No. 21-CV-31

District of Columbia Court of Appeals

TAX ANALYSTS AND AARON DAVIS,

Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

On Appeal from the Superior Court of of the District of Columbia, Civil Division

JOINT APPENDIX

KARL A. RACINE
Attorney General for the District of Columbia
LOREN L. ALIKHAN
Solicitor General
CAROLINE S. VAN ZILE
Principal Deputy Solicitor General
Office of the Solicitor General
OFFICE OF THE ATTORNEY GENERAL
400 Sixth Street, NW, Suite 8100
Washington, DC 20001
(202) 724-6609
E-mail: carolinevanzile@dc.gov
Attorneys for Defendant-Appellee

Cornish F. Hitchcock
(D.C. Bar No. 238824)
HITCHCOCK LAW FIRM PLLC
5614 Connecticut Avenue, NW, No. 304
Washington, DC 20015
(202) 489-4813
E-mail: conh@hitchlaw.com
Attorney for Plaintiffs-Appellants

March 2021

TABLE OF CONTENTS

2020 CA 001999 B TAX ANALYSTS et al Vs. DISTRICT OF COLUMBIA et al RR

- Case Type:
- Civil II
- Case Status:
- Closed
- File Date:
- 03/23/2020
- Action:
- Complaint for Declaratory Judgment Filed
- Status Date:
- 03/23/2020
- Next Event:
-

All Information | Party | Event | Docket | Receipt | Disposition

Party Information

TAX ANALYSTS
- Plaintiff

- Disposition
  -
  - Disp Date
  -

Alias

Party Attorney
- Attorney
- HITCHCOCK, CORNISH F

DAVIS, AARON
- Plaintiff

- Disposition
  -
  - Disp Date
  -

Alias

Party Attorney
- Attorney
- HITCHCOCK, CORNISH F

DISTRICT OF COLUMBIA
- Defendant

- Disposition
  -
  - Disp Date
  -

Alias

Party Attorney
- Attorney
- TROUT, MATTHEW D

DC OFFICE OF THE CHIEF FINANCIAL OFFICER
- Defendant

- Disposition
  -
  - Disp Date
  -

Alias

Party Attorney
- Attorney
- TROUT, MATTHEW D

Events

Date/Time	Location	Type	Result	Event Judge
07/10/2020 10:00 AM	Courtroom 201	Initial Scheduling Conference-60	Scheduling Conference Hearing Continued	
10/23/2020 10:00 AM	Courtroom 201	Scheduling Conference Hearing	Scheduling Conference Hearing Vacated	

Docket Information

Date	Docket Text	Image Avail.
03/23/2020	Complaint for Declaratory Judgment Filed Receipt: 453859 Date: 03/24/2020	
03/23/2020	eComplaint Filed. Submitted 03/23/2020 18:44. chd Attorney: HITCHCOCK, Mr CORNISH F (238824) TAX ANALYSTS (Plaintiff); AARON DAVIS (Plaintiff);	Image
03/24/2020	Event Scheduled Event: Initial Scheduling Conference-60 Date: 07/10/2020 Time: 10:00 am Judge: RIGSBY, ROBERT R Location: Courtroom 201	
03/24/2020	Issue Date: 03/24/2020 Service: Summons Issued Method: Service Issued Cost Per: $ DISTRICT OF COLUMBIA 1350 Pennsylvania Ave NW WASHINGTON, DC 20004 Tracking No: 5000225598 DC OFFICE OF THE CHIEF FINANCIAL OFFICER 1101 4TH STREET, S.W. SUITE 7000/OFFICE ROOM NUMBER 7606 WASHINGTON, DC 20024 Tracking No: 5000225599	
03/24/2020	Complaint Package eServed to Filer	Image
04/10/2020	Affidavit of Service of Summons & Complaint filed. submitted 04/10/2020 18:29. NB Attorney: HITCHCOCK, Mr CORNISH F (238824) DISTRICT OF COLUMBIA (Defendant);	Image
04/10/2020	Proof of Service Method : Service Issued Issued : 03/24/2020 Service : Summons Issued Served : 03/24/2020 Return : 04/10/2020 On : DISTRICT OF COLUMBIA Signed By : Reason : Proof of Service Comment : Tracking #: 5000225598	

Date	Docket Text	Image Avail.
05/26/2020	Defendants' Opposed Motion to Dismiss the Complaint Filed. Submitted 05/26/2020 17:56. chd Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant);	Image
06/09/2020	Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss Filed. Submitted 06/09/2020 19:58. ajm Attorney: HITCHCOCK, Mr CORNISH F (238824) TAX ANALYSTS (Plaintiff); AARON DAVIS (Plaintiff);	Image
06/16/2020	Defendant Reply Filed. submitted 06/16/2020 15:56. NB Attorney: TROUT, MATTHEW D (1030119)	Image
06/22/2020	Plaintiffs' Opposed Motion for In Camera Review of Records Filed. Submitted 06/22/2020 19:36. TB Attorney: HITCHCOCK, Mr CORNISH F (238824) TAX ANALYSTS (Plaintiff); AARON DAVIS (Plaintiff); DISTRICT OF COLUMBIA (Defendant); Receipt: 457043 Date: 06/23/2020	Image
06/30/2020	Event Resulted: The following event: Initial Scheduling Conference-60 scheduled for 07/10/2020 at 10:00 am has been resulted as follows: Result: Scheduling Conference Hearing Continued Judge: RIGSBY, ROBERT R Location: Courtroom 201	
06/30/2020	Scheduling Conference Hearing Event: Scheduling Conference Hearing Date: 10/23/2020 Time: 10:00 am Judge: RIGSBY, ROBERT R Location: Courtroom 201	
06/30/2020	Scheduling Conference Hearing for 10.23.2020. Signed by Judge Rigsby 6.30.2020. Efiled and Eserved 6.30.2020. IJM.	
06/30/2020	Rescheduling Order signed by J/Rigsby on 06/30/2020. Submitted on 06/30/2020 17:10. KT	Image
07/01/2020	Notice of Hearing Mailed Next Business Day Notice Of Hearing Sent on: 07/01/2020 10:13:25.53	Image
07/06/2020	Defendants' Opposition to Plaintiffs' Motion for In Camera Review of Records Filed. Submitted 07/06/2020 13:15. ajm Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant); DC OFFICE OF THE CHIEF FINANCIAL OFFICER (Defendant);	Image
07/13/2020	Reply Memorandum of Points and Authorities in Support of Plaintiffs' Opposed Motion for In Camera Review of Records Filed. Submitted 07/13/2020 16:15. chd Attorney: HITCHCOCK, Mr CORNISH F (238824) TAX ANALYSTS (Plaintiff); AARON DAVIS (Plaintiff);	Image
07/30/2020	Order Granting in Part Motion to Dismiss Entered on the Docket on 7/30/20. Signed by J. Rigsby on 7/30/20. E-filed and E-served on 7/30/20. AB	
07/30/2020	Order Granting Motion to Dismiss as to District of Columbia Office of the Chief Financial Officer signed by Judge Rigsby submitted 07/30/2020 14:32:50. kc.	Image
07/31/2020	Order Denying Motion for in Camera Review Entered on the Docket on 7/31/2020. Signed by J.Rigsby on 7/31/2020. E-filed and E-served on 7/31/2020. AB	
08/03/2020	Order Denying as Moot Plaintiff's Motion for In Camera Review of Records signed by J/Rigsby on 08/03/2020. Submitted on 08/03/2020 15:54. KT	Image
08/13/2020	Answer to Complaint (Jury Demand) Filed. Submitted 08/13/2020 13:42. ajm Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant);	Image

