

**IN THE SUPREME COURT
FOR THE
STATE OF VERMONT
Supreme Court Docket No: 2011-128**

IN RE: H.S. 122

**] Appealed from
] Vermont Superior Court
] Bennington Unit, Civil Div.
] Docket No. 195-5-10 Bncv**

**BRIEF OF THE APPELLANT
TOWN OF MANCHESTER**

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INTRODUCTION

This appeal arises out of a public document request made under the Vermont Access to Public Records Act, 1 V.S.A. §§ 315-320 (the “Public Records Act”). The trial Court ordered the Town of Manchester (the “Town”) to disclose information that (a) is derived from confidential personal tax returns, (b) is furnished to the Town by the Vermont Tax Department, and (c) would allow anyone to determine the income reported on tax returns by persons living in specific Manchester households in the substantial majority of cases.

The document at issue is a list of all households in the Town that qualify for the “homestead property tax income sensitivity adjustment.” 32 V.S.A. Chap. 154. The list specifies the tax credit calculated by the Tax Department for particular households.

In 2005, a legislative summer study committee identified privacy concerns with public disclosure of this information. A bill subsequently adopted by the House would have amended existing law to *allow* public disclosure of the tax adjustments for particular households. However, the Senate rejected this proposal and it never became law. The trial Court nonetheless held that because the Legislature did not expressly exempt the adjustment data from public disclosure, the Legislature must have intended that tax adjustments for identifiable households could be made public.

In this brief, the Town argues that the Court erred because specific legislative action was not required to exempt the data from public disclosure. The data is exempt from disclosure under the statute governing confidentiality of “return information” furnished to the Vermont Tax Department, 32 V.S.A. § 3102, and under the Public Records Act, 1 V.S.A. § 317(c)(6), (7) & (10).

STATEMENT OF THE CASE

Vermont resident property owners are required annually under the pains and penalties of perjury to declare a homestead. 32 V.S.A. § 5410. The declaration is filed with the Vermont Department of Taxes on Form HS-122. Printed Case (PC) at 13-15, 53-54.

The Tax Department calculates for each qualifying household the amount of the “homestead property tax income sensitivity adjustment” (the “Adjustment”). The Adjustment is a credit against statewide education taxes levied on the homestead. 32 V.S.A. §§ 6061(1), 6066 & 6066a.

The amount of each household’s Adjustment is calculated by the Tax Department based on the income reported by members of the qualifying household on tax form HI-144, the Household Income Schedule. This form contains a detailed disclosure of the personal income of all persons living in the household. PC at 11-12, 55-56; *see also* 32 V.S.A. §§ 6061(4)-(5) & 6066.

The Town is required to assess and collect statewide education property taxes for the State of Vermont. 32 V.S.A. §5409. In Fiscal Year 2010, the State paid the Town \$36,745.71 for these services. PC at 16-18; *see also* 32 V.S.A. § 5402(c).

The Town of Manchester maintains a secure computer link that enables the Town’s Finance Director to access certain information stored on the State of Vermont data server. The Finance Director downloads the Tax Department’s list of homestead declarations and the Tax Department’s calculation of Adjustments for all eligible households in the Town. PC at 12-13.

The HS-122 State Payment Report (the “HS-122 Report”) is a sorted collation of data that the Town can create from the data furnished by the Tax Department. The HS-122 Report itemizes (a) identifying numbers for each declared homestead property in the Town; (b) the name and mailing address of the homestead owner(s) for each identified property; and (c) the amount of the Adjustment calculated by the Tax Department as a credit against the education property tax bill for each homestead whose owners qualify for an Adjustment. PC at 13-14.¹

On or about July 1, 2010, the Town of Manchester’s finance director downloaded data respecting 703 declared homestead records together with the Adjustments calculated for each by the Tax Department. In a second download on September 15, 2010, there were 53 declared homesteads with new or supplemental Adjustments. PC at 14.

The HS-122 Report is available only to the Town’s Finance Director and, as necessary, to the Treasurer and to the Town Manager. The HS-122 Report is not made available to the Select Board, Town Clerk or other internal Town staff. *Id.*

On or about April 7, 2010, Appellee Joseph J. O’Dea requested the Town to produce the HS-122 Report pursuant to the Public Records Act. After consultation with counsel, the Town declined to produce the requested information on the grounds that it was exempt from disclosure under the Public Records Act. PC at 3-6.

