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No. 21-CV-31

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

TAX ANALYSTS, *et al.*,
APPELLANTS,

v.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

Tax Analysts and Aaron Davis (collectively "Tax Analysts") brought this action under the District of Columbia Freedom of Information Act, D.C. Code §§ 2-531 *et seq*. (2001) ("DC FOIA"), seeking copies of private letter rulings issued by the District of Columbia's Office of Tax and Revenue ("OTR"). The trial court granted summary judgment to the District. The issues in this appeal are:

1. Whether Tax Analysts is entitled to access OTR's private letter rulings under DC FOIA where such rulings are, in their entirety, tax information pertaining to a particular taxpayer which is specifically protected from disclosure by statute.

2. Whether the trial court abused its discretion when it denied Tax Analysts' request for an *in camera* review of the private letter rulings where the entire ruling is tax information that may appropriately be withheld and where, even if there were non-exempt information that could be redacted, the resulting document would have little to no informational value.

STATEMENT OF THE CASE

On October 8, 2019, Tax Analysts submitted a request to the Office of the Chief Financial Officer under DC FOIA for copies of all private letter rulings issued by OTR, its sub-agency, from January 1, 2016. JA 7, 57. Asserting, among other reasons, that private letter rulings were statutorily exempt from disclosure, the agency denied the request on November 14, and Tax Analysts unsuccessfully appealed to the Mayor. JA 7-9, 59-63, 79-83. On March 28, 2020, Tax Analysts filed a complaint for declaratory and injunctive relief in the Superior Court to compel production of the private letter rulings. JA 6-10. On July 30, the court determined that a private letter ruling is tax information that D.C. Code § 47-4406 prohibits the District from disclosing. JA 44-46. It concluded that the entirety of private letter rulings were exempt tax information, and in any event, redacting any non-exempt information would result in a document with no informational value. JA 46-47. Accordingly, the court granted judgment to the District, finding that private letter rulings could be withheld in their entirety, and denied Tax Analysts' request that it inspect the rulings *in camera*. JA 47. Tax Analysts timely appealed to this Court. JA 5.

STATEMENT OF FACTS

1. The Legal Framework.

DC FOIA provides "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them." D.C. Code § 2-531. Thus, the Court "construe[s] the statutory disclosure provisions liberally and the statutory exemptions from disclosure narrowly." *Padou v. District of Columbia*, 29 A.3d 973, 980 (D.C. 2011). Because DC FOIA "is modeled on the corresponding federal statute," the Court treats the Federal FOIA "as instructive authority with respect" to similar provisions of DC

FOIA. *Id*. at 982 (internal quotation marks omitted). DC FOIA "provides for full disclosure unless the information requested is exempt under a specific statutory provision." *Barry v. Wash. Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

DC FOIA exempts several matters from disclosure. D.C. Code § 2-534. Among the matters exempted is "[i]nformation specifically exempted from disclosure by statute (other than this section)." *Id*. § 534(a)(6). This exemption applies when the statute "[r]equires that the matters be withheld from the public in such a manner as to leave no discretion to the issue;" or "[e]stablishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id*. § 534(a)(6)(A) & (B). DC FOIA also exempts "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" and "[t]rade secrets and commercial or financial information" "to the extent disclosure would result in substantial harm to the competitive position to the person from whom the information was obtained." *Id*. § 534(a)(1) & (2).

In addition, the District's tax code provides that its employees "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." D.C. Code § 47-4406(a). This prohibition is also "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." *Id.*

2. Tax Analysts' FOIA Request.

Tax Analysts publishes periodicals concerning issues of taxation. JA 7. In October 2019, it submitted a FOIA request for all private letter rulings, among other documents not at issue here, from the beginning of 2016 through the date of its request. JA 7, 57. Private letter rulings are "OTR's response to taxpayer's requests for guidance on specific tax matters." JA 71. They include "personally identifying information and a statement of facts and circumstances provided by the taxpayer upon which the ruling is based, as well as OTR's legal analysis and conclusion as to the matter ruled upon." JA 71. "The ruling may be relied upon by the taxpayer concerning the specific tax matter ruled upon," but "may not be used or cited as precedent" "by any other taxpayer." JA 71.