Date	Docket Text	Image Avail.
09/02/2020	Praecipe to Change Address Filed. Submitted 09/02/2020 11:08. ajm Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant);	Image
09/28/2020	Joint Motion to Waive Civil Rule 16 Requirements and to Approve Stipulated Scheduling Order Filed. Submitted 09/28/2020 15:36. ajm Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant);	Image
09/29/2020	Order Granting Motion to Extend Scheduling Order Entered on the Docket 9.29.20. Signed by J.Rigsby 9.29.2. Efiled and eserved 9.29.20. IJMS	
09/29/2020	Event Resulted: The following event: Scheduling Conference Hearing scheduled for 10/23/2020 at 10:00 am has been resulted as follows: Result: Scheduling Conference Hearing Vacated Judge: RIGSBY, ROBERT R Location: Courtroom 201	
09/29/2020	Order Granting Motion to Waive Civil Rule 16 Requirements and to Approve Stipulated Scheduling Order signed by Judge Rigsby submitted 09/29/2020 17:24:32. kc.	Image
10/19/2020	Certificate Regarding Discovery Filed. Submitted 10/19/2020 15:45. ajm Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant);	Image
11/18/2020	Motion To Extend Filed. submitted 11/18/2020 12:00. NB Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant); DC OFFICE OF THE CHIEF FINANCIAL OFFICER (Defendant);	Image
11/23/2020	Defendant District of Columbia's Opposed Motion for Summary Judgment Filed. Submitted 11/23/2020 15:37. TB Attorney: OKEREKE, CHRISTINA (219272) Attorney: TROUT, MATTHEW D (1030119)	Image
11/23/2020	Additional eFiling Document to Defendant District of Columbia's Opposed Motion for Summary Judgment Filed. Submitted 11/23/2020 15:37. TB Attorney: OKEREKE, CHRISTINA (219272) Attorney: TROUT, MATTHEW D (1030119)	Image
11/24/2020	Order Granting Motion to Extend Scheduling Order Entered on the Docket on 11.24.20. Signed by J.Rigsby on 11.24.20. Efiled and Eserved on 11.24.20. BGL	
11/25/2020	Order Granting Motion to Extend Scheduling Order signed by J/Rigsby. submitted 11/24/2020 14:08. NB	Image
12/04/2020	Plaintiffs Opposed Motion for in Camera Review of Records Filed submitted 12/4/2020 14:02pm. ae Attorney: HITCHCOCK, Mr CORNISH F (238824) Receipt: 464491 Date: 12/07/2020	Image
12/04/2020	Additional eFiling Document to Plaintiffs Opposed Motion for in Camera Review of Records Filed submitted 12/4/2020 14:02pm. ae Attorney: HITCHCOCK, Mr CORNISH F (238824)	Image
12/15/2020	Plaintiffs' Praecipe Filed. submitted 12/15/2020 13:55. NB Attorney: HITCHCOCK, Mr CORNISH F (238824) TAX ANALYSTS (Plaintiff); AARON DAVIS (Plaintiff);	Image
12/15/2020	Praecipe Filed. Submitted 12/15/2020 16:00. mq Attorney: TROUT, MATTHEW D (1030119) DISTRICT OF COLUMBIA (Defendant);	Image
12/18/2020	Defendant District of Columbia's Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment Filed. submitted 12/18/2020 16:02. TB Attorney: OKEREKE, CHRISTINA (219272) Attorney: TROUT, MATTHEW D (1030119)	Image

Date	Docket Text	Image Avail.
01/13/2021	Order Granting Motion for Summary Judgment Entered on the Docket on 1.13.21. Signed by J.Rigsby on 1.13.21. Efiled and Eserved on 1.13.21. BGL	
01/13/2021	Judgment entered on the docket on 1.13.21. Signed by J.Rigsby on 1.13.21. Efiled an Eserved on 1.13.21. BGL	
01/13/2021	Judgment by Court Entered on Docket	
01/13/2021	Order Granting Motion for Summary Judgment Signed by J.Rigsby on 1/13/2021 Submitted on 1/13/2021 14:04PM. dd	Image
01/13/2021	Judgment Order Signed by J.Rigsby on 1/13/2021 Submitted on 1/13/2021 14:09PM. dd	Image
01/14/2021	Notice of Appeal Filed. Submitted 01/14/2021 13:41. ajm Attorney: HITCHCOCK, Mr CORNISH F (238824) TAX ANALYSTS (Plaintiff); AARON DAVIS (Plaintiff); Receipt: 466322 Date: 01/15/2021 Notice of Appeal filed by plaintiffs; on the order entered on 1/13/2021; emailed to the District Court of Appeals.	Image

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
453859	03/24/2020	HITCHCOCK, Mr CORNISH F	$120.00
457043	06/23/2020	HITCHCOCK, Mr CORNISH F, Attorney	$20.00
464491	12/07/2020	HITCHCOCK, Mr CORNISH F, Attorney	$20.00
466322	01/15/2021	HITCHCOCK, Mr CORNISH F, Attorney	$100.00
Total	Total	Total	Total $260.00

Case Disposition

Disposition	Date	Case Judge
Judgment-by Court Entered on Docket	01/13/2021	

Filed
D.C. Superior Court
03/23/2020 15:04PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS
400 South Maple Avenue, Suite 400
Falls Church, VA 22046
(703) 533-4400, and

AARON DAVIS
2231 Cedar Cove Court
Reston, VA 20191
(703) 533-4400,
Plaintiffs,

v. — Case No. 2020 CA 001999 B

DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 727-2643, and

DISTRICT OF COLUMBIA OFFICE OF THE CHIEF FINANCIAL OFFICER
1101 4th Street, S.W.
Suite 7000/Office Room Number 7606
Washington, DC 20024
(202) 442-6515,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a complaint for declaratory and injunctive relief to compel the production of records that were improperly withheld under the District of Columbia Freedom of Information Act ("DC FOIA"), D.C. Official Code § 2-531 *et seq.*

Jurisdiction

2. This Court has jurisdiction under D.C. Official Code § 2-537(a)(1).

Parties

3. Plaintiff Tax Analysts is a leading publisher of periodicals dealing with taxation issues. Founded in 1970 as a District of Columbia non-profit corporation, Tax Analysts has its principal place of business in Falls Church, Virginia. Its periodicals include the weekly magazine *Tax Notes State* and the daily online publication, *Tax Notes State Today*. Tax Analysts serves a readership of 100,000 tax professionals by regularly reporting on taxation-related developments, including news in the District of Columbia.

4. Plaintiff Aaron Davis is a reporter for Tax Analysts. He made the DC FOIA request for the records at issue here on behalf of Tax Analysts.

5. Defendant District of Columbia is a municipal corporation.

6. Defendant District of Columbia Office of the Chief Financial Officer ("OCFO") is an agency of the District of Columbia. It is a "public body" that is subject to the DC FOIA. OCFO has custody of the records sought by plaintiffs, and OCFO denied plaintiffs' request for access to these records.

Facts

7. On 8 October 2019, plaintiffs submitted a request to OCFO seeking: "All private letter rulings (PLRs), general information letters (GILs) and technical advice memoranda (TAM) created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019."

8. OCFO denied the request on 14 November 2019. OCFO stated that the records could be withheld in their entirety under two of the DC FOIA's exemptions

that allow agencies to withhold records:

(a) "Exemption 1," which allows public bodies to withhold confidential business records, as specified in D.C. Official Code § 2-534(a)(1),and

(b) "Exemption 6," which allows public bodies to withhold records that are "specifically exempted from disclosure by statute (other than this section), 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" as specified in D.C. Official Code § 2-534(a)(6)(A).

9. On 20 November 2019, plaintiffs appealed the OCFO's decision to the Mayor.

10. By letter dated 16 December 2019, the OCFO responded to plaintiffs' appeal. OCFO stated for the first time that OCFO could not locate any "general information letters" or "technical advice memoranda."

11. OCFO did, however, identify 24 "private letter rulings" as being responsive to plaintiffs' request. According to the OCFO web site, https://otr.cfo.dc.gov/page/private-letter-rulings-tax-and-law-guidance: "Private Letter Rulings are the official tax positions of the Office of Tax and Revenue (OTR). The rulings are OTR's response to taxpayer requests for guidance on specific tax matters. A ruling may be relied upon by a taxpayer concerning a specific tax matter, since the ruling binds OTR as to the specific tax matter."

12. In denying access to these private letter rulings, OCFO reiterated its reliance on Exemptions 1 and 6. OCFO cited as an additional basis to withhold the

records the DC FOIA's "Exemption 2," which allows public bodies to withhold records if disclosure would lead to a "clearly unwarranted invasion of personal privacy," as specified in D.C. Official Code § 2-534(a)(2),

13. On 14 January 2020, the Mayor's Office of Legal Counsel (the "Mayor's Office") issued a letter dismissing plaintiffs' appeal. The Mayor's Office agreed with OCFO that the three cited exemptions allowed OCFO to withhold the 24 PLRs in their entirety.