On May 19, 2010, Mr. O’Dea filed an action in what is now the Superior Court, Bennington Unit, Civil Division, pursuant to 1 V.S.A. §319. Mr. O’Dea sought a

¹ A similar tax credit is also available to residential tenants based on a formula related to the amount of their rent and the property taxes attributed to the rental unit. 32 V.S.A. §§ 6061(7) & 6066(b). Data for renters is not included in the HS-122 Report.

declaration that the HS-122 Report is a public record subject to inspection and copying. PC at 3-4.

The Court, with the Hon. John P. Wesley presiding, held a trial on November 15, 2010. Mr. O'Dea, a member of the Vermont bar, appeared *pro se*. The Town, represented by Robert E. Woolmington, called two witnesses.

Ruth Woodard, the Town's Finance Director, described the content of the HS-122 Report. She testified that the Report only identifies households that qualify for the Adjustment. PC at 14.

The Town also called its Treasurer, David L. Fielding, Jr. He is a certified financial planner and also maintains a private tax accounting practice. As treasurer of the Town, he is familiar with the HS-122 Report. PC at 24-26.

Mr. Fielding testified that the Tax Department furnishes free of charge to the public a "Property Tax Adjustment Worksheet" (the "Worksheet.") The Worksheet is an Excel computer file containing data cells with embedded formulas.² PC at 26-29.

The purpose of the Worksheet is to allow homestead owners to determine the amount of their Adjustment. Once data is entered into several cells, the Worksheet automatically calculates the Adjustment. *Id.*

Mr. Fielding testified that if a person knows the amount of the Adjustment for a particular homestead property, it is a simple matter using other publicly available data to determine the income reported by that household to the Department of Taxes. PC at 29-31.

² The Worksheet is available for public download at <http://www.state.vt.us/tax/pvr.shtml>.

To calculate a household's reported income, one must know the Grand List assessment of the property, the total tax bill for the previous and current year, and the applicable tax rate. This information is all publicly available. *Id.*

Mr. Fielding picked at random nine Manchester households listed as receiving Adjustments and for which he also prepared the Vermont tax return. Using the Adjustment disclosed on the HS-122 Report and the publicly available information described above, Mr. Fielding used the Worksheet to calculate the household income for all nine households to within \$15 of the income actually reported. PC at 30-31.

Mr. Fielding testified that the calculation of household income would be less precise for any taxpayers who elect to credit an income tax overpayment to the Adjustment. 32 V.S.A. § 6066a(b). It is unlikely that a significant number of persons entitled to the Adjustment would fall into this category. Even if an individual chose to increase his or her Adjustment by declining to accept a tax refund in cash, the person's name would still appear on the Report. PC at 31-33.

If the Adjustment data were disclosed by the Town, a member of the public without any specialized knowledge or training could determine the income reported to the Vermont Tax Department by household members to a high degree of certainty. PC at 31-33, 43.

If the Adjustment data were disclosed by the Town, a member of the public without any specialized knowledge or training could determine whether a particular household's reported income for the prior year was less than \$97,000. PC at 32, 46-47.

In cross examination, Mr. Fielding acknowledged that the amount of the Adjustment for some households might be affected by a credit from prior year income

tax overpayments. He testified, however, based on 40 years of preparing Vermont tax returns, that such credits were not common. PC at 40, 43-44.

The Town at trial also introduced as an exhibit the decision by the Tax Department, in response to a public records request for an HS-122 Report for another town, to deny release of the report. In refusing to disclose the information, the Tax Department relied on the confidentiality provisions of 32 V.S.A. § 3102. The Department nonetheless advised that the information should be available from the town. PC at 47-48, 58.

Mr. O'Dea then called one witness, an accountant named Donald Keelan. Mr. Keelan testified that because the amount of Adjustment could be affected by an individual's unpaid tax liabilities or by the individual's choice to accept a credit rather than refund for prior tax overpayments. Because of these variables, he concluded that a household's taxable income could not necessarily be calculated from the amount of the Adjustment. Mr. Keelan acknowledged in cross-examination that he did not prepare tax returns, that he had not attempted to perform any of the calculations about which Mr. Fielding testified, and that he did not know "whether or not it is possible to calculate income based on the amount of the [Adjustment.]" PC at 49-53.