The agency denied Tax Analysts' request in November, determining that the requested documents were exempt from disclosure under D.C. Code § 2-534(a)(1) because they included trade secrets and commercial or financial information, and D.C. Code § 2-534(a)(6) because they included tax information that was specifically exempt from disclosure by statute—specifically, D.C. Code § 47-4406(a). JA 59-61. Tax Analysts appealed the agency's decision to the Office of the Mayor. JA 62-63. In response, OTR notified the Mayor's office that it had located 24 private letter rulings issued during the requested period and explained the reasons why those rulings were exempt from disclosure under DC FOIA. JA 70-78.

Largely agreeing with OTR, the Mayor's office denied the appeal in January 2020. JA 79-83. It found that District law "protects more than just the tax return itself"; it also "prohibits the disclosure of taxpayer specific taxpayer information." JA 80-81; *see also* JA 80 (citing D.C. Code §§ 47-1805.04, -2018 & -4406). The Mayor's office also found that in addition to taxpayer specific information, private letter rulings contained confidential financial information, which was exempt under D.C. Code § 2-534(a)(1) because it "could give a competitor a view" of the taxpayer's "financial strength" or "problems" and that public disclosure of such information "would result in substantial harm to the competitive position of the taxpayer." JA 81. It also found that non-business taxpayers were protected by the personal privacy exemption, D.C. Code § 2-534(a)(2). JA 81-83. Individual taxpayers have a privacy interest in the information contained in private letter rulings, which includes detailed financial information and an analysis of "a particular tax issue presented by the taxpayer" that "is unique to [his/her] facts and circumstances." JA 82. Furthermore, the Mayor's office found that there was no public interest that outweighed the individual taxpayer's privacy interest because "the facts and circumstances of the specific situation presented by the taxpayer sheds no light on OTR's operations." JA 83. In addition, the Mayor's office reviewed one example of a private letter ruling and found that "redactions of taxpayer identification information, financial data and analysis drawing on the financial data left the document with little to no informational value." JA 83 (internal quotation marks and ellipses omitted).

3. The Superior Court Proceedings.

In March 2020, Tax Analysts filed a complaint in Superior Court for declaratory and injunctive relief to compel production of documents that it contended were improperly withheld under DC FOIA. JA 6-10. In May, the District moved to dismiss the complaint, arguing that private letter rulings are exempt from disclosure under D.C. Code § 2-534(a)(6) because they include tax information that is exempt from disclosure by statute. JA 11-12. Specifically, the District pointed to D.C. Code § 47-4406, which provides that:

> 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 tax 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.

D.C. Code § 47-4406(a). Relying solely on the first sentence in the above-quoted provision, the court found that "tax returns are not at issue" here because "private letter rulings predate tax returns." JA 26-27. Accordingly, on July 30, the court denied the motion to dismiss. JA 27. It also denied as moot Tax Analysts' motion for an *in camera* review of the private letter rulings. JA 29.

In November 2020, the District moved for summary judgment, which Tax Analysts opposed. JA 35-38. Tax Analysts again moved the court to review *in camera* the requested documents. On January 13, 2021, the court granted the District's motion. JA 41-48.

The court began by noting that private letter rulings "contrast with other types of tax guidance provided by OTR, such as tax notices, tax rulings, and declaratory orders, which provide generalized interpretive guidance or decisions made through public administrative proceedings, all of which are available online." JA 42. It next found that D.C. Code § 47-4406 prohibits the disclosure of "not only . . . [tax] returns but also . . . any tax information submitted by the taxpayer, whether it is included in the return or not," and that the statutory provision "leaves no discretion to District officials." JA 45. The court observed that in denying the District's motion to dismiss, it "based its ruling on the first half" of D.C. Code § 47-4406(a) concerning "'any information relating to value or the computation of value, disclosed in a [tax] return,'" whereas in moving for summary judgment the District relied "on the latter half of this provision which states that '[t]his subsection shall also be applicable to federal, state, or local tax returns . . . and to *federal, state, or local tax information* . . . .'" JA 45 n.2 (quoting D.C. Code § 47-4406(a)). Further, the court found that although the statute listed exceptions to disclosure, DC FOIA was not among them and that "none of the other narrow exceptions apply." JA 45. Indeed, the court observed that there are “criminal penalties that attach to anyone who willingly discloses this tax information.” JA 45 (citing D.C. Code § 47-4406(f)).

The court held that a private letter ruling “is tax information” since “it is undisputed” that it is OTR’s response “to private requests by taxpayers for advice on their specific tax circumstances.” JA 45. Accordingly, the court concluded that “[b]ecause this tax information is specifically exempted from disclosure by statute in a manner that leave[s] no discretion on this issue, D.C. FOIA does not entitle [Tax Analysts] to this information.” JA 45-46 (internal quotation marks omitted).