14. If portions of a requested record are exempt from the disclosure, the DC FOIA requires public bodies to redact exempt portions and to provide any "reasonably segregable portion of a public record . . . after deletion" of exempt portions. D.C. Official Code § 2-534 (b). The Mayor's Office determined that redactions of exempt portions of the PLRs would leave the PLRs "with little to no informational value," and accordingly the PLRs could be withheld in their entirety.

15. Plaintiffs asked the Mayor's Office to reconsider its decision by letter dated 4 February 2020. That letter cited precedents that contradicted OCFO's arguments and its effort to withhold the PLRs in their entirety. The Mayor's Office did not respond either to that letter or to several telephone calls inquiring about the status of the matter.

16. Plaintiffs lack an adequate remedy at law and are entitled to injunctive relief.

<u>Cause of Action</u>

17. Plaintiffs repeat and re-allege the facts contained in paragraphs 1

through 16 of this Complaint.

18. Defendants' failure to produce the requested records is a violation of the DC FOIA.

Prayer for Relief

WHEREFORE, for these reasons, Plaintiffs respectfully requests the Court to—

(a) Enter declaratory relief stating that defendants have improperly withheld the records requested by plaintiffs;

(b) Grant injunctive relief barring defendants from continuing to withhold the requested records from plaintiffs;

(c) Award plaintiffs' their attorneys' fees and costs pursuant to D.C. Official Code § 2-537(c); and

(d) Grant such other and further relief that the Court may deem just and proper.

Cornish F. Hitchcock

Cornish F. Hitchcock (DC Bar No. 238824)
Hitchcock Law Firm PLLC
5614 Connecticut Avenue, NW N0. 304
Washington, DC 20015-2604
(202) 489-4813 - (202) 315-3552 (fax)
conh@hitchlaw.com
Attorney for Plaintifs

23 March 2020

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALAYSTS, *et al.*, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et al.*, *Defendants.*	2020 CA 001999 B Judge Robert R. Rigsby Next Event: Initial Scheduling Conference Next Date: July 10, 2020

DEFENDANTS' OPPOSED MOTION TO DISMISS THE COMPLAINT

Defendants District of Columbia and District of Columbia Office of the Chief Financial Officer respectfully submit this motion to dismiss the Complaint pursuant to Super. Ct. Civ. R. 12(b)(6). Plaintiff fails to state a claim under the Freedom of Information Act as the documents requested are legally exempt from disclosure. Additionally, the Office of the Chief Financial Officer is *non sui juris.* In support of this motion, Defendants submit the attached memorandum of points and authorities. A proposed order is also attached.

Date: May 26, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ *Christina Okereke*
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section II

/s/ *Matthew Trout*
MATTHEW TROUT [1030119]
Assistant Attorney General

441 Fourth Street, N.W.
Suite 630 South
Washington, D.C. 20001
(202) 724-5695
(202) 724-6590 (fax)
matthew.trout1@dc.gov

Counsel for Defendants

RULE 12-I CERTIFICATION

On May 22, 2020, and May 26, 2020, undersigned counsel contacted counsel for Plaintiffs via email to request Plaintiffs' consent to the relief sought in this motion. Undersigned has received no response to date.

/s/ *Matthew Trout*
MATTHEW TROUT

CERTIFICATE OF SERVICE

On May 26, 2020, I served a copy of the foregoing Motion to Dismiss and the accompanying memorandum of points and authorities and proposed order via CaseFileXpress upon:

Cornish F. Hitchcock
Counsel for Plaintiffs

/s/ *Matthew Trout*
MATTHEW TROUT

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS v and AARON DAVIS, Plaintiffs, v. DISTRICT OF COLUMBIA *et al.*, Defendants.	)))))))	 No.: 2020 CA 1999 B Judge Rigsby Next event: Initial scheduling conference Next date: July 10, 2020

DECLARATION OF AARON DAVIS

Aaron Davis hereby declares and states as follows.

1. My name is Aaron Davis. I reside in Reston, Virginia, and I am a plaintiff in this case. I am submitting this declaration in response to defendants' motion to dismiss on behalf of myself and plaintiff Tax Analysts, a non-profit publisher of periodicals relating to taxation, which is based in Falls Church, Virginia.

2. Tax Analysts was founded in 1970, and its publications serve 100,000 tax professionals in law firms, accounting firms, corporations and government agencies. Our weekly periodical, *Tax Notes State*, and its daily online publication, *Tax Notes Today State*, report on developments affecting the tax laws and policies of the 50 states. I am a reporter for *Tax Notes Today State*, and I report on developments in the area of state taxation in several jurisdictions, including the District of Columbia.

3. On October 8, 2019, Tax Analysts and I submitted a request under the Freedom of Information Act ("FOIA") to the Office of the Chief Financial Officer ("OCFO"), seeking several categories of record, including the records at issue in this case, namely, "[a]ll private letter rulings (PLRs)" that had been "created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019." OCFO denied the request on

November 14, 2019, relying on an FOIA exemption for confidential business records, as well as the sole exemption upon which defendants seek dismissal, namely, D.C. Code § 2-534(a)(6)(A), which allows public bodies to withhold records that are "specifically exempted from disclosure by statute," provided that the statute in question "[r]equires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." The statute cited by OCFO that allegedly meets this criterion is D.C. Official Code § 47-4406, entitled *Secrecy of returns.* A copy of the correspondence is attached as Plaintiffs' Exhibit ("Pl. Ex.") 1.

5. We appealed that denial to the Mayor's Office of Legal Counsel in a letter attached as Plaintiffs' Exhibit 2. In response, OCFO advised the Mayor's office that there were 24 "private letter rulings" that were responsive to our request. OCFO defended its refusal to provide these documents by reiterating its reliance on the two FOIA exemptions just cited and added a third claim, namely, that our request could be denied under an exemption designed to prevent against a "clearly unwarranted invasion of personal privacy." A copy of that letter is attached as Plaintiffs' Exhibit 3. The Mayor denied our appeal on January 14, 2020 in a letter attached as Plaintiffs' Exhibit 4. We sought reconsideration in a letter attached as Plaintiffs' Exhibit 5, but the Mayor's office did not respond.

6. OCFO's Office of Tax and Revenue ("OTR") publishes a web page entitled *Tax Law and Guidance*, which is available at https://otr.cfo.dc.gov/page/tax-law-and-guidance (accessed June 4, 2020), and a copy is reproduced here as Plaintiffs' Exhibit 6. OTR's *Tax Law and Guidance* page has a microsite entitled *Private Letter Rulings* that describes private letter rulings this way: "Private Letter Rulings are the official tax positions of the Office of Tax and Revenue (OTR). The rulings are OTR's response to taxpayer requests for guidance on specific tax matters. A ruling may be relied upon by a taxpayer concerning a specific tax matter, since the ruling

binds OTR as to the specific tax matter." This page is available at https://otr.cfo.dc.gov/page/private-letter-rulings-tax-and-law-guidance/ (accessed June, 4, 2020), and a copy is attached as Plaintiffs' Exhibit 7.

7. In this regard OTR's use of private letter rulings is similar to the practice of most state revenue departments, as well as the Internal Revenue Service, in that taxpayers may request and receive written guidance about how the agency believes that the tax laws apply to a particular situation or transaction. Private letter rulings may thus help the taxpayer structure a transaction, resolve a private dispute, or otherwise act in accordance with the advice provided by the agency.

8. I have reviewed private letters rulings issued by the IRS and several other state revenue departments. The PLRs issued by these agencies tend to follow a fairly standard format, with a recitation of the pertinent facts, a statement of the question presented, a legal analysis of the facts, and the agency's conclusion. The name of the taxpayer or the taxpayer's business, as well as personal identifiers, are generally redacted in the public versions of these rulings that are made public. As examples, I attach as Plaintiffs' Exhibit 8 two "private letter rulings" taken from the IRS website.

9. The publication of redacted versions of such private letter rulings thus harmonizes two important policy goals: (1) providing guidance to the taxpaying public, and (2) protecting the privacy of the individual taxpayer who has requested the guidance.

10. I understand that OTR is relying on a statute that is said to protect the "secrecy of returns." Requests for a private letter ruling, any supporting documentation, and the text of the ruling itself are submitted independently of the filing of any return. The purpose of such rulings is often to provide guidance *in advance of* the filing of any return. For example, if a taxpayer deems the position in a private letter ruling as unfavorable to the taxpayer's position, the

taxpayer may abandon the proposed transaction or may structure it differently.

