which the North Carolina Public Records Act shields from information requests. In such cases, it is the obligation of the party entering sensitive information in the contested case to apply for a confidentiality order to shield the information from public access.¹

2. What constitutes a final decision for this purpose?

The term “final decision” is not defined in the APA. The term was originally understood to be the final decision of the DOR. The understanding changed when OAH was given final decision-making authority with respect to contested tax cases. The plain meaning and most practical definition of the term is the action of an Administrative Law Judge (ALJ) in a case that can be appealed to a judicial court.

3. Do federal tax confidentiality laws apply to OAH contested tax cases?

In general, federal tax law confidentiality rules are irrelevant to OAH's contested tax case records. Two important exceptions are 1) information on donors to Section 501(c)(3) organizations obtained from the federal government by a State agent, and 2) information related to federal tax returns obtained by a State agent pursuant to a request from the taxpayer for the federal government to release it to that State agent.

¹ It has always been the obligation of the submitting agency to consider the APA's general requirement of transparency in OAH proceedings in light of the submitting agency's obligations under the Public Records Act and other confidentiality laws. This memorandum serves as a reminder to attorneys for agencies and petitioners that it is the duty of the parties to request protective orders for confidential information and to refrain from submitting confidential information not material to the contested case.

DISCUSSION

I. Following the Issuance of a Final Decision, OAH Contested Tax Case Records Are Not Confidential.

A. Background.

OAH was first designated to hear appeals from decisions by DOR hearing officers when the APA was amended effective January 1, 2008. A comprehensive discussion of the changes can be found in a two-part publication in the N. C. State Bar Journal.² After the change, Final Decisions in tax-related cases were still made by DOR, but only after receipt of the recommendatory opinions from ALJs. Two agencies were now involved with these cases necessitating the coordination of confidentiality by the two agencies. The APA amendment designating OAH to hear contested tax cases for recommendatory decisions included the following language regarding confidentiality:

The record, proceedings, and decision in a contested tax case are confidential until the final decision is issued in the case.

N.C. Gen. Stat. § 150B-31.1(e) (the “**APA Confidentiality Statute**”).

Given that ALJ opinions were only advisory at the time the APA Confidentiality Statute was adopted, the plain meaning of “final decision” was the DOR decision made following DOR’s receipt of the OAH recommendatory opinion. This final decision by DOR was appealable to the judicial courts. For their part, DOR had been publishing only selected decisions prior to 2008³ (to the disfavor of the tax bar), so Chapter 105 was amended to require DOR to publish “the final decision of the Secretary in a contested case,” and to redact the taxpayer’s identity. N.C. Gen. Stat. § 105- 256(a)(9) (repealed by S.L. 2013-416, eff. Aug. 23, 2013). At that time one could have wondered why DOR was required to redact the taxpayer’s identity, while no such restriction was imposed on OAH. Happily, the Legislature answered the question in S.L. 2011-330 wherein the requirement for DOR to redact the taxpayer information was deleted.

Effective 2012, the APA was again amended, this time granting OAH final decision authority for petitions related to DOR actions. Thus, ALJ decisions were now “final decisions” subject to judicial review. The plain meaning of “final decision” at

² See “Examining NC’s New Tax Assessment, Refund, and Appeal Procedures by C. B Neely and N. S. Rendleman, <https://www.ncbar.gov/media/121025/journal-12-4.pdf>, and <https://www.ncbar.gov/media/121029/journal-13-1.pdf>

³ A practice reported by Neely and Rendleman to be disfavored by the tax bar at the time.

that point became the OAH decision, rather than the final DOR decision, since the appeal to judicial courts followed the OAH final decision. This is further supported by the repeal in 2013 of §105-256(a)(9) by S.L. 2013-416, eff. Aug. 23, 2013 *to apply to cases filed since 1/1/2012* which is the date OAH decisions became final.

With any possible inconsistency between the two agencies removed, OAH released some tax decisions to Westlaw during the 2012 – 2016 period.⁴ It is not known whether any other parts of contested tax case records were released pursuant to requests under the Public Records Act during this period.

At some point in 2016, OAH stopped releasing any final decisions in contested tax cases.⁵ At the same time all records in contested tax cases, including the final decision, in the OAH docket system were labelled “sealed,” meaning they could not be released pursuant to public records requests.

Apparently, the 2016 changes were prompted by concern that the longstanding provision of Chapter 105 (Taxation) providing for personal criminal liability for the disclosure of “tax information” by any officer, employee or agent of the State, N.C. Gen. Stat. § 105-259(b) (the “**Revenue Confidentiality Statute**”), might create liability for OAH personnel.⁶ “Tax information” is defined for the purposes of the Revenue Confidentiality Statute to include information contained on a tax return, tax report, information obtained through an audit, information on whether a taxpayer has filed a tax return, and personally identifiable information associated with taxpayers such as names, addresses, and social security numbers. N.C. Gen. Stat. § 105-259(a)(2).