The court rejected Tax Analysts’ argument that it would be entitled to copies of private letter rulings if the phrase “tax information” in D.C. Code § 47-4406(a) were interpreted consistently with federal tax provisions. JA 46. It found that Tax Analysts could not reconcile its claimed entitlement with the definition in 26 U.S.C. § 6103(b)(2)(A), the federal tax provision that it urged the court to apply. JA 46. That provision bars disclosure of a “taxpayer’s identity, the nature, source, or amount of his income . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability.” *Id.* Even under Tax Analysts’ reading, it would not be “entitled to the facts submitted by a taxpayer along with the analysis of those facts if ‘any other data . . . furnished to

[OTR] . . . with respect to the determination, existence, or possible existence of liability' is exempt from disclosure." JA 46 (quoting 26 U.S.C. § 6103(b)(2)(A)).

The court also found that any non-exempt information could not reasonably be segregated from exempt information because private letter rulings "are in their entirety an evaluation of the tax consequences of a taxpayer's financial circumstances." JA 47. Further, even if there was non-exempt information, redacting that information "would [p]roduce an edited document with little informational value." JA 47 (internal quotation marks omitted). Consequently, the court denied Tax Analysts' request for *in camera* review. JA 47.

STANDARD OF REVIEW

This Court reviews de novo the trial court's entry of summary judgment. *Fraternal Order of Police v. District of Columbia*, 82 A.3d 803, 813 (D.C. 2014). Summary judgment is proper "when there are no genuine issues as to any material facts" and the record shows that "the moving party is entitled to judgment as a matter of law." *Doe v. Safeway, Inc.*, 88 A.3d 131, 132 (D.C. 2014). "FOIA cases typically and appropriately are decided on motions for summary judgment." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009).

A trial court's decision to deny a request for *in camera* inspection of documents is reviewed for abuse of discretion. *Crane v. Crane*, 657 A.2d 312, 317 (D.C. 1995).

SUMMARY OF ARGUMENT

1. D.C. Code § 47-4406 requires the District to keep confidential not only information provided on tax returns, but also tax information submitted or obtained, whether included in a tax return or not. Private letter rulings are in their entirety tax information covered by Section 47-4406(a): they are responses to an individual taxpayer's request for guidance on a specific tax matter based on information the taxpayer submitted. Thus, under the plain text of the statute, OTR has no discretion to disclose them to the public. That interpretation is bolstered by the purpose of the provision: taxpayers who provide information to the government for tax purposes rely on the assurance of confidentiality required by the District's tax code, and permitting disclosure might incentivize future taxpayers to avoid reaching out to OTR when they have tax questions for fear that their tax information might become public. Finally, even if there were ambiguity, OTR's interpretation of Section 47-4406(a), a provision of tax law which OTR administers, deserves deference.

Tax Analysts' contrary claims lack merit. Its reliance on the definition of "return information" in a federal tax provision is misplaced. That definition prohibits disclosure of any data received or prepared by the IRS with respect to determining tax liability, so it would actually prevent disclosure of private letter rulings if it applied here. Tax Analysts also mistakenly relies on a D.C. Circuit decision which required the disclosure of the IRS's letter rulings based on a dissimilar federal tax provision that prohibited disclosure of information contained in a federal income tax return alone, unlike the broader District provision applicable here. And although Congress later passed legislation requiring the release of letter rulings and other IRS written determinations, that provision is also dissimilar to D.C. Code § 47-4406, which more broadly prohibits the disclosure of local tax information.

The lower court also correctly found that the statute does not vest discretion in OTR to release private letter rulings. Although Section 4406 lists some narrow exceptions, they do not include DC FOIA and are not otherwise applicable here. Tax Analysts incorrectly asserts that OTR has such discretion, relying on a single public guidance OTR issued almost 20 years ago that was adapted from a private letter ruling, but that sole example does not change the plain meaning of Section 47-4406(a), which explicitly refers to the types of matter that are not to be disclosed—i.e., tax information.