The Town argued that because the income and homestead declaration data collected by the Tax Department on forms HS-122 and HI-144 fall within the expansive statutory definition of "return information," the Adjustment calculated from that data must be kept confidential under the non-disclosure statute applicable to the Tax Department and its agents. 32 V.S.A. § 3102(a)(3). The Town, as an agent of the State

for purposes of assessing and collecting education taxes, argued that it was statutorily bound not to disclose the information. PC at 90-92, 100.

The Town also argued that the Adjustment data was exempt from disclosure under several sub-sections of 1 V.S.A. § 317(c), principally under sub-section (6). PC at 92-96, 98-100. That sub-section exempts from disclosure:

[A] tax return and related documents, correspondence and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont department of taxes or submitted by a person to any public agency in connection with agency business.

In arguing for disclosure, Mr. O'Dea principally relied on a letter opinion dated October 12, 2007 from William Griffin, an Assistant Attorney General. PC at 59-62. Mr. Griffin noted that in 2005 a report by a legislative summer study commission³ raised concerns about the privacy impact of any disclosure of the amount of an Adjustment. The Legislature subsequently did not take any action to amend the public records statute to specifically address the confidentiality of this data. Mr. Griffin argued that the absence of legislative action was proof of legislative satisfaction with public disclosure of the amount of individual Adjustments.

The Town responded to this argument as follows:

Interpreting legislative intent has justly been compared to interpreting the dreams of Pharaoh. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)(Jackson, J. concurring). The meaning of the *absence* of Legislative action in relation to comments in a report is even more enigmatic. One might more readily conclude that the General Assembly was satisfied in this case that existing law protected the privacy rights of citizens than that the Legislature intended by its inaction to require confidential return information to be disclosed to the public. PC at 96.

³ *Report*, House Legislative Study Committee on Income-Based Education Property Tax for Vermonters (December 15, 2005). PC at 77-78.

By Order filed on February 4, 2011, the Court held that the HS-122 Report was not exempt from disclosure. PC at 104-111.

Relying on Mr. Fielding's testimony, the Court found that:

[I]n the substantial majority of cases there will be a straightforward mathematical relationship between any reported adjustment on the HS-122 report and the income of the household entitled to the adjustment. This is because the "other factors" which might affect the adjustment reported in the HS-122 report rarely come into play as to most property tax adjustments." PC at 109.

The Court considered the argument that the possibility of refund credits and other variables in the Adjustment would effectively camouflage the amount of income reported by the household. The Court held that this "camouflage... is virtually transparent in the few cases where other factors are present, and non-existent in the vast majority of cases where the adjustment is solely a function of income." PC at 110.

However, the Court accepted Mr. Griffin's argument that legislative inaction is proof of legislative intent. The Court wrote that in light of the committee report's discussion of privacy concerns, the "Legislature doubtless understood [the concerns] and elected against any explicit protection for the information generated by the process it was creating." PC at 110.

The Court characterized the Tax Department's refusal to release the information while suggesting that a town could release it as "titillating bit of buckpassing." The Court wrote that "if the information is public it ought to be available from the state agency from which it emanates originally." However, because the Tax Department was not a party to the suit, the Court found that the Department's refusal to disclose the same information was not "particularly relevant to the duty of the Town." PC at 107.

The Court also relied on the “strong policy favoring access to public documents and records” under the Act. While the Court acknowledged the Town’s arguments under the confidentiality provisions of 32 V.S.A. 3012, it did not specifically address these independently from its analysis under the Act. PC at 107.

Mr. O’Dea sought reimbursement of his attorneys’ fees, but the Court denied this request. The Court held that “it is clear that the Town of Manchester had a reasonable basis for withholding the HS-122 reports.” PC at 114.

The Town filed this appeal on March 2, 2011.

STATEMENT OF THE ISSUE

Did the trial Court err in ordering public disclosure of information that (a) is derived from confidential personal tax returns, (b) is furnished to the Town by the Vermont Tax Department, and (c) would allow anyone to determine, in the substantial majority of cases, the household income reported on tax returns by persons living in specific Manchester households.

SUMMARY OF ARGUMENT

The tax adjustment calculation for identified households is exempt from public disclosure under the strict confidentiality requirements of 32 V.S.A. § 3102 applicable to “return information” furnished to the Tax Department and its agents.

The trial Court erred by interpreting legislative intent based on legislative inaction, and by holding that the requested information must be produced under the Public Records Act. The requested information is exempt from disclosure under the express provisions of 1 V.S.A. § 317(c)(6), (7) & (8).