11. As noted above, OTR views PLRs as binding on the agency as to the taxpayer who requests one. PLRs issued by other revenue agencies may or may not be binding, depending on applicable law. For example, the IRS treats its private letter rulings as non-precedential. Regardless of any official status, however, PLRs can be very valuable to taxpayers and tax professionals because they provide guidance as to the agency's thinking about the tax consequences of a specific situation or transaction. It is no secret that tax law can be exceedingly complex. Guidance from a taxing authority can help taxpayers decide how to proceed and possibly avoid litigation.

12. In 2012 Tax Analysts conducted an in-depth survey of disclosure and transparency practices of the revenue departments of the 50 states and the District of Columbia. Tax Analysts published a report stating that approximately 45 states and the District of Columbia offer private letter rulings, and of those about 35 make them available for the public, typically by publishing a redacted version on the department of revenue's website. The redacted versions typically omit the taxpayer's name and personal identifiers, thus protecting taxpayer privacy under laws similar to D.C. Code § 47-4406, which is cited here. The District of Columbia and seven states were in the minority by not making letter rulings publicly available, even with redactions.

13. Since that time the Council on State Taxation ("COST"), a non-profit membership group that focuses on state taxation issues, issues a periodic scorecard on tax administration policies in the 50 states and the District of Columbia. According to COST's most recent survey, published in May 2020, 47 states and the District of Columbia are willing to offer private letter rulings or other written guidance if requested by a taxpayer; 36 of those states publish these rulings (with redactions). The District of Columbia and ten state revenue departments do not

routinely publish redacted versions of their rulings. The COST report, entitled *The Best and Worst of Tax Administration*, is available at https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-studies-articles-reports/admin-scorecard-final-may-2020.pdf

14. As I understand defendants' argument, OTR has no discretion under D.C. Code § 47-4406 to disclose the contents of private letter rulings, even if they are redacted to remove the taxpayer's name and any identifiers. OTR is also arguing that protected tax information in these PLRs is so "inextricably intertwined" with any non-exempt portions that OTR cannot engage in redacting exemption portions and produce "reasonably segregable" non-exempt portions. Instead, we are told, PLRs must be withheld in their entirety. In response, I note the following facts.

15. OTR's web page on private letter rulings (Pl. Ex. 7) states: "While a ruling is applicable solely to the taxpayer to which it is directed and may not be used by any other taxpayer, *rulings provide guidance to other District taxpayers as to the interpretation and development of the DC Tax Code*" (emphasis added). OTR's web page does not explain how "other District taxpayers" can benefit from PLRs if OTR is forbidden by statute from disclosing PLRs, even in redacted form.

16. I am aware of at least one instance in which OTR has published a document called a "General Counsel Memorandum," which states that it was "originally issued as a private letter ruling." This memorandum, entitled *Sales Tax on Hotel Attrition Fees and Cancellation Fees,* contains the standard elements of a private letter ruling, i.e., the issues to be decided, OTR's conclusion, the pertinent facts, the taxpayer's argument and OTR's legal analysis. This four-page memorandum is available on the OTR web site at https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/hotel_attrition_fees.p

df. (accessed June 4, 2020) and is attached as Plaintiffs' Exhibit 9.

17. This memorandum redacts the names and potential identifiers of the parties. The memorandum does not name the hotel or the convention client, but refers to them only as "HOTEL" or "CLIENT" and contains statements such as "Convention CLIENT entered into a contract with HOTEL for the reservation of **X** number of rooms for **Y** number of days in the month of **Z.** If this example is any indication, OTR can redact identifiers and issue PLRs that protect taxpayer privacy while providing significant guidance.

18. In addition, in January 2015 Tax Analysts e-mailed OCFO in an attempt to follow up on its earlier reporting regarding the availability of PLRs. In response, Aaishah Hashmi, a lawyer at OTR advised that "we don't publish them." In a follow-up e-mail, Mr. Hashmi stated: "We sometimes convert PLR to Notices which are then published on our website under "Law & Guidance," another OTR web page. A copy of the e-mail thread from January 2015 is attached as Plaintiffs' Exhibit 10.

19. Apart from private letter rulings, OTR allows taxpayers to request and obtain "declaratory orders" that opine on the tax treatment of certain events or transactions in much the same way as private letter rulings. As with PLRs, these orders omit or redact the name of the petitioner/taxpayer, and they are deemed binding on OTR as to the requesting taxpayer. As with PLRs, the format includes the issues presented, the pertinent facts and the legal analysis of the issue. Unlike PLRs, however, these declaratory orders are posted on the OTR web page and are available on a web page entitled *Declaratory Orders*, which is a microsite of OTR's *Tax Law and Guidance* page. That page has links to two declaratory orders, which are available at https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/2015-02%20DO%20Response%20Redacted.pdf and

https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/DO201301.pdf and are attached as Plaintiffs' Exhibit 11.

20. OTR's *Tax Law and Guidance* page (Pl. Ex. 6)also has a microsite entitled *Tax Rulings*, which contains five "revenue rulings" that state OTR's official position on certain tax situations. At least one of these rulings (Revenue Ruling 2007-02) was issued in response to a taxpayer request, specifically, a request from a Presidential appointee, who could be removed from office only for cause, as to whether he or she was obligated to pay the District of Columbia's income tax. This is an example of how OTR can respond to a taxpayer request in a manner that does not disclose the taxpayer's identity or personal identifiers, even in situations that describes a situation faced by only a small number of taxpayers. A copy of this ruling is available at file:///D:/Tax%20Analysts/DC%20PLR/Rev%20Ruling_pres%20appointee.pdf and is attached as Plaintiffs' Exhibit 12.

21. Based on my review of these documents, as well as PLRs issued by other taxing authorities, the contents of OTR's declaratory orders and tax rulings are functionally the same as the contents of a private letter ruling, in that both set out the issue and the pertinent facts and statutes, along with a legal analysis and conclusion. OTR's denial of our request did not explain why OTR is free to publish declaratory orders with personal identifiers redacted, but considers the publication of PLRs, even with redactions, as absolutely forbidden by D.C. Code § 47-4406.

22. OTR's denial of our request also failed to explain why OTR can publish rulings that fully examine the legal issues and OTR's analysis, but then claim that PLRs are written in a way that makes non-exempt material portions of the ruling "inextricably intertwined" with exempt portions that may withheld to protect taxpayer privacy.

23. I believe that the rulings attached to this declaration show that redaction can be

done in ways that make letter rulings understandable and useful to taxpayer and practitioners. I note too that OTR issued a Notice in July 2002 entitled *Recall and Review of OTR Rulings*, in which OTR stated that it "would conduct a review of all rulings relating to taxes administered by OTR," and would "determine whether a ruling is of general applicability and should be made available to all taxpayers, or released (in sanitized form) pursuant to the Freedom of Information Act." A copy is attached as Plaintiffs' Exhibit 13.

Aaron Davis

_________________________________)

COMMONWEALTH OF VIRGINIA)

Subscribed and sworn before me this 9th day of June, 2020.

Notary Public

VICTORIA ANN BERENS
NOTARY PUBLIC
REGISTRATION #7833038
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES JULY 31, 2023

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS and AARON DAVIS, Plaintiffs,	)	
	)	
v.	)	No.: 2020 CA 1999 B
	)	Judge Rigsby
DISTRICT OF COLUMBIA *et al.*, Defendants.	)	Next event: Initial Scheduling Conference Next date: July 10, 2020

PLAINTIFFS' OPPOSED MOTION FOR *IN CAMERA* REVIEW OF RECORDS

Plaintiffs In this Freedom of Information Act ("FOIA") case hereby move for entry of an order requiring defendants to submit the requested private letter rulings ("PLRs") for *in camera* review by this Court. Such *in camera* review is expressly authorized in D.C. Code § 2-537(b) in order to let the trial court determine whether such records or any part thereof shall be withheld under any of the exemptions"in the FOIA.

As we explain more fully in the accompanying memorandum of points and authorities, *in camera* review is warranted in light of assertions in defendants' pending motion to dismiss that (1) the requested records are exempt in their entirety because they contain information that must by law be kept confidential; and (2) to the extent that any portions of these records are not exempt from disclosure, it is impossible to make those portions public because they are "inextricably intertwined" with exempt portions.

