

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2020-033**

January 14, 2020

VIA ELECTRONIC MAIL

Mr. Aaron R. Davis

RE: FOIA Appeal 2020-033

Dear Mr. Davis:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the District of Columbia Office of Chief Financial Officer (“OCFO”) Office of Tax and Revenue (“OTR”) failed to properly respond to a request for documents.

Background

On October 8, 2019, you submitted a FOIA request to the OCFO for “[a]ll private letter rulings (“PLRs”), general information letters (“GILs”) and technical advice memoranda (“TAM”) created by OCFO’s Office of Tax and Revenue between January 6, 2016 and October 8, 2019. The OCFO denied your request on November 14, 2019, on the basis that the information you sought was exempt from disclosure under D.C. Official Code § 2-534(a)(1) (“Exemption 1”) and (6)(A) (“Exemption 6”). On November 20, 2019, you appealed the OCFO’s denial of your FOIA request contending that (1) the OCFO did not redact the responsive documents to delete any information that would otherwise be protected as required under D.C. Official Code § 2-534(b); (2) the OCFO failed to identify the specific statutes which exempted the responsive documents from production under DC FOIA, and (3) the requested documents are routinely released by the Internal Revenue Service (“IRS”) and state governments. On December 16, 2019, the OCFO responded to your appeal.¹ In the response, the OCFO contends that the search did not locate any GILs or TAMs. The OCFO noted in the Vaughn Index that 24 PLRs were located. However, the OCFO argues that the PLRs are exempt from production under Exemptions 1 and 6, as stated in the OCFO’s initial FOIA response, as well as D.C. Official Code § 2-534(a)(2) (“Exemption 2”).

According to the OCFO, PLRs are OTR’s response to a taxpayer’s request for guidance on specific tax matters. A taxpayer may request a PLR by providing under penalty of perjury, the taxpayer’s name, business address, federal taxpayer identification number, a statement of the facts and circumstances concerning the specific tax matter for which the taxpayer is requesting

¹ A copy of the OCFO response to your appeal is attached to this decision.

guidance, a statement of statutory or judicial authority upon which the taxpayer is relying and the ruling requested. The PLR issued by the OTR incorporates personally identifying information and a statement of facts and circumstances provided by the taxpayer on which the ruling is based, along with OTR's legal analysis and determination. According to OTR, a PLR may be withdrawn, revoked or modified if the taxpayer's facts or circumstances change, the law changes or the ruling was issued in error. A PLR may not be cited as precedent and the ruling is applicable only to the taxpayer to whom the PLR is directed and may not be used or relied upon by any other taxpayer.

OTR further states that the PLRs represent OTR's opinion as to the tax treatment of the particular facts provided by the taxpayer, are used to prepare tax returns, including the computation of the tax shown on the return and so are integral to the actual tax return. As such, the PLRs constitute tax information that is protected as they relate to the tax computation and tax liabilities of the taxpayer requesting the PLR.

Discussion

It is the public policy of the District of Columbia government that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531. In aid of that policy, the DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." *Id.* at § 2-532(a).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 312 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemption 6 – Information Exempted by other Statutes

Exemption 6 protects "[i]nformation specifically exempted from disclosure by statute (other than DC FOIA), provided that such statute: (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) Establishes particular criteria for withholding or refers to particularly types of matters to be withheld." D.C. Official Code § 2-534(a)(6). OTR cites a number of statutes for the proposition that because of the information contained in the PLRs, those records cannot be produced except in very limited circumstances (e.g., D.C. Official Code § 47-1805.04; § 47-2018; § 47-4406). OTR also states that it has entered into a memorandum of understanding with the IRS covering the sharing of tax information between the District and the IRS which incorporate non-disclosure provisions which must be observed in order for the District to have access to federal tax information.

You contend that the PLRs are not tax returns under Section 6103 of the Internal Revenue Code ("IRC"). Therefore you believe there is no basis for OTR to withhold the PLRs. However, we agree with OTR, that District tax information is also subject to District law which clearly protects more than just the tax return itself but also the financial information provided by the

taxpayer. You also argue that as a matter of policy, District PLRs should be available to the public because IRS PLRs are subject to disclosure. However, OTR notes that IRS PLRs are available to the public because there is a specific federal code provision for such disclosure. IRC § 6110.² That is not the case for PLRs issued by OTR. Indeed, we have reviewed the statutes relied upon by the OTR in its appeal response and agree with OTR that District law prohibits the disclosure of taxpayer specific tax information. And the exemptions for the sharing of tax information with the federal government or other District agencies are limited to very narrow conditions. There is no general grant of discretion to city officials to release tax information outside of the narrow parameters provided by various District statutes.³ Therefore, we conclude that the District statutes relied upon by OTR in withholding the information in the PLRs satisfy the requirement for Exemption 6.