2. The court below did not abuse its discretion in declining Tax Analysts' request to inspect the private letter rulings *in camera*. Having found that the private letter rulings were in their entirety tax information that the agency was prohibited from disclosing, and that redacting any extraneous non-tax information that might exist would result in a document without informational value, the court reasonably concluded that such an inspection was unnecessary. Tax Analysts' belief that an *in*

camera inspection is necessary relies on its incorrect assumption that OTR's analysis of the consequences of a specific taxpayer's tax matter can be disclosed with the taxpayer's name and other identifiers redacted. But the analysis is *also* tax information about a specific taxpayer which is not exempt from disclosure.

3. Consistent with its role as a court of review, this Court should decline Tax Analysts' invitation to undertake an *in camera* inspection of the private letter rulings in the first instance. Further, the Court should decline to consider in the first instance the applicability of the privacy exemption to DC FOIA, which the trial court did not address. If the Court does address that exemption, however, the exemption applies because the taxpayer's privacy interest in his tax information is substantial and is not outweighed by the limited public interest that may exist in disclosing OTR's analysis.

ARGUMENT

I. A Private Letter Ruling Is In Its Entirety Tax Information That Is Specifically Exempted From Disclosure By Statute.

Under DC FOIA, documents are not subject to disclosure where they are "specifically exempted from disclosure by statute . . . provided that such statute . . . [r]equires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." D.C. Code § 2-534(a)(6). Here, D.C. Code § 47-4406(a) specifically exempts from disclosure private letter rulings, so this DC FOIA exemption applies.

This Court "give[s] effect to the plain meaning of the statute" when its language is clear. *Providence Hospital v. D.C. Dep't of Emp. Servs.*, 855 A.2d 1108, 1112 (D.C. 2004). Section 47-4406(a) clearly prohibits the disclosure of private letter rulings. The provision's plain text requires the District to maintain the secrecy not only of tax returns, but also "federal, state, or local tax *information* either submitted by the taxpayer or otherwise obtained." D.C. Code § 47-4406(a) (emphasis added). The definition of the word "information" is broad: it encompasses any "[k]nowledge or facts learned, especially about a certain subject or event." *Knowledge*, Am. Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=information. As the court below explained, "it is undisputed that the Private Letter Rulings . . . are [OTR's] responses to private requests by taxpayers for advice on their specific tax circumstances based on the information they provide to OTR." JA 45. Every aspect of a private letter ruling—whether the facts, the legal analysis, or the conclusion—thus explicitly concerns the tax information of a particular taxpayer. A private letter ruling is therefore in its entirety tax information covered by D.C. Code § 47-4406(a).

The purpose of D.C. Code § 47-4406(a) supports this interpretation. As OTR explained in response to appellants' DC FOIA request, maintaining "confidentiality is one of the cornerstones of sound tax administration, as it encourages taxpayers to provide complete and accurate information to the government for the purposes of determining tax liability." JA 71. Indeed, "[t]axpayer information is one of the most extensively protected types of information received by the government, and taxpayers who provide information to the government for tax purposes rely on the assurance of confidentiality provided by these rules." JA 71. This is likely why numerous other provisions of D.C. law mirror the protections in D.C. Code § 47-4406(a), protecting the secrecy of not simply tax returns, but also tax information obtained by the government more broadly. *See, e.g.*, D.C. Code §§ 47-2018(a)(1) & (2) (provision relating to sales and use taxes making it unlawful for any District employee "to divulge or make known in any manner the amount of gross proceeds or tax due or any particulars relating thereto or the computation thereof," and applying it to "any returns" and "*any other state or local sales tax information either submitted by the taxpayer or otherwise obtained*" (emphasis added)); D.C. Code § 47-1804.04(a) (same as to income tax information); D.C. Code §§ 47-3719(a) & (c) (same as to inheritance or estate tax information). Tax Analysts' narrow interpretation of D.C. Code § 47-4406(a) and other provisions protecting tax information could discourage taxpayers from submitting information to OTR to receive guidance before submitting their tax returns, for fear that the specifics of their tax issues might become public through a private letter ruling.