STANDARD OF REVIEW

The Supreme Court’s review of legal issues is non-deferential and plenary. *In re South Burlington-Shelburne Highway Project*, 174 Vt. 604, 605, 817 A.2d 49, 51 (2002).

The Supreme Court will not disturb a finding, even if it is contradicted by substantial evidence, unless there is no credible evidence to support the finding. *Timberlake Associates v. City of Winooski*, 170 Vt. 643, 645, 756 A.2d 774, 776-777 (2000).

ARGUMENT

I. **The tax calculation for specific households is exempt from public disclosure under the strict confidentiality requirements of 32 V.S.A. § 3102 applicable to “return information” furnished to the Tax Department and its agents.**

Tax “return information” is strictly confidential. Except in limited circumstances not pertinent here, “return information” cannot be disclosed by any employee or agent of the Vermont Department of Taxes. 32 V.S.A. §3102(a).

“Return information” includes a person’s name, address, date of birth, social security or federal identification number or any other identifying number; information as to whether or not a return was filed or required to be filed; the nature, source or amount of a person's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liabilities, tax payments, deficiencies or over-assessments; **and any other data**, from any source, furnished to or *prepared* or collected **by the department of taxes with respect to any person**. 32 V.S.A §3102(b)(3) (emphasis supplied).

The Adjustment is calculated by the Department of Taxes for every qualifying homestead property in the State. The components of the calculation are the income reported on tax returns by the persons living in the household,⁴ the statewide education tax rate, the “applicable percentage” of household income and the equalized value of the property. 32 V.S.A. §6066. All of the components except household income are readily available to the public. PC at 29-31.

The Town calculates the amount of education taxes due from homestead owners after credit for the Adjustments prepared by the Department. The Town collects those funds, remits them to the Department, and is paid for the administrative and collection services it provides to the State. 32 V.S.A. §5409 (describing duties of municipalities in

⁴ “Household income” is defined in 32 V.S.A. §6061(4) to include income reported by all members of the household, with one exception. There is no record respecting the percentage of households in the Town or State that include persons filing more than one income tax return.

the administration of the statewide education tax); 32 V.S.A. § 6066a (specifying duties of municipalities with respect to the Adjustment); PC at 16-18 (testimony respecting amount of payment the Town has received from the State for these administrative and collection services.)

These duties and activities make the Town of Manchester an agent of the Vermont Tax Department for purposes of assessing and collecting the statewide property tax.

In *Rule v. New Hampshire-Vermont Health Service*, 144 Vt. 323, 477 A.2d 622 (1984), a trade association was held to be the agent of an insurer when the association collected and remitted premiums based on instructions from insurer. *See also Abbiati v. Buttura & Sons, Inc.*, 161 Vt. 314, 639 A.2d 988 (1994) (employer held to be agent of insurer based on insurer's delegation of administrative duties to employer). The only material difference between those cases and this one is that the duties of the Town are defined by statute rather than by contract.

The Town has no choice in performance of these statutory duties. It is a legal instrument of the State as a matter of law. 24 V.S.A. § 3; *Courchesne v. Town of Weathersfield*, 2003 VT 62, 175 Vt. 585, 830 A.2d. 118 (municipal corporation may exercise those powers and functions specifically authorized by the legislature, as well as those necessarily implied in the expressly delegated powers); *City of Burlington v. Central Vermont Railway Company*, 82 Vt. 5, 71 A. 826 (1909) (municipal corporations are created for the purpose of performing such governmental functions as the State may for convenience devolve upon them).

Even if the Town were not an agent of the State under the common law principles of *respondeat superior*, the obligation to keep “return information” strictly confidentiality is imposed on the Tax Department and on “the persons or persons... receiving such return information... as if such person were the agent of the Commissioner.” 32 V.S.A. § 3102(h).

In sum, if the Adjustment is “return information” within the meaning of 32 V.S.A. §3102(b)(3), the Town is barred from disclosing it.

In *Finberg v. Murnane*, 159 Vt. 431, 623 A.2d 979 (1992), this Court held that a list of the names of businesses subject to a municipal receipts tax was not exempt from disclosure under the Public Records Act. In so holding, this Court found that “derivative” information -- separate documents made up by the agency from municipal tax filings -- would be exempt under the Public Records Act if necessary to avoid disclosure of information taken from tax returns.