Exemption 1- Trade Secrets

Exemption 1 protects “trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.” D.C. Official Code § 2-534(a)(1). Documents prepared by the government can come within this exemption if they contain summaries of information provided from outside the government. *Gulf & Western Indus. V. U.S.*, 615 F.2d 527, 529-30 (D.C. Cir. 1979). For the purposes of federal FOIA, the D.C. Circuit has indicated that the terms “commercial” and “financial” used in the federal FOIA should be accorded their ordinary meanings. *Public Citizen Research Group v FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Here, the confidential financial information provided by a business taxpayer to the OTR that is included in the PLR could give a competitor a view of the financial strength of the taxpayer or financial problems the taxpayer may be facing. We agree that such public disclosure of a taxpayer’s sensitive confidential financial information would result in substantial harm to the competitive position of the taxpayer.⁴

Exemption 2 – Personal Privacy

² OTR also notes that under IRS regulations, a taxpayer has the right to challenge the disclosure of information contained in the IRS PLRs. Rev. Proc. 2019-1, sec. 7.01(12).

³ We also agree that OTR’s interpretation of the District’s statutes relied upon by OTR as mandating confidentiality for tax information provided by a taxpayer is entitled to deference by this Office unless OTR’s interpretation conflicts with the plain meaning of a statute or its legislative history. This doctrine has been clearly established in a series of D.C. Court of Appeals’ decisions on deference to the Department of Employment Services (“DOES”) interpretation of District statutes applicable to the DOES programs. *See Murphy v DOES*, 935 A.2d 1066, 1070 (D.C. 2007); *Asylum Co. v DOES*, 10 A.3d 619, 625 (D.C. 2010); and *Johnson v DOES*, 111 A. 3d 9, 11 (D.C. 2015).

⁴ We note that Exemption 1 has not been shown by OTR to apply to individual non-business taxpayers. However, the individual non-business taxpayers have the protection of Exemption 2 (personal privacy).

Under Exemption 2, determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989). A privacy interest is cognizable under DC FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). The first part of the privacy analysis is determining whether a sufficient privacy interest exists. *Id.*

The privacy interest in the FOIA balancing analysis “encompasses the individual's control of information concerning his or her person,” including names, addresses, and other identifying information. *Padou, supra*, 29 A.3d at 982. Moreover, individuals have a privacy interest in personal information even if it is not of an embarrassing or intimate nature. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982).

District of Columbia v. FOP, 75 A.3d 259, 265-66 (D.C. 2013).

Here, the OCFO characterizes the PLRs as containing detailed information on the taxpayer's identity. The taxpayer's name, location, business operations, contact information, and detailed financial information, including financial tax return information, are all included in the PLRs. And, the tax analysis of a particular tax issue presented by the taxpayer is unique to the facts and circumstances of the specific taxpayer. As such, the public disclosure of the information in the PLRs would constitute a clearly unwarranted invasion of personal privacy of the individual taxpayer. Therefore, we find that an individual private taxpayer has a privacy interest in the information contained within the PLRs.⁵

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest in disclosure. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772-773. In the context of DC FOIA, a record is deemed to be of “public interest” if it would shed light on an agency's conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

This statutory purpose is furthered by disclosure of official information that “sheds light on an agency's performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that “reveals little or nothing about an agency's own conduct” does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773.

Id. at 1492-93.

⁵ Because we find that Exemptions 1 and 6 apply to business entities, we do not need to decide whether Exemption 2 (personal privacy) applies to business entities in the context of this FOIA request.

In this matter, the taxpayer's disclosure of financial information to the OTR and the issuance of a PLR that is limited to the facts and circumstances of the specific situation presented by the taxpayer, sheds no light on OTR's operations. The public has no cognizable interest in the release of the PLRs. And, as discussed in the next section, any cognizable public interest in disclosure of the requested information would be harder to satisfy if this Office directed production of the PLRs with the taxpayer's identity and salient financial information redacted.

Segregability

The last issue to be considered is whether the OCFO can redact the withheld records to protect personal privacy interests or to delete confidential tax information provided by a taxpayer. D.C. Official Code § 2-534(b) requires that an agency produce "[a]ny reasonably segregable portion of a public record . . . after deletion of those portions" that are exempt from disclosure. The phrase "reasonably segregable" is not defined under DC FOIA and the precise meaning of the phrase as it relates to redaction and production has not been settled. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). To withhold a record in its entirety, courts have held that an agency must demonstrate that exempt and nonexempt information are so inextricably intertwined that the excision of exempt information would produce an edited document with little to no informational value. *See e.g., Antonelli v. BOP*, 623 F. Supp. 2d 55, 60 (D.D.C. 2009). As part of the review, this Office requested that the OTR produce for inspection by this Office a PLR with the information identifying the taxpayer, the tax or financial information provided by the taxpayer, and any analysis which includes the tax information provided by the taxpayer redacted. The redactions of taxpayer identification information, financial data and analysis drawing on the financial data left the document "...with little to no informational value." *Id.* Therefore, we conclude that redacting the 24 PLRs to delete the exempt information would be useless and does not further any public interest sufficient to outweigh the privacy interest of the taxpayer.

Conclusion

Based on the forgoing, we find that OTR's decision to withhold the 24 PLRs finds sufficient support under DC FOIA, and therefore, we dismiss your appeal. This shall constitute the final decision of this Office with respect to your appeal. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: Brazil Facchina
Assistant General Counsel
OCFO/OTR (via email)