

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2022-081**

February 1, 2023

VIA ELECTRONIC MAIL ONLY

Mr. Ernest E. Johnson

RE: FOIA Appeal 2022-081

Dear Mr. Johnson:

This letter responds to the administrative appeal that you have submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531, *et seq.* (“DC FOIA”). In your appeal, you have challenged the response of the Office of Tax and Revenue (“OTR”) to your DC FOIA request.

Background

On January 17, 2022, you submitted a DC FOIA request to OTR, identified as 20220122_064, which sought the following:

Unpaid property tax and any other obligations by the Howard Theater Development Group LLC and Howard Theater Restoration nonprofit 501 c3. The amount outstanding and the corporations compliance standings.

On January 22, 2022, you submitted another request to OTR, identified as 20220122_071, which stated:

Please amend FOIA Request: 20220117 064 to include is the Howard Theater Development LLC eligible for "Clean Hands Certification". This LLC's compliance history since its inception any outstanding property taxes or other financial liabilities. Finally, is there a payment plan in place and what is the date of the last payment?

You submitted a third DC FOIA request to OTR on January 27, 2022, identified as 20220127_074, which sought the following:

The Howard Theater Development LLC and Howard Theater restoration nonprofit (501 C3) was given a lease in 2008 for the Howard Theater located 620-T Street NW. The lease payment terms are \$25,000 annually with wavier for first year, 3% increase after three (3) years and 5% increase after the fifth (5) year. These payments were to be made to _P.O. Box 206, Washington, DC

20055-0206. This payment location may have changed over the course of this lease. Our REQUEST: Are payments current? If not when was the last payment? Is there any modification or payment plan for payment of lease rent? I am Chairman/CEO for nonprofit Friends of the Frank Reeves Center. I have attached our "Clean Hands Certification" for 2021 as proof of our identity[.]

On January 31, 2022, OTR responded to your requests by providing you with “copies of real property tax bills issued to the entities named in this request, as such information is publicly available.” The remainder of your request was denied pursuant to D.C. Code §§ 2-534(a)(1)(“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..”) and 2-534(a)(6)(“[i]nformation specifically exempted from disclosure by statute...”). OTR also advised you that under DC FOIA, it did not have any obligation to answer questions or create documents and it did not maintain records concerning the referenced lease, which may be obtained from the Department of General Services (“DGS”).

You filed an appeal with this Office on February 2, 2022 challenging the denial of your DC FOIA requests because:

Our FOIA request seek the truth in just a few things to determine if a historic Black asset is in jeopardy due to incompetent management. Seven (7) years not filing a financial report or audit deserves explanation. In summary our FOIA request ask:

1. What is the payment history of \$25,000 annually with 5% increase after 5 years? Has any payment arrangements been made?
2. Is there \$3 million in outstanding property taxes? Has any payment arrangements been made?
3. Has the **Howard Theater Development Group LLC and its partners Howard Theater Restoration nonprofit been compliant with their LLC and nonprofit status?**

On March 3, 2022, we notified OTR of your appeal and requested a response. OTR responded to your appeal on March 10, 2022 by noting, “a number of [your] requests were generally framed in the form of questions, rather than requests for specific records...” OTR also reiterated its position that the records you sought were exempt from disclosure pursuant to D.C. Code §§ 2-534(a)(1) and 2-534(a)(6).

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. 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 . . .” D.C. Code § 2-532(a).

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).

Adequacy of the Request

Under DC FOIA, an agency “has no duty either to answer questions unrelated to document requests or to create documents.” *Zemansky v. United States Envtl. Prot. Agency*, 767 F.2d 569, 574 (9th Cir. 1985). The law only requires the disclosure of nonexempt documents, not answers to interrogatories. *Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978). “FOIA creates only a right of access to records, not a right to personal services.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Brown v. F.B.I.*, 675 F. Supp. 2d 122, 129-130 (D.D.C. 2009). As such, OTR had no obligation to answer the questions you presented.

D.C. Code § 2-534(a)(6) (“Exemption 6”)

D.C. Code § 2-534(a)(6) provides for the withholding of “information specifically exempted from disclosure by statute...” Under D.C. Code § 47-1805.04(a),

[I]t shall be unlawful for any officer or employee, or any former officer or employee, of the District to divulge or make known in any manner the amount of income or any particulars relating thereto or the computation thereof set forth or disclosed in any return required to be filed under § 47-1805.01 or information pertaining to the interception of any tax refund pursuant to the provisions of the Project Setoff Liability Act of 1982, The provisions of this subsection shall also be applicable to any federal, state, or local income tax returns or copies thereof and to any other federal, state, or local income tax information either submitted by the taxpayer or otherwise obtained

Similarly, D.C. Code § 47-4406(a), states:

. . . an officer, employee, or contractor, or a former officer, employee, or contractor, of the District of Columbia shall not divulge or make known in any manner the amount of reported value, or any information relating to value or the computation of value, disclosed in a return required to be filed under this title....This subsection shall also be applicable to federal, state, or local tax returns (or copies of these returns) and to federal, state, or local tax information either submitted by the taxpayer or otherwise obtained.

Both statutory provisions explicitly state the information sought as related to an entities’ tax returns. Here, we accept OTR’s representation that the withheld records consist of tax returns and associated tax information which “consists of all information relating to the liabilities and compliance status of particular taxpayers.”

A discussion of the other exemption cited by OTR, D.C. Code § 2-534(a)(1), is reserved at this time.

Conclusion

Based on the foregoing, we affirm the agency's decision and deny your appeal.

This constitutes the final decision of this Office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in Superior Court in accordance with the DC FOIA.

Respectfully,

Mayor's Office of Legal Counsel

cc: William Bowie, OTR Senior Counsel (via email only)