The Court in *Finberg* specifically held that the confidentiality provisions of 32 V.S.A. § 3102(a) are broader than the disclosure exemptions under the Public Records Act.⁵ The Court found that the names of taxpayers would have been confidential under 32 V.S.A. § 3102(a) if reported to the State, but the names of municipal taxpayers were not exempt from disclosure under 1 V.S.A. § 317(c)(6). 159 Vt. at 436, 623 A.2d at 982.

⁵ This Court wrote in *Finberg*: “The exception to the Act listed in 1 V.S.A. § 317(b)(6) and the state tax return exception, 32 V.S.A. § 3102(a), are related only because each deals with taxes. In this case, however, they are applicable to different taxing authorities and different taxing schemes. They are best harmonized by viewing the Act exception as the minimum protection for tax records applicable to all taxing authorities and types of taxes, and viewing the state tax disclosure exception as a broader confidentiality policy applicable only to the state tax information the Legislature has specified. The Act excepts from disclosure “records which by law are designated confidential or by a similar term.” 1 V.S.A. § 317(b)(1). This is a recognition that in specific instances the Legislature may choose to go beyond the general confidentiality policies contained in the public records exceptions.” 159 Vt. at 436, 623 A.2d at 982.

The same confidentiality principle for derived data enunciated by the Court in *Finberg* is appropriately applied to the confidentiality requirements of 32 V.S.A. § 3102(a). If the confidential source data can be determined from the information subject to the disclosure request, then the requested information must also be treated as confidential.

If the HS-122 Report were made public, it would provide conclusive proof that the individual members of each identified household reported aggregate income on their tax returns in the prior year in an amount low enough to qualify for the Adjustment. The maximum reportable income for Manchester households to receive an adjustment in 2009 was \$97,000. PC at 32, 46-47; *see also* 32 V.S.A. § 6066.

In this case, the trial Court found that:

[I]n the substantial majority of instances there will be a straightforward mathematical relationship between any reported adjustment on the HS-122 report and the income of the household entitled to that adjustment. This is because the “other factors” which might affect the adjustments reported in the HS-122 report rarely come into play as to most property tax adjustments.

The trial Court also found that the Adjustment “produce[s] a camouflage that is virtually transparent in the few cases where other factors are present, and non-existent in the vast majority of cases where the adjustment is solely a function of income.” PC at 110.

The record at trial showed that the calculation of the reported income was within \$15 of the reported values in all of the cases chosen at random. PC at 30-31.⁶

⁶ These households were chosen at random from among the Manchester residents who used the tax preparation services of the Town’s expert. There was no showing or reason to believe that the expert’s clients were themselves an unrepresentative sample of Town residents who used a tax preparation service.

There could be no argument, consistent with the principle enunciated in *Finberg*, that would allow release of information by the Tax Department or its agents if the confidential source data could be determined in every case. The strong public policies against disclosure of tax return information require the same result in the insubstantial minority of the cases in which the exact confidential source data cannot be determined.

This Court summarized the principles it uses in interpreting a statute in *In re Carroll*, 2007 VT 19 ¶9, 181 Vt. 383, 925 A.2d 990 (reversing Environmental Court's interpretation of statute governing standing in zoning appeals):

Our objective in construing a statute is to effectuate the Legislature's intent, and we look first to the statute's language. *Springfield Terminal Ry. v. Agency of Transp.*, 174 Vt. 341, 346, 816 A.2d 448, 453 (2002).

We will enforce the plain meaning of the statutory language where the Legislature's intent is evident from it, *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 14, 177 Vt. 287, 865 A.2d 350, but, if doubts exist, "the real meaning and purpose of the Legislature is to be sought after and, if disclosed by a fair and reasonable construction, it is to be given effect." *Langrock v. Dep't of Taxes*, 139 Vt. 108, 110, 423 A.2d 838, 839 (1980).

The intent should be gathered from a consideration of "the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law." *In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 84, 702 A.2d 397, 403 (1997).

The strong public policy supporting the confidentiality of data reported to the Tax Department is evidenced by the stern penalties for violating the confidentiality provisions of 32 V.S.A. § 3102(a). A violation by an officer or employee of the State is punished by termination of employment and a bar from holding public employment for five years. 32 V.S.A. § 3102(a). The Tax Department's refusal, based on 32 V.S.A. § 3102, to release the Adjustment data is not surprising in light of these penalties. PC at 58.