As discussed below, the Revenue Confidentiality Statute must be read in conjunction with the APA Confidentiality Statute. The result of such a reading is that OAH staff incur no liability under the Revenue Confidentiality Statute for the release of tax information contained in contest tax case records following a final decision.

⁴ OAH decisions dated as late as November 2016, can be found on Westlaw. The last issue of the NC Register to list a contested tax case in the index of OAH cases was published May 17, 2017. NC Register Vol. 31, Issue 20.

⁵ The 2012-2016 OAH decisions, which continue to appear on Westlaw, are sealed in CMS.

⁶ There was also concern about N.C. Gen. Stat. § 105-113.112(a) (Unauthorized Substance Tax information is “tax information” subject to N.C. Gen. Stat. § 105-259).

B. Law.

It is a basic principle of statutory construction that “statutes dealing with the same subject matter must be construed in *pari materia*, as together constituting one law, and harmonized to give effect to each.” *First Bank v. S&R Grandview*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 395 (2014) (quoting *Williams v. Williams*, 299 N.C. 174, 180–81, 261 S.E.2d 849, 854 (1980)). “Such statutes should be reconciled with each other when possible and any irreconcilable ambiguity should be resolved in a manner which most fully effectuates the true legislative intent.” *Martin v. NC Dept. of Health & Human Services*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009).

The Revenue Confidentiality Statute contains many exceptions to its general rule barring disclosure of tax information. The first exception covers disclosures made “[t]o comply with... a law.” N.C. Gen. Stat. § 105-259(b)(1). The APA Confidentiality Statute is such a law. It provides that “[t]he record, proceedings, and decision in a contested tax case are confidential until the final decision is issued in the case.” The clear implication of the APA Confidentiality Statute is that such records are not confidential following the final decision, which, since 2012, refers to the final decision of an Administrative Law Judge.

Even if the Revenue Confidentiality Statute had not contained this explicit exception to its application, other rules of statutory construction would lead to the same conclusion, *i.e.*, the APA Confidentiality Statute controls.

First, the APA Confidentiality Statute was adopted well after the Revenue Confidentiality Statute (2008 and 1939, respectively). Any conflict between the two statutes should be resolved in favor of the APA Confidentiality Statute because it should be assumed that the legislature was aware of the longstanding Revenue law and was creating an exception to it. *Town of Pine Bluff v. Moore County*, 374 N.C. 254, 256, 839 S.E.2d 833, 835 (2020) (“[W]e assume that ‘the Legislature acted with full and complete knowledge of existing and prior law’ [cites omitted]” and *A & F Trademark, Inc. v. Tolson*, 167 N.C.App. 150, 156, 605 S.E.2d 187, 192 (2004) (“The legislature is always presumed to act with full knowledge of prior and existing law.”)⁷

Second, the rule of statutory construction favoring a specific law over a more general law also favors the APA Confidentiality Statute. *High Rock Lake Partners*,

⁷ The limitation on the period of confidentiality makes sense in the context of the APA declaration that “[a]ll hearings under this Chapter shall be open to the public.” N.C. Gen. Stat. § 150B-23(e). The general spirit of transparency in OAH actions is conveyed by this statement, although the APA Confidentiality Statute is, admittedly, a limitation of the transparency.

L.L.C. v N.C.D.O.T., 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (“This Court adheres to the long-standing principle that when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls.” By its terms, the APA Confidentiality statute is specific to “the record, proceedings, and decision in a contested tax case,” *i.e.*, OAH’s contested tax case records. The Revenue Confidentiality Statute addresses the actions of State employees and officers with respect to more general “tax materials.”

Third, in construing a statute, one must accord every word of a statute a meaning. “[S]ignificance and effect should, if possible,...be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.” *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991), quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975). Thus, one cannot ignore the words “until the final decision has been issued” found in the APA Confidentiality Statute.