Even if there were some ambiguity in D.C. Code § 47-4406(a), OTR's determination merits deference. Although this Court reviews legal issues de novo, it "defer[s] to the agency's interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose." *DeVita v. District of Columbia*, 74 A.3d 714, 719 (D.C. 2013) (quoting *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012)); *Sch. St. Assocs. Ltd. P'ship v. District of Columbia*, 764 A.2d 798, 805 (D.C. 2001) ("[W]e owe a level of deference to OTR's interpretation of its governing statute."). "Indeed, [the Court] must sustain the agency's interpretation even if a petitioner advances another reasonable interpretation of the statute or if we might have been persuaded by the alternate interpretation had we been construing the statute in the first instance." *Smith v. D.C. Dep't of Emp. Servs.*, 548 A.2d 95, 97 (D.C. 1988). D.C. Code § 47-4406(a) is a part of the tax code that OTR administers, and its interpretation of the provision is therefore entitled to deference. The agency's determination here that the provision prohibits the public disclosure of private letter rulings is neither unreasonable nor inconsistent with the statute's language or purpose.

In response, Tax Analysts focuses principally on federal statutory provisions and case law to justify its interpretation. Its arguments lack merit.

First, Tax Analysts argues, with little elaboration, that interpreting "local tax information" in D.C. Code § 47-4406(a) consistently with the definition of "return information" in federal tax provisions would "require disclosure of private letter rulings with the names and similar identifiers redacted." Br. 17. But the provisions it cites actually bolster the *District's* interpretation. Specifically, District law defines "[f]ederal tax information" as "a return or return information received directly from the Internal Revenue Service." D.C. Code § 47-4406(h)(3). Federal law, in turn, bars the disclosure of return information, including "any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return *or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person*." 26 U.S.C. § 6103(b)(2)(A) (emphasis added). That final phrase squarely covers private letter rulings. Tax Analysts fails to explain how it is entitled to the facts submitted by a local taxpayer along with OTR's analysis of those facts if "any other data" submitted to or prepared by OTR "with respect to the determination of the existence or possible existence of liability" is exempt from disclosure. *See* JA 46.

Second, Tax Analysts argues that disclosing private letter rulings with names and other identifiers redacted is "consistent with IRS's disclosure obligations," but it relies on irrelevant case authority and a dissimilar federal tax provision. Br. 17. Specifically, in *Tax Analysts and Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974), the D.C. Circuit considered two statutory provisions that made it unlawful to divulge "the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any [federal] income return." *Id.* at 353. The D.C.

Circuit observed that the provisions "are designed to prevent disclosure of information contained *either in the returns or in documents filed in conjunction therewith*"; therefore, it had little difficulty in concluding "that letter rulings are not encompassed in either statute." *Id*. at 354 (emphasis added). Letter rulings, the D.C. Circuit explained, "are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions," and while they may "aid[] in the preparation of their tax returns," they are not a "part of a return." *Id*. Accordingly, the court concluded, the statutes did not prevent the disclosure of letter rulings.

D.C. Code § 47-4406(a) is markedly different from the federal provision at issue in *Tax Analysts and Advocates*. The D.C. prohibition is applicable not only to "any information relating to value or the computation of value, disclosed in a return," but more broadly to "local tax information either submitted by the taxpayer or otherwise obtained." *Id.* The court in *Tax Analysts and Advocates* therefore had no occasion to address the statutory language at issue here, and that decision has little bearing on this case.

Tax Analysts' reliance on 26 U.S.C. § 6110 is similarly misplaced. Br. 18-20. Congress enacted that provision after *Tax Analysts and Advocates* was decided, authorizing for public inspection "a ruling, determination letter, technical advice memorandum, or Chief Counsel advice," as well as "the request for that written determination, any written material submitted in support of the request, and any communication" "in connection with such written determination." 26 U.S.C. §§ 6110(b)(1)(A) & (2). The statute also requires the redaction of "the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person." *Id*. § 6110(c)(1). Tax Analysts is of course correct that this provision authorizes the disclosure of "a whole range of IRS written determinations," Br. 20, but it fails to acknowledge that D.C. law does *not* contain similar provisions. Indeed, while the District looks to interpretations of the federal FOIA statute for guidance in interpreting DC FOIA when considering "parallel provisions" of the District's tax code, Br. 20, federal law is of little help where the "two acts differ," *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1220 (D.C. 2008). Unlike federal law, D.C. law prohibits the disclosure of local tax information and contains no exception for written determinations; federal law therefore sheds no light on the proper scope of D.C. Code § 47-4406(a).

