**Kentucky Department of Revenue Must Produce
Final Rulings under Open Records Act**

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In an Opinion affirming the judgment of the Franklin Circuit Court, the Kentucky Court of Appeals held the Department of Revenue (the “Department”) is required by the Open Records Act to produce redacted copies of its final rulings in tax administration cases (“Final Rulings”).[[1]](#footnote-1) The case began in 2012 when tax attorney Mark Sommer submitted an Open Records Request to the Department requesting Final Rulings issued by the Department from 2004 to the present.

The Department denied Mr. Sommer’s request, citing KRS §§ 131.190 and 131.081(15), which provide that certain tax schedules, returns, or reports filed with the Department may not be disclosed if there is an expectation of taxpayer privacy. The Department claimed that Final Rulings not appealed to the Kentucky Board of Tax Appeals (the “Board”) were exempt from disclosure under the Open Records Act. The Department also claimed that a review of all of the documents to determine what redactions were needed was unduly burdensome pursuant to KRS § 61.872(6). Although the Department conceded that Final Rulings appealed to the Board are public records, it declined to produce those Final Rulings as well.

The Office of the Attorney General affirmed the denial of Mr. Sommer’s request, and Mr. Sommer appealed to the Franklin Circuit Court. Tax Analysts, a non-profit news organization, was granted leave to intervene after the Department denied a nearly identical open records request filed by the news organization.

The circuit court reversed the Attorney General’s ruling and ordered the Department to produce the requested information with appropriate redactions. The court found that Final Rulings appealed to the Board were public records and the Department’s denial of access to those rulings was entirely without basis. The court also held that even those Final Rulings that had not been appealed to the Board were subject to disclosure with proper redactions. The court denied the Department’s motion for reconsideration and awarded costs to Mr. Sommer and Tax Analysts, including attorney’s fees.

The Department did not appeal the portion of the circuit court’s judgment regarding Final Rulings appealed to the Board. However, the Department argued the circuit court erred by holding Final Rulings *not* appealed are also subject to disclosure under the Open Records Act.

The Court of Appeals affirmed, finding the Department had taken an unreasonably and overly broad view of KRS §§ 131.190(1)(a) and 131.081(15). The court held that exceptions to the disclosure of public records are to be strictly construed, and when a public record contains both exempt and non-exempt information, government agencies are required by KRS § 61.878(1)(l) to separate the material and make the non-exempt material available for inspection. The court noted that the substantive portions of the Final Rulings “contain a wealth of information relative to the implementation of our tax laws.” The court also found the Department itself had used redacted copies of Final Rulings to support its position in litigation with other taxpayers, a fact undermining its position throughout the proceedings.

The Department has filed a motion for discretionary review with the Kentucky Supreme Court.

1. *Department of Revenue v. Sommer*, No. 2015-CA-001128-MR (Ky. App. Jan. 13, 2017) (to be published). [↑](#footnote-ref-1)