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25-ORD-304

October 3, 2025

In re: Justin Hicks/Kentucky Department of Revenue

Summary: The Kentucky Department of Revenue (“the Department”) did not violate the Open Records Act (“the Act”) when it withheld preliminary documents under KRS 61.878(1)(i) and (j) until the Department’s review concludes and final action is taken.

Open Records Decision

Justin Hicks (“the Appellant”) submitted a request to the Department seeking records showing “all applications for the ‘qualifying attraction sales tax incentive’”¹ and the Department’s “responses to applications which indicate their approval or rejection.” In response, the Department denied the request under KRS 131.190(1), explaining the statute prohibits it from disclosing information “regarding the affairs of any person or information regarding the tax schedules, correspondence, returns, applications or reports required to be filed with the Department insofar as the information may have to do with the affairs of a person’s business.” The Department also stated the applications are preliminary documents that are exempt under KRS 61.878(1)(i) and (j) because the Department has not yet taken final action related to them. Finally, the Department explained that applications must be submitted 60 days prior to an event, and the Department cannot approve or deny the request until it receives and reviews “post-event supporting documentation.”² This appeal followed.

KRS 61.878(1)(i) exempts “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” The Department explains that “the application itself

¹ The “qualifying attraction sales tax incentive” is authorized by KRS 139.5325. That statute was enacted during the 2025 regular session. *See* 2025 Ky. Acts ch. 98. The statute’s effective date was July 1, 2025. *See id.*

² In so stating, the Department also explained that it has not yet granted or denied any of the applications, meaning no such records responsive to the request exist. The Appellant has not challenged this portion of the response.

is a preliminary step in the process of an applicant seeking the sales tax incentive.” KRS 61.878(1)(j) exempts “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” Analogous here is case law regarding complaints giving rise to a formal investigation. Kentucky courts have long held that such complaints may be withheld from inspection under KRS 61.878(1)(i) and (j), but only until the investigation is completed and final action is taken. *See Ky. Bd. of Med. Licensure v. Courier-Journal & Louisville Times Co.*, 663 S.W.2d 953, 956 (Ky. App. 1983) (holding that “once final action is taken by the [agency], the initial complaints must be subject to public scrutiny”); *Palmer v. Driggers*, 60 S.W.3d 591, 595–97 (Ky. App. 2001) (holding that an employee’s resignation before the agency’s investigation concluded constituted “final action” such that the initiating complaint lost its preliminary status).

Here, although the Appellant has not requested complaints, he has requested the initiating documents that begin the Department’s process of review before issuing final notice regarding the applications. Like complaints, such applications are preliminary until final action has been taken on them by the Department. *See also* 22-ORD-213 (finding letters of intent to lease office space did not constitute final agency action until final action related to the leases was taken). Here, the Department has explained that its review of the applications is ongoing and it has not taken final action. Accordingly, the Department properly relied on KRS 61.878(1)(i) and (j) to deny the Appellant’s request for applications.³

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.

**Russell Coleman
Attorney General**

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

³ Because the applications are exempt under KRS 61.878(1)(i) and(j), the Office need not address the Department’s reliance on KRS 131.190.

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Distributed to:

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