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**23-ORD-199**

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In re: Mark Sommer/Kentucky Department of Revenue

**Summary:** The Kentucky Department of Revenue (the “Department”) violated the Open Records Act (“the Act”) when it denied a request for redacted copies of taxpayer settlement agreements.

***Open Records Decision***

Mark Sommer (“Appellant”) submitted a request to the Department for copies of “any settlement Agreement between the [Department] and any taxpayer having distilled spirits in a bonded warehouse, which is related to the ongoing assessment or collection of tax under” KRS 132.140 as amended by 2023 Ky. Acts. Ch. 148 § 1. The Appellant acknowledged that the records “released by the Department shall be sufficiently redacted to protect the involved taxpayer’s confidentiality under applicable provisions of Kentucky law.” In a timely response, the Department denied his request under KRS 131.190(1) and KRS 61.878(1)(l). This appeal followed.

The disclosure of certain tax information is prohibited under KRS 131.190(1), which provides that “[n]o . . . person, shall intentionally and without authorization inspect or divulge any information acquired by him or her of the affairs of any person, or information regarding the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by a hearing or investigation, insofar as the information may have to do with the affairs of the person’s business.” KRS 131.190(1) is incorporated into the Act under KRS 61.878(1)(l), which exempts from inspection public records “the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.” However, the Act also requires that “[i]f any public record

contains material which is not excepted . . . the public agency shall separate the excepted and make the nonexcepted material available for examination.” KRS 61.878(4); *see also Dept. of Revenue v. Eifler*, 436 S.W.3d 530, 533 (Ky. App. 2013) (affirming the Attorney General’s decision to require the Department to redact private information that would reveal a taxpayer’s identity from records related to registration for the “Utility License Tax” and provide the remainder of the documents).

Here, the Appellant asserts that the requested records could be “sufficiently redacted to protect the involved taxpayer’s confidentiality” under KRS 61.878(4). In contrast, the Department argues that “redaction of taxpayer settlement agreements pursuant to KRS 61.878(4) is not possible.”

To determine whether the taxpayer settlements could be redacted under KRS 61.878(4), and to ensure the Department has carried its burden of proof, the Office asked the Department to provide for the Office’s confidential review one taxpayer settlement agreement that would accurately represent the substance of all the requested settlement agreements. *See* KRS 61.880(2)(c). Initially the Department agreed to provide the Office with one such agreement. However, the Department later notified the Office that it would not provide an actual agreement because it is prohibited from disclosing “information regarding the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by . . . investigation, insofar as the information may have to do with the affairs of the person’s business.” KRS 131.190(1). The Department claims the Office’s authority under KRS 61.880(2)(c) to obtain copies of the actual records involved in a dispute under the Act does not meet one of the exceptions in KRS 131.190.

Instead of providing a copy of an actual settlement agreement with a taxpayer, the Department provided the Office with a “mocked-up settlement agreement” that it claims accurately reflects the general contents of the settlement agreements at issue. The Office cannot reveal the contents of the “mocked-up settlement agreement.” *See* KRS 61.880(2)(c); 40 KAR 1:030 § 3. However, the “mocked-up settlement agreement” can accurately be described as a template, or form agreement, in which a taxpayer’s information is simply inserted. The language of the agreement makes no reference to any particular taxpayer and the identity of any taxpayer could not be ascertained by any of the prepopulated language. In other words, if the “mocked-up settlement agreement” really is an accurate reflection of the settlement agreements, then the Department could easily redact the fields of information it

inserted that were unique to an individual taxpayer and the remainder of the agreement would not divulge “the affairs” of that taxpayer. Accordingly, the Department violated the Act when it denied the Appellant’s request for records under KRS 131.190(1) and KRS 61.878(1)(l) because the information protected by those exemptions can be redacted under KRS 61.878(4).

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to [OAGAppeals@ky.gov](mailto:OAGAppeals@ky.gov).

**Daniel Cameron**  
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s/ Matthew Ray  
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Distributed to:

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