Plaintiffs responded to these assertions with an affidavit and exhibits rebutting the factual bases of those claims. Defendants submitted no affidavits or evidence in reply. Under the circumstances, and at a minimum, these factual disputes warrant an *in camera* review to assess the validity of the assertions in defendants' motion to dismiss.

Accordingly, plaintiffs respectfully request that this motion be granted. A proposed order accompanies this motion

Rule 12-I Certification

Counsel have conferred, and defendants intend to oppose this motion.

Respectfully submitted,

/s/ ______________________________

Cornish F. Hitchcock (D.C. Bar No. 238824)
Hitchcock Law Firm PLLC
5614 Connecticut Avenue, NW, No. 304
Washington, DC 20015
(202) 489-4813 • conh@hitchlaw.com
Attorney for Plaintiffs

Dated: __ June 2020

CERTIFICATE OF SERVICE

On 22 June 2020 I caused a copy of this motion, supporting memorandum and proposed order to be served via CaseFilExpress upon Matthew Trout, attorney for defendants.

/s/ ______________________________
Cornish F. Hitchcock

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS, et al., *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et. al.*, *Defendants*.	Case No. 2020 CA 001999 B Judge Robert R. Rigsby

ORDER

This matter is before the Court on the Defendants District of Columbia ("the District") and District of Columbia Office of the Chief Financial Officer's ("OCFO") Motion to Dismiss the Complaint ("Motion"), filed on May 26, 2020. Upon consideration of Defendant's motion and the entire record herein, Defendants' Motion to Dismiss is **GRANTED** with respect to Defendant OFCO and **DENIED** with respect to the District, for the reasons set forth below.

BACKGROUND

Plaintiff Tax Analysts is a non-profit publisher of periodicals dealing with taxation issues, and Plaintiff Aaron Davis is a reporter for Tax Analysts. Compl. ¶ 3-4. Plaintiffs submitted a request for information under the District of Columbia's Freedom of Information Act ("D.C. FOIA") for various records including, at issue in this case, "all private letter rulings (PLRs). . . created by the District of Columbia's Office of Tax and Revenue ["OTR"] between January 1, 2016 and October 8, 2019." Compl. ¶ 7. PLRs are "OTR's response to taxpayer requests for guidance on specific tax matters." Compl. ¶ 11. PLRs may be relied upon by individual taxpayers concerning specific tax matters, since the ruling binds OTR as to a specific tax matter. *Id.*.

After plaintiffs' request was denied, plaintiffs appealed to the Mayor; in response, OTR identified "24 private letter rulings that are responsive to Tax Analysts' request" but denied access, citing FOIA exemptions protecting confidential business information under D.C. Code § 2-534(a)(2), information that would lead to a "clearly unwarranted invasion of personal privacy" under D.C. Code § 2-534(a)(2), and information that is "specifically exempted from disclosure by statute (other than this section)" under D.C. Code § 2-534(a)(6)(A) Pl. Ex. 3. The Mayor's office, after examining one of the rulings in camera, upheld the OTR's denial. A request for reconsideration went unanswered. Complaint ¶¶8-13, 15. Plaintiffs then filed a Complaint for declaratory and injunctive relief under D.C. FOIA seeking a declaration that the 24 PLRs were wrongfully withheld by Defendants and requesting an injunction prohibiting the District from continuing to withhold the documents that Plaintiffs requested. Defendants then filed the instant Motion to Dismiss.

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *See Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007). A plaintiff's complaint must contain a short and plain statement of the claim for relief, such that the complaint "puts the defendant on notice of the claim against him." *Sarete, Inc. v. 1344 U St. Ltd. P'Ship*, 871 A.2d 480, 497 (D.C. 2005); *see generally* Super. Ct. R. Civ. P. 8(a). A complaint must, at a minimum, contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Super. Ct. Civ. R. 8(a)(2).

When considering a motion to dismiss, the Court must accept as true all of the allegations put forth in the complaint, and construe all facts and inferences in favor of the non-moving party. *See Murray v. Wells Fargo Home Mort.*, 953 A.2d 308, 316 (D.C. 2008). Dismissal for failure to state a claim upon which relief can be granted is warranted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. *See id.* However, the allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Additionally, the complaint must provide more than mere labels and legal conclusions couched as fact. *See Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). The complaint need not include "detailed factual allegations," but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Mazza v. House Craft, LLC*, 18 A.3d 786, 790 (D.C. 2011).

DISCUSSION

Defendant OCFO is Non Sui Juris

As an initial matter, Defendant seeks dismissal of the Complaint as to the OCFO on the ground that OCFO is *non sui* juris. Plaintiffs do no oppose OCFO's dismissal. Accordingly, the Defendants' Motion is **GRANTED** as to defendant OCFO and the Complaint shall be **DISMISSED** as to defendant OCFO.

Section 47-4406 Does Not Prohibit the Disclosure of PLRs

"The District of Columbia FOIA. . . .was modeled on the corresponding federal statute, 5 U.S.C. § 552 (1982), and many of its provisions closely parallel those of the federal act." *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Like the federal FOIA, the D.C. FOIA embodies a strong policy that favors the disclosure of information related to governmental affairs and the acts of public officials. *Id.* This policy "requires the courts to read narrowly any statutory exemptions from disclosure." *Id.* (citing *Dunhill v. Director, District of Columbia Department of Transportation*, 416 A.2d 244, 247 n.5 (D.C. 1980)). "The act provides for full disclosure unless the information requested is exempted under a specific statutory provision; in the absence of a statutory exemption, a court has no general equitable power to prevent disclosure under FOIA of public documents and records." *Id.* (citing *Washington Post Co. v. United States Department of State*, 222 U.S. App. D.C. 248, 250, 685 F.2d 698, 700 (1982), *cert. granted*, 464 U.S. 812, 104 S. Ct. 65, 78 L. Ed. 2d 80, *vacated as moot*, 464 U.S. 979, 104 S. Ct. 418, 78 L. Ed. 2d 355 (1983)). The Court has no power to create additional exemptions from disclosure. *Id* Finally, "any doubts about the applicability of a particular exemption must be resolved in favor of disclosure." *Id.* (citing *Hawkes v. Internal Revenue Service*, 467 F.2d 787, 795-796 (6th Cir. 1972)). Judicial review of an agency's decision under D.C. FOIA is *de novo*, the burden is on the agency to sustain its decision, and the court may examine the withheld documents *in camera* in order to assess any exemption claims. D.C. Code §2-537(b).

Defendants argue that Plaintiffs' complaint must be dismissed because the documents at issue, 24 PLRs, are exempt from disclosure under D.C. Code 47-4406, which governs the secrecy of tax returns. Defendants claim that the section 47-4406 is a separate statute that specifically exempts the PLRs from disclosure thus qualifying as an exemption under D.C. FOIA section § 2-534(a)(6)(A). Defendants reading of section 47-4406 is too broad.

Section 47-4406 state in relevant part that "an officer, employee, or contractor, or 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." D.C. Code 47-4406. As the text and the title of section 47-4406 indicate the provision governs the "secrecy of returns" or " the amount of reported value, or any information relating to value or computation of value" disclosed in a tax return. Here, private letter rulings predate tax returns, therefore tax returns are not at issue. A taxpayer in a PLR is generally seeking advice on how a certain fact pattern should be treated under D.C. tax law when filing a hypothetical future return. As Plaintiffs point out in their opposition, the taxpayer may upon receipt of a PLR decide not to pursue a specific transaction and thus there would be no "information disclosed" about such a transaction in "a return to be filed." D.C. Code 47-4406. Accordingly, section 47-4406 does not prevent the disclosure of the information contained in PLRs.

Defendants next argue that any non-exempt information contained in the PLRs is not reasonably segregable from exempt portions, such that they are excused from producing the non-exempt material. The Court has ruled that the section 47-4406 does not prevent the disclosure of PLRs and that is the only basis advanced by Defendants to withhold information in the instant Motion. Additionally, any determination of whether a document contains exempt information that is reasonably segregable from non-exempt information requires review of the specific document at issue, which is a question of fact that is not currently before the Court. Accordingly, Defendants' Motion to Dismiss as to the District is **DENIED**.