The DOJ agrees that OAH contested tax case records are not confidential following an ALJ’s final decision. In a pleading filed on behalf of DOR in Business Court last year, a Special Deputy Attorney General wrote that OAH contested tax case records are not confidential after a final decision and therefore, OAH should not be ordered to send contested tax case records to the Business Court under seal.⁸ The pleading cited the APA Confidentiality Statute to support this position, and dismissed the possible conflict with the Revenue Confidentiality Statute – “[t]he public filing of the record of a contested case, including any tax information, is expressly contemplated and directed by ‘a law’ and therefore not subject to the disclosure limitations of [the Revenue Confidentiality Statute].”⁹

After listing many instances where he maintained that the OAH transmitted unsealed contested tax case records to the Business Court, both before and after 2016, the Special Deputy Attorney General wrote that this practice is “consistent with the plain and unambiguous language of [the APA Confidentiality Statute]” and that “[b]y statute, the record in a contested tax case become public once a final decision is rendered by the Office of Administrative Hearings,” again citing the APA Confidentiality Statute. “The General Assembly made a legislative choice to have the

⁸ The Business Court granted the petitioner’s expedited motion to keep all records confidential on a temporary basis and ordered OAH to send the records under seal. Order on Petitioner’s Expedited Protection Order, *N.C. Farm Bureau v. DOR*, 20 CVS 10244, Oct. 12, 2020. Ultimately, the Business Court agreed to the petitioner’s request to permanently seal certain tax return information. Order, *N.C. Farm Bureau*, Dec. 4, 2020.

⁹ Respondent’s Response to Motion for Protective Order, *N.C. Farm Bureau*, filed Oct. 14, 2020, p. 8.

record in contested tax cases be kept confidential during the administrative OAH proceeding, but public once a final decision is rendered.”¹⁰

C. Benefit.

By following the APA Confidentiality Statute and treating contested tax case records as not confidential after a final decision is issued, OAH will conform to the practice of the judicial courts. All North Carolina judicial courts that hear tax cases publish their opinions and, unless they receive a proper motion for sealing records, make their dockets publicly accessible.¹¹ OAH contested tax case decisions and other records of the OAH proceedings not subject to confidentiality orders are routinely available to the public when it becomes part of the record on appeal to the judicial courts.¹²

II. **The “Final Decision” which Ends the Confidentiality of Contested Tax Case Records is Any Decision or Order That May be Appealed to a Court Under Article 4 of the APA.**

The APA Confidentiality Statute provides that OAH contested tax case records will not be held confidential following the issuance of a “final decision.” “Final decision” is not formally defined for the purposes of the APA. As discussed above, when the statute was originally adopted, “final decision” referred to a determination of DOR following an ALJ’s issuance of a recommendatory opinion.

Section 150B-34(a) provides that “[i]n each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law.” However, ALJs do not issue findings of fact and conclusions of law with respect to “each contested case” as Section 150B-34(a) states. Some contested cases are ended by motions “made in accordance with...Rule 12(c)...or summary judgment,” which need not include findings of fact and conclusions of law. N.C. Gen. Stat. § 150B-34(e). Many other cases are ended either by Orders of Dismissal for the failure of the petitioner to diligently prosecute, or by the voluntary withdrawal of a petition by a petitioner.

¹⁰ Id. at pp. 2, 4, and 5, fn. 1.

¹¹ E.g., the North Carolina Business Court’s docket is available to the public at ncbc.nccourts.org/public/.

¹² Before OAH was given authority to issue a final decision in a contested tax case, the Secretary of Revenue was required to publish his final decisions. N.C. Gen. Stat. § 105-259(a)(9) (repealed) and *infra* at p. 3. There is no statutory publishing requirement for ALJ final decisions.

As discussed in Section I, above, judicial courts to which OAH decisions are appealed do not hold ALJs' tax decisions and other OAH contested tax case records confidential. These courts have a Constitutional requirement that they be "open." N.C. Constitution, Art. I, Sec 18. Thus, it is possible that the judicial courts have a case for denying routine confidentiality to contested tax cases because of this Constitutional mandate.

However, it is more likely that the courts reasonably interpret the "final decision" in an OAH contested tax case as an action by an ALJ from which appeal to the judicial courts is allowed, pursuant to Article 4 of the APA. Orders of Dismissal with prejudice, as well as decisions disposing of "all issues in the contested case," can reasonably be deemed "final decisions" for the purpose of determining when confidentiality of OAH contested tax cases end, whether or not the case is appealed to a judicial court.¹³ The APA Confidentiality Statute's requirement that contested tax case records lose confidential status as soon as the "final decision" is issued clearly indicates that the fact of a subsequent appeal is irrelevant.

III. Federal Tax Confidentiality Laws Have Little Significance to OAH

Occasionally, petitioner's federal tax information may be disclosed in OAH proceedings. The Federal Tax Code includes a general rule against disclosure of federal returns and "return information." 26 U.S.C. § 6103(a). The relevance to OAH is limited.

The requirement to keep federal returns and return information confidential applies only to information received from the federal government. 26 U.S.C. § 6103(a)(2). Therefore, any federal return information supplied to a State employee or officer by a *taxpayer* would not be protected by this statute.