Indeed, one of the express statutory charges to the Commissioner is to “provide for the security of information required by law to be kept confidential.” 32 V.S.A. § 3101(a)(2).

The strong policy against disclosure is further evidenced by the penalties for disclosure applicable to a third party who obtains confidential information furnished to the Tax Department and then discloses it, even if the person is not a common-law agent of the State. 30 V.S.A. § 3102(h).

Public release of the HS-122 Report would expose the reported tax data in a substantial majority of cases, and would confirm the upper limits of reported household income in all cases. This result would hardly be consistent with a strict policy of maintaining the confidentiality of reported tax data.

The consequences of public disclosure would not apply only to those who qualify for an Adjustment. If a resident household does *not* appear on the HS-122 Report, that is nearly conclusive proof that the reported income of persons living in the household exceeds the tax-credit qualification limits for the prior year. A list of specific households in Manchester that reported income in excess of \$97,000 would be of great value to marketers, fundraisers and others seeking to target prosperous households in the community. Surely 32 V.S.A. § 3102(a) was intended to prevent just such uses of data reported on income tax returns.

The trial Court erred by applying the public policy in favor of disclosure applicable to requests made under the Public Records Act to information that is designated confidential under 32 V.S.A. § 3102(a). As this Court held in *Finberg*:

The exception to the Act listed in 1 V.S.A. § 317(b)(6) and the state tax return exception, 32 V.S.A. § 3102(a), are related only because each deals with taxes...They are best harmonized by viewing the Act exception as the minimum protection for tax records applicable to all taxing authorities and types of taxes, and viewing the state tax disclosure exception as a broader confidentiality policy applicable only to the state tax information the Legislature has specified. The Act excepts from disclosure “records which by law are designated confidential or by a similar term.” 1 V.S.A. § 317(b)(1). This is a recognition that in specific instances the Legislature may choose to go beyond the general confidentiality policies contained in the public records exceptions...

159 VT at 436, 623 A.2d at 982.

In sum, the information requested by the Appellee (a) is derived directly from return information, (b) allows conclusive determination of the maximum income reported to the Tax Department by a household, and (c) in a substantial majority of the cases allows quite precise determination of the income reported to the Tax Department. Disclosure is therefore prohibited by 32 V.S.A. §3102(a).

II. The trial Court erred by interpreting legislative intent based on legislative inaction, and by holding that the requested information must be produced under the Public Records Act.

The trial Court held that the Adjustments calculated by the Tax Department for specific households must be produced under the Public Records Act. In so ruling, the Court relied principally on its assessment of the Legislature’s understanding of the Public Record Act’s requirements. This interpretation of legislative intent was based solely on the fact that the Legislature did not choose to enact any express statutory amendments to protect the tax Adjustment calculations after confidentiality concerns were identified in a summer study commission report. PC at 110.

The trial Court's reasoning in reaching this conclusion underscores the wisdom of this Court's holding in *Harrington v. Gaye*, 124 Vt. 164, 166, 200 A.2d 262, 263 (1964) that a Court should not ascribe legislative intent to "a mere act of omission."

The Public Records Act exempts from public disclosure "a tax return and related documents, correspondence and certain types of substantiating forms which include the same type of information as in the tax return itself." 1 V.S.A. § 317(6).

In a report filed December 15, 2005 (the "Report"), the House Legislative Study Committee on Income-Based Education Property Tax for Vermonters presented a series of options for replacing the "prebate" and rebate payments then being sent directly to qualifying households to mitigate the impact of statewide education taxes. The Report noted that a credit adjustment system would raise concerns about the confidentiality of personal income information if the adjustment were made public. The Report concluded that the problem could be addressed by allowing taxpayers to choose to over-withhold payroll taxes or designate tax credits to be applied to the Adjustment. PC at 77-78.⁷

In the following year, a bill was introduced and passed in the House that would *expressly make the amount of the Adjustment a public record*. Appendix A.

Section 19 of H-888 (2007- 2008) would have amended 32 V.S.A. § 3102(h) as follows:

Adjusted property tax bills shall be public records, and the provisions of this section requiring municipalities to include on the homestead property tax bill notice of the adjusted property tax liabilities shall override any confidentiality provisions of section 3102 of this title.