CONCLUSION

Accordingly, and based on the entire record herein, it is this the 30th day of July, 2020, hereby

ORDERED that defendants' Motion to Dismiss is **GRANTED** as to District of Columbia Office of the Chief Financial Officer; and it is further

ORDERED that defendants' motion to dismiss is **DENIED** as to defendant District of Columbia.

SO ORDERED.

Robert R. Rigsby, Associate Judge
Superior Court of the District of Columbia

Copies to:

Counsel of Record Via CaseFileXpress

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSISTS ET AL, *Plaintiffs*, v. DISTRICT OF COLUMBIA ET AL., *Defendants*.	Case No. 2020 CA 001999 B Judge Robert R. Rigsby

ORDER

This matter is currently before the Court on Plaintiffs' Motion For In Camera Review Of Records. Plaintiffs sought review of certain records at issue in this matter in light of arguments made in Defendants Motion to Dismiss filed on May 26, 2020. In light of this Court's denial of Defendant's Motion to Dismiss, Plaintiffs' Motion for In Camera Review is now moot. Accordingly, and based on the entire record herein, it is this the 31st day of July, 2020, hereby

ORDERED, that Plaintiffs Motion for In Camera Review of Records is **DENIED** as moot.

SO ORDERED.

Robert R. Rigsby

Robert R. Rigsby, Associate Judge
Superior Court of the District of Columbia

Copies to:

Counsel of Record via CaseFileXpress

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS, *et al.*, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et al.*, *Defendants.*	2020 CA 001999 B Judge Robert R. Rigsby Next Event: Initial Scheduling Conference Next Date: October 23, 2020

ANSWER

Defendant District of Columbia (the District)[1] hereby answers the Complaint. The District asserts that anything not specifically admitted herein is denied, and answers the Complaint as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

In response to the enumerated paragraphs in the Complaint, the District responds as follows:

1. This paragraph contains Plaintiff's characterization of the Complaint, to which no response is required. To the extent this paragraph contains factual allegations, they are denied.

---

[1] The Court dismissed Defendant Office of the Chief Financial Officer on July 30, 2020.

Jurisdiction

2. The District acknowledges the statute cited in this paragraph but denies that jurisdiction is necessarily conferred therefrom. To the extent this paragraph contains factual allegations, they are denied.

Parties

3. The District lacks sufficient information to admit or deny the factual allegations in this paragraph.

4. The District admits that Plaintiff Aaron Davis submitted a FOIA request on behalf of Tax Analysts. The District lacks sufficient information to admit or deny the remaining factual allegations in this paragraph.

5. The District admits the factual allegations in this paragraph.

6. The District admits the factual allegations in this paragraph.

Facts

7. The District admits the factual allegations in this paragraph.

8. The District admits the factual allegations in this paragraph.

9. The District admits the factual allegations in this paragraph.

10. The District admits the factual allegations in this paragraph.

11. The District admits the factual allegations in this paragraph.

12. The District admits the factual allegations in this paragraph.

13. The District admits the factual allegations in this paragraph.

14. The District admits that it withheld the PLRs in their entirety. The remaining factual allegations in this paragraph assert legal conclusions, to which no response is required. To the extent a response is required, the District denies the allegations.

15. The District admits that Plaintiffs requested reconsideration from the Mayor's Office and that the Mayor's Office did not respond. The District denies the remaining factual allegations in this paragraph.

16. The District denies the allegations in this paragraph.

Cause of Action

17. To the extent Plaintiffs incorporate the allegations set forth in paragraphs 1-16 of the Complaint, the District repeats its responses to each paragraph accordingly.

18. The District denies the allegations in this paragraph.

Prayer for Relief

The District denies that Plaintiffs are entitled to the relief prayed for in the "Wherefore" clause or any other relief.

Third Defense

The District, at all relevant times, acted consistently with applicable constitutional requirements, laws, rules, and regulations.

Fourth Defense

Plaintiffs' claims may be moot in whole or in part.

Fifth Defense

The agency records requested either do not exist or are exempted from disclosure by applicable privileges, protections, and exemptions, including but not limited to D.C. Code § 2-534.

Sixth Defense

Plaintiffs may have failed to file notice of their claims as required by D.C Code § 12-309.

Seventh Defense

Plaintiffs may have failed to exhaust their available administrative remedies.

Eighth Defense

Plaintiffs may have failed to follow the required procedures under FOIA.

Ninth Defense

Plaintiffs seek unreasonable fees.

Tenth Defense

The District made all appropriate redactions and produced any reasonably segregable portion of any document in accordance with the law.

Eleventh Defense

The District conducted an adequate search for documents responsive to Plaintiffs' FOIA requests.

Twelfth Defense

The District reserves the right to amend this Answer to the Complaint and to raise any additional defenses that the evidence in discovery may reveal.

Set Off

The District is entitled to a set off for any funds paid to Plaintiffs from public sources.

Jury Demand

The District hereby demands a trial by jury on all issues so triable.

Date: August 13, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ *Christina Okereke*
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section II

/s/ *Matthew Trout*
MATTHEW TROUT [1030119]
Assistant Attorney General
441 Fourth Street, N.W.
Suite 630 South
Washington, D.C. 20001
(202) 724-5695
(202) 724-6590 (fax)
matthew.trout1@dc.gov

Counsel for Defendant District of Columbia

CERTIFICATE OF SERVICE

I certify that on August 13, 2020, I served a copy of the foregoing Answer electronically via CaseFileXpress upon:

Cornish F. Hitchcock
Counsel for Plaintiffs

/s/ *Matthew Trout*
MATTHEW TROUT

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS, *et al.*, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et al.*, *Defendants.*	2020 CA 001999 B Judge Robert R. Rigsby Next Court Date: December 4, 2020 Event: Plaintiffs' Response Due

DEFENDANT DISTRICT OF COLUMBIA'S OPPOSED MOTION FOR SUMMARY JUDGMENT

Defendant District of Columbia (the District) respectfully submits this motion for summary judgment under Super. Ct. Civ. R. 56. The Court should enter summary judgment in the District's favor because all documents withheld by the District are exempt from disclosure under FOIA. A memorandum of points and authorities in support of this motion and a proposed order are attached.

Date: November 23, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ *Christina Okereke*
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section I

/s/ *Matthew Trout*
MATTHEW TROUT [1030119]
Assistant Attorney General
400 Sixth Street, N.W.

Washington, D.C. 20001
(202) 724-5695
(202) 724-6590 (fax)
matthew.trout1@dc.gov

Counsel for Defendant District of Columbia

RULE 12-I CERTIFICATION

On November 19, 2020, undersigned counsel emailed Plaintiff's counsel seeking Plaintiff's position on the relief requested in this motion. Plaintiff does not consent to the relief requested.

/s/ *Matthew Trout*
MATTHEW TROUT

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS and AARON DAVIS, Plaintiffs,	)))	
v.	))	No. 2020 CA 1999 B Judge Rigsby
DISTRICT OF COLUMBIA, Defendant.	))	Next event: None scheduled

PLAINTIFFS' OPPOSED MOTION FOR
***IN CAMERA* REVIEW OF RECORDS**

In response to defendant's motion for summary judgment and pursuant to the the stipulated briefing order entered on 29 September 2020 plaintiffs respectfully move the Court to conduct an *in camera* inspection of the records at issue here.

In support of this motion, plaintiffs submit a memorandum of points and authorities. Plaintiffs also rely on the declaration of plaintiff Aaron Davis and the supporting exhibits previously filed in this case opposing the motion to dismiss.

Accordingly, plaintiffs respectfully request that this motion be granted and that defendant's motion be denied. A proposed order accompanies this motion.

Rule 12-I Certification

Counsel have conferred, and defendant intends to oppose this motion.

Respectfully submitted,

Cornish F. Hitchcock

Cornish F. Hitchcock (D.C. Bar No. 238824)
Hitchcock Law Firm PLLC
5614 Connecticut Avenue, NW, No. 304
Washington, DC 20015
(202) 489-4813 • conh@hitchlaw.com
Attorney for Plaintiffs

Dated: 4 December 2020

Filed
D.C. Superior Court
12/15/2020 13:55PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS and AARON DAVIS, Plaintiffs,	)	
	)	
v.	)	No.: 2020 CA 1999 B
	)	Judge Rigsby
DISTRICT OF COLUMBIA,	)	Next event: None scheduled
Defendants.	)	Next date: None

PRAECIPE RE PLAINTIFFS' MOTION FOR *IN CAMERA* REVIEW

The Clerk will please note that plaintiffs' motion for *in camera* review, filed on 4 December 2020, erroneously stated that defendant District of Columbia opposes the motion. Plaintiffs' motion should have stated that defendant District of Columbia does not oppose plaintiffs' request for *in camera* review.