Further, Section 6103(a) apparently does not apply in all cases of return information received from the Federal government by a State officer or employee. It applies only to information released by the Federal government for certain purposes or pursuant to a request by the taxpayer to release the return information to the State officer or employee. See 26 U.S.C. § 6103(a)(2) and (3) and 6103(c).¹⁴ The receipt of federal return information by State officers and employees for the purpose of enforcing State law is not a receipt which triggers the general rule to keep the

¹³ See §150B-45 (using "Final Decision" in procedure for judicial review).

¹⁴ As suggested in the quote from a DOJ attorney below, the DOJ may be of the opinion that Section 6103 does apply to information received by State agents from the Federal government for the purpose of enforcing State tax laws. This may be an area requiring DOJ guidance to agencies submitting such information in OAH contested cases.

information confidential. 26 U.S.C. § 6103(a)(2) and (3)(the list of purposes does not include the purpose of enforcing State tax law).

In the unlikely event that an OAH contested tax case would involve information on donors to organizations qualifying as Section 501(c)(3) organizations received from the federal government by a State officer or employee, the State may be required to keep that information confidential. Confidentiality may also be required with respect to tax information received from the federal government by State child support enforcement agencies and some other State programs not including State tax enforcement. 26 U.S.C. § 6103(a)(2) and (3).

In *N.C. Farm Bureau*, the petitioner successfully sought a protective order for tax information from the Superior Court. The petitioner supported its initial motion for temporary protective order by reference to several confidentiality laws, including 26 U.S.C. § 6103(a).¹⁵

DOR's response took issue with the relevance of this Federal statute to the case at hand:

Regarding federal tax law confidentiality provisions, Farm Bureau incorrectly references 26 U.S.C. § 6103 in an attempt to support the proposition that federal law somehow created confidentiality requirements for the OAH and the Department related to this record. This statute creates restrictions on the use of taxpayer information obtained from the Internal Revenue Service ("IRS") or its electronic systems providing access to federal tax information. None of the federal tax returns in this case were obtained from the IRS or its systems. Rather, all of the federal tax returns were disclosed by Farm Bureau. Accordingly, the provisions of 26 U.S.C. § 6103 do not apply to any of the documents or tax records in this case.¹⁶

The Business Court's temporary protective order does not include the basis for the Court's ruling. When the plaintiff moved for a permanent protective order, after DOR filed the pleading quoted above, no claim of confidentiality under Federal law was made.¹⁷ The later protective order issued by the Business Court also did not mention Federal law.

¹⁵ Farm Bureau's Expedited Motion, N.C. Farm Bureau, filed Oct. 9, 2020.

¹⁶ Respondent's Response to Motion for Protective Order, N.C. Farm Bureau, filed Oct. 14, 2020.

¹⁷ Farm Bureau's Consent Motion for Protective Order, N.C. Farm Bureau, filed Dec. 20, 2020.

Therefore, in contested tax cases, at least, it is highly unlikely that Federal law would require tax materials be kept confidential beyond the period determined by the APA Confidentiality Statute, as long as DOR safeguards personal information and trade secrets as required by the North Carolina Public Records Act.

IMPLEMENTATION

As before, OAH contested tax case records will remain sealed during the adjudicatory process. As of November 1, however, these records will be unsealed from the time of issuance of a final decision by an ALJ, unless subject to protective orders. Final decisions will be published at the discretion of OAH.

We recognize that petitioners in cases closed before this November 1, 2021 may have relied on the prior practice of OAH and therefore, never sought protective orders during the pendency of their cases. To allow these parties a chance to request protection of their records OAH will attempt to contact former petitioners upon the receipt of a relevant Public Records request. OAH will consider petitioner requests that specific records, but not the final decision, be withheld in conformity to the Public Records Act. Unless OAH receives a request for confidentiality within 30 days of attempted notice by OAH, all requested contested tax case records will be released.

CONCLUSION

By reclassifying contested tax case records as nonconfidential in accordance with the APA Confidentiality Statute, OAH can accomplish all of the following:

1. Give effect to the APA Confidentiality Statute's provision that contested tax case records will not be held confidential permanently (N.C. Gen. Stat. § 150B-31.1(e));
2. Respect the spirit of the general rule of the APA that OAH be as transparent as the law allows (*see* N.C. Gen. Stat. § 150B-23(e));
3. Comply with the Public Records Act (Chapter 132));
4. Promote uniformity in publication of opinions with that of the judicial courts, which publish not only their own tax decisions and other tax case records, but also those of OAH, in contested tax cases appealed from OAH; and
5. Follow the opinion of the DOJ that the APA Confidentiality Statute renders OAH contested tax case records not confidential following a final decision.