⁷ There was no evidence cited by the Report to suggest the Vermont taxpayers might choose in significant numbers to prepay tax obligations to the State, or to delay receipt of refunds that would otherwise go into their pockets, for the purpose of masking their reported income on an HS-122 Report.

Section 20 of the bill would have amended 1 V.S.A. § 317(c) as follows:

...”for purposes of this section, property tax bills and related documents, including any adjustment to the property tax liability under chapter 154 of Title 32, are not tax returns and do not contain the same type of information as a tax return and are not exempt from public disclosure under this subchapter.”

However, the Senate deleted these sections, and the Committee of Conference approved the Senate version. The trial Court apparently believed the Legislature rejected special new confidentiality protections for the Adjustment data. The Judgment Order in this case states that the Legislature “elected against any protection for the information generated by the process it was creating.” PC at 110.

This precisely inverts what happened: The Legislature rejected an attempt to create an exception for the Adjustment data from the existing confidentiality requirements of 32 V.S.A. § 3102(a), and to remove the Adjustment from the existing exemption for tax-related documents in 1 V.S.A. § 317(c)(6).

It is more plausible to conclude in light of this history that both chambers understood the Adjustment would be confidential under existing law, that the House wanted to make the Adjustment data public, that the Senate did not, and therefore the existing statutory protections against disclosure remain in effect.

However, in light of this Court’s prior caution about interpreting legislative inaction, it is more appropriate to conclude that the applicability of 32 V.S.A. §3102(a) and the exemptions from the Public Records Act depend on the language of the respective statutes, general principles of statutory interpretation, and the facts in the record. What a summer study committee flagged as a possible concern, and what the

two chambers of the Legislature could not later agree upon, are not conclusive in interpreting the application of the statutes to the case before the Court.

The issue of whether the HS-122 Report is exempt from disclosure is governed by the specific language of 1 V.S.A. § 317(c)(6). This exempts from disclosure “a tax return and related documents, correspondence and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont department of taxes.”

No fair reading of the record would contradict the Court’s factual conclusion. The confidential tax return data that was the source of the Adjustment is plainly discernable in the “vast majorities” of cases, and “virtually transparent” in the remaining ones. PC at 110.

The Town fully recognizes the strong public policy in favor of disclosure of public documents that are *not* also classified as confidential under 32 V.S.A. §3102(a). *See, e.g., Trombley v. Bellows Falls Union High School*, 160 Vt. 101, 106-07, 624 A.2d 857, 861 (1993)(records of public employee grievance are not exempt as personal documents under Public Record Act).

However, even if 32 V.S.A. §3102(a) did not govern this case, the requested data falls within the express language of the Public Records Act’s exemption from disclosure of tax materials. The exemption is not limited to the tax return data, but also covers “the same type of information.” 1 V.S.A. § 317(c)(6). The trial Court’s findings make clear that the Adjustment data is the “same type” as reported income on the tax return. The Adjustment is directly based upon the reported income, and allows determination of the reported income in “the vast majority” of the cases. PC at 110.

Indeed, as the Town argued below, the information also would be exempt under 1 V.S.A. § 317(c)(7) as a document related to personal finances. PC at 92-93.

While this Court construed that exemption narrowly in *Trombley*, it recognized that the exemption would apply to public documents “if they reveal intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.” *Trombley*, 160 Vt. at 110, *citing Kotulski v. Mt. Hood Community College*, 62 Or.App. 452, 660 P.2d 1083, 1086 (Or.Ct.App.1983)(information is personal if it normally would not be shared with strangers).

Personal income is customarily treated as a highly confidential matter that is not shared friends and most family, let alone strangers.

Finally, V.S.A. § 317(c)(10) exempts from disclosure “lists of names compiled or obtained by a public agency when disclosure would violate a person’s right to privacy or produce public or private gain...”

The HS-122 Report is just such a list. It would disclose personal income data that is routinely treated as private and highly confidential. Public disclosure might also expose household members to targeted predation by marketers and others armed with foreknowledge of their report income.

Accordingly, the HS-122 Report falls within three express exemptions of the Public Records Act, and therefore is not subject to public disclosure.

CONCLUSION

The judgment of the Superior Court should be reversed.