Date: December 15, 2020

Respectfully submitted,

/s/ *Cornish F. Hitchcock*
CORNISH F. HITCHCOCK [238824]
Hitchcock Law Firm PLLC
5614 Connecticut Avenue, NW No. 304
Washington, D.C. 20015
(202) 489-4813 • (202) 315-3552 (fax)
E-mail: ConH@hitchlaw.com
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

On December 15 2020 I caused a copy of this praecipe to be served via CaseFileXpress upon Christina Okereke and Matthew Trout, counsel for defendant.

/s/ Cornish F. Hitchcock
Cornish F. Hitchcock

Filed
D.C. Superior Court
12/15/2020 16:00PM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS, *et al.*, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et al.*, *Defendants.*	2020 CA 001999 B Judge Robert R. Rigsby

PRAECIPE CLARIFYING DEFENDANT DISTRICT OF COLUMBIA'S POSITION REGARDING *IN CAMERA* REVIEW

The District of Columbia (the District) files this praecipe to clarify its position on the relief sought in Plaintiffs' December 4, 2020 filing. The District filed its motion for summary judgment on November 23, 2020. In response, Plaintiffs filed an "opposed" motion for *in camera* review on December 4, 2020. The District had previously conveyed to Plaintiffs that it did *not* oppose *in camera* review, and Plaintiffs later filed a praecipe on December 15, 2020, correcting their representation of the District's position. Plaintiffs' motion for *in camera* review is, however, a combined motion for such review as well as an opposition to summary judgment. Although the District does not oppose *in camera* review to aid the Court in resolving this case at the summary judgment stage, the District continues to believe summary judgment should be granted. Thus, the District consents *only* to Plaintiffs' request for *in camera* review. The District does *not* consent to their request that summary judgment be denied.

Accordingly, the District intends to respond to the portions of Plaintiffs' motion opposing summary judgment by Friday, December 18, 2020. Because Plaintiffs' December 4, 2020 filing was filed as a motion and not as an opposition to a motion, the District has 14 days to respond to the filing under Super. Ct. Civ. R. 12-I(e).

Date: December 15, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ *Christina Okereke*
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section I

/s/ *Matthew Trout*
MATTHEW TROUT [1030119]
Assistant Attorney General
400 Sixth Street, N.W.
Washington, D.C. 20001
(202) 724-5695
(202) 724-6590 (fax)
matthew.trout1@dc.gov

Counsel for Defendant District of Columbia

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS, et al., *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et. al.*, *Defendants.*	Case No. 2020 CA 001999 B Judge Robert R. Rigsby

ORDER

This matter is before the Court on the *Defendant District of Columbia*'s ("the District") *Opposed Motion for Summary Judgment, filed on* November 23, 2020. Plaintiff filed an Opposition on December 4, 2020, and Defendant filed a Reply on December 18, 2020.[1] Upon consideration of the parties' submissions and the entire record herein, Defendant's Motion is **granted**.

BACKGROUND

Private Letter Rulings (PLRs) are the Office of Tax and Revenue's ("OTR") "response to taxpayer requests for guidance on specific tax matters. A ruling may be relied upon a taxpayer concerning a specific tax matter, since the ruling binds OTR as to the specific tax matter." Def. Ex. 7, *Private Letter Rulings – Tax Law and Guidance, Office of Tax and Revenue, available at* https://otr.cfo.dc.gov/node/410292 (last accessed, Jan. 11, 2021). PLRs apply solely to the taxpayers requesting them, and OTR does not consider them as having precedential effect. *See id.* PLRs thus contrast with other types of tax guidance provided by OTR, such as tax notices, tax

[1] Along with their opposition, Plaintiffs filed a *Motion for In Camera Review of Records* to review the 24 PLRs at issue in the instant dispute.

rulings, and declaratory orders, which provide generalized interpretive guidance or decisions made through public administrative proceedings, all of which are available online. *See* Def. Ex. 8, *Tax Law and Guidance,* Office of Tax and Revenue, available at https://otr.cfo.dc.gov/page/tax-law-and-guidance (last accessed Jan. 11, 2021).

On October 8, 2019, Plaintiffs submitted a District of Columbia Freedom of Information Act Request ("FOIA") to the Office of the Chief Financial Officer ("OCFO"), of which OTR is a sub-agency. *See* DC. Code § 1-204.24a, seeking copies of all private letter rulings, general information letters, and technical advice memoranda prepared by OTR between January 1, 2016 and October 8, 2019. Ex 2, Pls.' Oct. 8, 2019 FOIA Request. On November 14, 2019, OCFO denied the request, citing FOIA exemptions 1 and 6, which respectively exempt from disclosure confidential business records and other records for which disclosure is specifically prohibited by statute. Def. Ex. 3, OCFO's Nov. 14, 2019 Letter.

Plaintiffs appealed that decision to the Mayor on November 20, 2019. Def. Ex. 4 Pls.' Nov. 20, 2019 Appeal. In response to the appeal, OCFO submitted a letter stating that it did not locate any general information letters or technical advice memoranda but had located 24 private letter rulings responsive to Plaintiff's request. Def. Ex. 5, OCFO's Dec. 16, 2019 Response to Pls.' Appeal, at 1. OCFO further indicated that FOIA exemption 2, which exempts disclosure of personal private information, also applied to portions of the PLRs *Id.* The Mayor denied the appeal on January 14, 2020, agreeing that the three FOIA exemptions cited by OCFO applied, and stating that any-nonexempt material was not reasonably segregable from the exempt portions of the letters. Ex. 6, Jan 14, 2020 Denial of Appeal. Plaintiffs now bring suit to compel disclosure of these Private Letter Rulings.

LEGAL STANDARD

Summary Judgment

To prevail on a motion for summary judgment, the moving party has the burden of demonstrating, based on the entire record, that there is no genuine issue as to any material fact and that it is thus entitled to judgment as a matter of law. *See* Super. Ct. Civ. R. 56(c); *see also Wash. Inv. Ptnrs. of Del., LLC v. Sec. House*, 28 A.3d 566, 573 (D.C. 2011) (citing *Grant v. May Department Stores Co.*, 786 A.2d 580, 583 (D.C. 2001)). "A genuine issue of material fact exists if the record contains 'some significant probative evidence…so that a reasonable fact-finder would return a verdict for the non-moving party.'" *See Brown v. 1301 K St. Ltd. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (citing *1836 S St. Tenants Ass'n v. Estate of Battle*, 965 A.2d 832, 836 (D.C. 2009)).

Once the movant satisfies this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *See id.*; *Bruno v. Western Union Fin. Servs., Inc.*, 973 A.2d 713, 717 (D.C. 2009). To defeat summary judgment, the non-moving party "must produce at least enough evidence to make out a prima facie case in support of his position," *Bruno*, 973 A.2d at 717 (internal quotations and citation omitted), and a showing of proof sufficient to create a genuine issue of a material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "A movant is entitled to summary judgment when the evidence is such that a reasonable jury, drawing all reasonable inferences in the non-movant's favor, could not return a verdict for the non-movant." *See Walker v. Johnson*, 798 F.3d 1085, 1091 (D.C. Cir. 2015) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986)).