Finally, Tax Analysts challenges the lower court's conclusion that the prohibition set forth in D.C. Code § 47-4406 leaves "no discretion to District officials," as required by D.C. Code § 2-534(a)(6). Tax Analysts argues that "OTR has discretion to disclose redacted private letter rulings," Br. 20, relying on its belief that OTR previously "disclose[d] the contents of private letter rulings with redactions of names and identifiers," Br. 21. This is wrong. Tax Analysts points to a single public guidance issued almost 20 years ago that was *adapted* from a private letter ruling. JA 102-05. But that is not the same as disclosing a private letter ruling itself, and Tax Analysts fails to identify any instance where a private letter ruling was disclosed as such. Br. 21-22. OTR's consistent practice of keeping private letter rulings secret supports its interpretation that District law requires secrecy.

In any event, even if Tax Analysts had identified an instance where OTR publicly disclosed private letter rulings, it is the statute, not any prior mistaken disclosure, that controls whether tax information may be divulged. D.C. Code § 47-4406(a) explicitly refers to the types of matter that are not to be disclosed: "local tax information either submitted by the taxpayer or otherwise obtained." Although the provision does identify instances where disclosure is permitted, D.C. Code §§ 47-4406(b)-(e), DC FOIA is not one of the listed exceptions to non-disclosure and those that are listed are narrow and inapplicable here. Moreover, rather than being subject to the discretion of agency employees, persons willfully violating the statute's secrecy provision are subject to a fine or imprisonment or both. D.C. Code § 47-4406(f). The plain text of these provisions makes clear that OTR has "no discretion" to disclose private letter rulings under DC FOIA, D.C. Code § 2-534(a)(6).[1]

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[1] Tax Analysts also questions why declaratory orders are made public while private letter rulings are not. Br. 22. Unlike private letter rulings, the District's tax code specifically authorizes the issuance of a declaratory order "[o]n petition of any interested person" and directs that the "Chief Financial Officer will publish declaratory orders of general interest." D.C. Code § 2-508; 9 DCMR § 4200.6. There is no similar provision for private letter rulings.

II. The Trial Court Did Not Abuse Its Discretion In Denying *In Camera* Review.

The trial court properly exercised its discretion to deny Tax Analysts' request that it review *in camera* OTR's private letter rulings. The court noted that it was "undisputed that the Private Letter Rulings [Tax Analysts] seek are the [District's] responses to private requests by taxpayers for advice on their specific tax circumstances based on the information they provided to OTR." JA 45; *see* JA 71. Accordingly, the court logically concluded that private letter rulings "are *in their entirety* an evaluation of the tax consequences of a taxpayer's financial circumstances." JA 47 (emphasis added). They do not contain any extraneous non-tax information; instead, as OTR explains on its website, private letter rulings "are OTR's response to taxpayer requests for guidance on specific tax matters." JA 92; *see* JA 93 (setting forth the taxpayer-specific information to be included in a request for a private letter ruling). Given that the entirety of private letter rulings concern tax information about an individual taxpayer, it was unnecessary for the trial court to review the documents *in camera*.

On top of that, because a private letter ruling is the tax information that OTR provides to an individual taxpayer regarding the taxpayer's specific tax circumstances, the court also found that redacting any non-tax information that may exist "would [p]roduce an edited document with little informational value." JA 47. So too did the Mayor's office, which indicated in its order denying Tax Analysts'

FOIA request that it had reviewed one of OTR's private letter rulings and found that the "redactions of taxpayer identification information, financial data and analysis drawing on the financial data left the document . . . with little to no informational value." JA 83 (internal quotation marks omitted). In light of this information, the court properly exercised its discretion to deny Tax Analysts' request that it inspect *in camera* OTR's private letter rulings.

Tax Analysts argues that it raised a genuine dispute as to whether there were non-exempt portions of private letter rulings that could reasonably be segregated from those parts that were exempt, and that the court should have resolved this dispute by reviewing the rulings *in camera*. Specifically, Tax Analysts asserts that "OTR can redact a taxpayer's name and other identifiers while leaving 95 percent of the ruling intact." Br. 24. That is wrong. It is not simply a taxpayer's name and other identifiers that cannot be disclosed. The *ruling itself* is tax information that D.C. Code § 47-4406(a) prohibits the District from disclosing because the ruling concerns OTR's analysis of the specific matter for which the ruling was requested. Having found that private letter rulings "are in their entirety an evaluation of the tax consequences of a taxpayer's financial circumstances," the court properly determined that there was not a genuine dispute as to segregability and that it was appropriate to enter judgment in the District's favor. JA 47.