Respectfully submitted,

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Dated: May 26, 2011

APPENDIX

2007-2008

**H.888
AS PASSED BY HOUSE**

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/house/H-888.HTM>

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Sec. 19. 32 V.S.A. § 6066a(h) is added to read:

(h) Adjusted property tax bills shall be public records, and the provisions of this section requiring municipalities to include on the homestead property tax bill notice of the adjusted property tax liability shall override any confidentiality provisions of section 3102 of this title.

Sec. 20. 1 V.S.A. § 317(c) is amended to read:

(c) The following public records are exempt from public inspection and copying:

* * *

(6) a tax return and related documents, correspondence and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont department of taxes or submitted by a person to any public agency in connection with agency business; for purposes of this section, property tax bills and related documents, including any adjustment to the property tax liability under chapter 154 of Title 32, are not tax returns and do not contain the same type of information as a tax return and are not exempt from public disclosure under this subchapter.

H.888
SENATE PROPOSAL OF AMENDMENT

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/senate/H-888.HTM>

page 1

H.888

AN ACT RELATING TO MISCELLANEOUS TAX AMENDMENTS

The Senate proposes to the House to amend the bill as follows:

Second: By striking out Secs. 19 and 20 [property tax adjustment information is public]

Journal of the Senate

FRIDAY, MAY 2, 2008

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/journal/sj080502.htm>

pages 1889-1890 of Word download

H. 888.

Pending entry on the Calendar for notice, on motion of Senator Shumlin, the rules were suspended and the report of the Committee of Conference on House bill entitled:

An act relating to miscellaneous tax amendments.

Was taken up for immediate consideration.

Senator Cummings, for the Committee of Conference, submitted the following report:

To the Senate and House of Representatives:

The Committee of Conference to which were referred the disagreeing votes of the two Houses upon House bill entitled:

H. 888. An act relating to miscellaneous tax amendments.

Respectfully reports that it has met and considered the same and recommends that the Senate recede from its following proposals of amendment:

Sixth; Eighth; Eleventh; Twelfth; Thirteenth, from Sec. 49 only; Fifteenth; Seventeenth; Eighteenth, from Secs. 56 and 57 only; Twentieth; Twenty-first; Twenty-second, from Sec. 71 only; Twenty-third, from Sec. 74 only; Twenty-fifth; Twenty-sixth; Twenty-seventh, from Secs. 109 through 112 only; and Twenty-ninth;

AND that the House accede to the following Senate proposals of amendment:

First; Second; Third; Fourth; Fifth; Seventh; Ninth; Tenth; Thirteenth, to Secs. 47 and 48 only; Fourteenth; Sixteenth; Eighteenth, to Secs. 54 and 55 only; Nineteenth; Twenty-second, Sec. 72 only; Twenty-third, Sec. 73 only; Twenty-fourth; Twenty-seventh, Secs. 82 through 108 only; and Twenty-eighth...

Journal of the Senate

FRIDAY, MAY 2, 2008

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/journal/sj080502.htm>

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Thereupon, the question, Shall the Senate accept and adopt the report of the Committee of Conference? was decided in the affirmative.

Rules Suspended; Reports of Committees of Conference Accepted and Adopted on the Part of the Senate

Journal of the House

SATURDAY, MAY 3, 2008

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/journal/hj080503.htm>

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H. 888

On motion of Rep. Adams of Hartland, the rules were suspended and House bill, entitled

An act relating to miscellaneous tax amendments;

Appearing on the Calendar for notice, was taken up for immediate consideration.

The Speaker placed before the House the following Committee of Conference report:

To the Senate and House of Representatives:

The Committee of Conference to which were referred the disagreeing votes of the two Houses upon the bill respectfully reports that it has met and considered the same and...

The House accede to the:

Second (Strikes property tax adjustment information is public)

Journal of the House

SATURDAY, MAY 3, 2008

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/journal/hj080503.htm>

Pending the question, Shall the House adopt the report of the Committee of Conference? Rep. Hube of Londonderry demanded the Yeas and Nays, which demand was sustained by the Constitutional number. The Clerk proceeded to call the roll and the question, Shall the House adopt the report of the Committee of Conference? was decided in the affirmative. Yeas, 121. Nays, 17.

CERTIFICATE OF COMPLIANCE

Robert E. Woolmington, Counsel for the Appellants, hereby certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of Microsoft Word 2007, the text of this brief (excluding statement of issues, table of contents, table of authorities, signature blocks, certificate of compliance) contains 5,808 words.

Robert E. Woolmington