Tax Analysts also asserts that the court's ruling is at odds with its statement in its earlier order denying the District's motion to dismiss that segregability is a question of fact. Br. 11, 25. But that statement is consistent with the court's denial of summary judgment. The court's summary judgment ruling was based on its finding that D.C. Code § 47-4406 prohibited the disclosure of private letter rulings *in their entirety*. JA 45-47. Segregability was therefore not an issue at all. Further, even if there were some portions of the private letter rulings that could have been segregated, it was self-evident from the undisputed content of private letter rulings that redacting any non-exempt information that may exist would result in a document with little or no informational value. JA 47; *see* JA 83 (the Mayor's office reached the same conclusion after reviewing a private letter ruling). *In camera* review was therefore unnecessary, and denying it was hardly an abuse of discretion.

Finally, Tax Analysts quibbles with the court's citation to *Mays v. Drug Enforcement Administration*, 234 F.3d 1324 (D.C. Cir. 2000). *Mays* found that the federal FOIA exemption for information the disclosure of which could constitute an unwarranted invasion of personal privacy "ordinarily permits the Government to withhold only the specific information to which it applies, not the entire page or document in which the information appears; any non-exempt information must be segregated and released." *Id.* at 1327. That rule is inapplicable to private letter rulings, however, whose entire focus is on responding to a taxpayer's request for information addressing a specific tax matter, and where a statute specifically prohibits the disclosure of such tax information. JA 45-46. In addition, *Mays* recognized an exception when "the exempt and nonexempt information are inextricably intertwined, such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Id*. The court's citation to *Mays* was meant to reinforce its finding that removing any non-tax information from a private letter ruling would "'produce a document with little informational value,'" not that redacting those rulings would impose significant costs on OTR. JA 47 (quoting *Mays*, 234 F.3d at 1327).

III. This Court Should Decline To Conduct An In Camera Review And Should Not Consider An Issue That Was Not Addressed Below.

For the reasons stated above explaining why the lower court correctly denied Tax Analysts' motion for *in camera* review, this Court should decline Tax Analysts' invitation to review OTR's private letter rulings *in camera* as well. Br. 27. Denial is especially prudent because this Court is "a court of review, not [of] first view." *Newell-Brinkley v. Walton*, 84 A.3d 53, 61 (D.C. 2014).

For the same reason, the Court should decline to consider an issue that Tax Analysts acknowledges the trial court did not rule on—OTR's assertion that private letter rulings also contain information which if disclosed would constitute a clearly unwarranted invasion of personal privacy. Br. 27-30. The lower court reasonably found it unnecessary to address this issue since it found that private letter rulings were exempted from disclosure in their entirety by statute. JA 45-47. If this Court concludes that the exception in D.C. Code § 2-534(a)(6) does not apply, it should remand this case to the lower court to consider the applicability of any privacy exception in the first instance.

Even if the issue is considered, Tax Analysts' argument lacks merit. It concedes that there is a privacy interest in the taxpayer's "name and personal identifiers" that warrants redaction. Br. 29. But as OTR pointed out, "because each ruling describes a unique set of circumstances pertaining to the particular taxpayer, simply redacting the taxpayer's name from the ruling" "would not be sufficient to protect the taxpayer's privacy." JA 77; *see Fraternal Order of Police Metro. Police Dep't v. District of Columbia*, 124 A.3d 69, 77 (D.C. 2015) ("[E]ven with names redacted, the disclosure of other personal information may result in an invasion of their privacy because individuals can often be identified through other, disclosed information and the later recognition of identifying details.") (internal quotation marks omitted). Moreover, Tax Analysts has not identified a public interest in disclosure that outweighs the privacy concerns. *See id.* (explaining that requester bears the burden "to demonstrate that disclosure of the withheld information would advance a significant public interest" that "outweighs the privacy concern"). Even if there is a modest public interest in the guidance provided in private letter rulings, that interest is minimal because OTR's guidance addresses only the requester's specific tax circumstances and may not be used as precedent by any other taxpayer. *See* JA 41-42. Further, OTR provides substantial tax guidance on its public website that can assist taxpayers and tax professionals. *See generally Office of Tax and Revenue*, DC.gov, https://otr.cfo.dc.gov/agency/office-tax-and-revenue. Finally, even if additional guidance beyond that provided in OTR's public postings could be gleaned from private letter rulings, it would not overcome the reliance interests of taxpayers who requested OTR's advice and who expected that private letter rulings would in fact remain private.

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 14, 2021, this brief was served through this Court's electronic filing system to:

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