District of Columbia Freedom of Information Act

"The District of Columbia FOIA. . . .was modeled on the corresponding federal statute, 5 U.S.C. § 552 (1982), and many of its provisions closely parallel those of the federal act." *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Like the federal FOIA, the D.C. FOIA embodies a strong policy that favors the disclosure of information related to governmental affairs and the acts of public officials. *Id.* This policy "requires the courts to read narrowly any statutory exemptions from disclosure." *Id.* (citing *Dunhill v. Director, District of Columbia Department of Transportation*, 416 A.2d 244, 247 n.5 (D.C. 1980)). "The act provides for full disclosure unless the information requested is exempted under a specific statutory provision; in the absence of a statutory exemption, a court has no general equitable power to prevent disclosure under FOIA of public documents and records." *Id.* (citing *Washington Post Co. v. United States Department of State*, 222 U.S. App. D.C. 248, 250, 685 F.2d 698, 700 (1982), *cert. granted*, 464 U.S. 812, 104 S. Ct. 65, 78 L. Ed. 2d 80, *vacated as moot*, 464 U.S. 979, 104 S. Ct. 418, 78 L. Ed. 2d 355 (1983)). The Court has no power to create additional exemptions from disclosure. *Id* Finally, "any doubts about the applicability of a particular exemption must be resolved in favor of disclosure." *Id.* (citing *Hawkes v. Internal Revenue Service*, 467 F.2d 787, 795-796 (6th Cir. 1972)). Judicial review of an agency's decision under D.C. FOIA is *de novo*, the burden is on the agency to sustain its decision, and the court may examine the withheld documents *in camera* in order to assess any exemption claims. D.C. Code §2-537(b).

DISCUSSION

Section 47-4406 Prohibits the Disclosure of PLRs

Defendants argue that summary judgment is appropriate because the documents at issue, 24 PLRs, are exempt from disclosure under D.C. Code 47-4406, which governs the secrecy of tax returns and tax information. Defendants claim that the section 47-4406 is a separate statute that specifically exempts the PLRs from disclosure thus qualifying as an exemption under D.C. FOIA section § 2-534(a)(6)(A). The Court agrees.

Section 47-4406 states in relevant part that:

> an officer, employee, or contractor, or 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 (emphasis added)[2]

The face of the provision leaves no discretion to District officials and applies not only to "returns" but also to any "tax information" submitted by the taxpayer, whether it is included in the return or not. *See id.* There are instances where the statute contemplates disclosure. *See id.* § 47-4406 (b)-(e). However, FOIA is not listed among the exceptions to disclosure, and none of the other narrow exceptions apply. *See id.* There are also criminal penalties that attach to anyone who willingly discloses this tax information. § 47-4406 (f).

Here, it is undisputed that the Private Letter Rulings Plaintiffs seek are the Defendant's responses to private requests by taxpayers for advice on their specific tax circumstances based on the information they provided to OTR. *See* Def. Ex. 7. This is "tax information. . .submitted by the taxpayer," which the District of Columbia shall not divulge." D.C. Code § 47-4406. Because this tax information is "specifically exempted from disclosure by statute" in a manner that

---

[2] In granting in part and denying in part the District's motion to dismiss, the Court based its ruling on the first half of this clause relating to "any information relating to value or the computation of value, disclosed in a [tax] return." *See* July 20, 2020 Order at 4-5. The District does not rely on this portion of the provision. Rather the District bases it's argument 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. . . .*" D.C. Code § 47-4406 (emphasis added).

"leave[s] no discretion on this issue," D.C. FOIA does not entitle Plaintiffs to this information. D.C. Code § 2-534(a)(6). Accordingly, the District is entitled to summary judgment on this basis.

Plaintiffs argue that the "tax information" protected by the tax code should be interpreted consistently with federal tax provisions which bar disclosure of "a taxpayer's identity, the nature source or amount of his income, payments receipts, deductions, exemptions, credits assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments. . . . *or any other data. . . furnished to* [the relevant tax authority]. . . with respect to the determination of the existence or *possible existence*, of liability. . . Pls.' Mot. At 6 (quoting 26 U.S.C. § 6103(b)(2)(A) (emphasis added). Plaintiffs argue that they are entitled to "the legal issue, the facts, and the agency's analysis" contained in the PLRs. Plaintiffs however cannot reconcile this entitlement with the definition of exempt information quoted above. Plaintiffs are not 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 of the existence, or possible existence of liability" is exempt from disclosure. Pls.' Mot. At 6 (quoting 26 U.S.C. § 6103(b)(2)(A). Thus even under Plaintiff's reading of the tax secrecy provisions, Plaintiffs are not entitled to the information sought.

The PLRs Are Not Reasonably Segregable from Any-Non Exempt Information

FOIA requires disclosure of "[a]ny reasonably segregable portion of a public record" not exempt from disclosure. D.C. Code § 2-534(b). The D.C. Court of Appeals has not defined "reasonably segregable" but other Courts applying federal FOIA evaluate whether "exempt" and non-exempt information are 'inextricably intertwined,' such that the excision of the exempt information would impose significant costs on the agency and produce and edited document with little informational value." *Mays v. Drug Enforcement Admin.*, 234 F.3d 1324, 1327 (D.C. Cir.

2000) (quoting *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981). "[I]n the context of FOIA cases, [the District] routinely look[s] to federal law to interpret analogous provisions in our own Act." *Fraternal Order of Police, Metro. Labor Comm. V. District of Columbia*, 113 A.3d 195, 199 (D.C. 2015). Under D.C. Code § 2-537(b), the Court may "examine the contents of such records or any part thereof shall be withheld under any of the exemptions set forth in 2-534." Here, the PLRs are in their entirety an evaluation of the tax consequences of a taxpayer's financial circumstances. *See* Def. Ex. 8. Redacting the tax-exempt information from an analysis of the same would "Produce an edited document with little informational value," *Mays*, 243 F.3d at 1327, and therefore it is appropriate to withhold the documents in their entirety. *See id.*

In light of the above the Court also denies the Plaintiffs' *Motion for In Camera Review* of the 24 PLRs at issue in this case.

CONCLUSION

Accordingly, and based on the entire record herein, it is this the 13th day of January, 2021, hereby

ORDERED that Defendants' Motion for Summary Judgment is **GRANTED;** and it is further

ORDERED that Summary Judgment is **GRANTED** in favor of Defendant and against Plaintiffs; and it is further

ORDERED that Plaintiff's Motion for In Camera Review of Records is **DENIED;**

.

SO ORDERED.

Robert R. Rigsby

Robert R. Rigsby, Associate Judge

Superior Court of the District of Columbia

Copies to:

Counsel of Record Via CaseFileXpress

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS, *et al.*, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *et al.*, *Defendants.*	2020 CA 001999 B Judge Robert R. Rigsby Next Event: Vaughn Index Due Next Date: October 19, 2020

DISTRICT OF COLUMBIA'S *VAUGHN* INDEX

The District withheld in full the following documents that are responsive to Plaintiff's FOIA request, Aaron A. Davis FOIA Appeal 2020-033.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
1-28-2016 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
2-3-2016 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
2-11-2016 Private Letter Ruling on QHTC Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
2-9-2016 Private Letter Ruling on Franchise Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
2-25-2016 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
11-3-2016 Private Letter Ruling on Franchise Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
1-26-2017 Private Letter Ruling on Sales Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
2-23-2017 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
5-9-2017 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
7-5-2017 Private Letter Ruling on QHTC Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
7-5-2017 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
9-1-2017 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
3-20-2018 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
5-10-2018 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
6-28-2018 Private Letter Ruling on QHTC Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
8-2-2018 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
10-12-2018 Private Letter Ruling on Individual Income Tax	Entire record	D.C. Code §§ 2-534(a)(2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
12-7-2018 Private Letter Ruling on Estate Tax	Entire record	D.C. Code §§ 2-534(a)(2), (6); 47-4406; 47-3719	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
2-14-2019 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
2-21-2019 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
2-28-2019 Private Letter Ruling on Franchise Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-1805.04	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
4-12-2019 Private Letter Ruling on Sales and Use Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Document Name	Information Redacted	Statutory Basis	Reasons Withheld
7-11-2019 Private Letter Ruling on Sales Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.
7-15-2019 Private Letter Ruling on Sales Tax	Entire record	D.C. Code §§ 2-534(a)(1), (2), (6); 47-4406; 47-2018	Disclosing personal information in this record would be a clearly unwarranted invasion of personal privacy; disclosing commercial or financial information in this record would result in substantial competitive harm to the person from whom the information was obtained; disclosure of this record is specifically prohibited by statutes protecting the confidentiality of tax information.

Date: October 19, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ *Christina Okereke*
CHRISTINA OKEREKE [219272]
Chief, Civil Litigation Division Section II

/s/ *Matthew Trout*
MATTHEW TROUT [1030119]
Assistant Attorney General
441 Fourth Street, N.W.
Suite 630 South
Washington, D.C. 20001

(202) 724-5695
(202) 724-6590 (fax)
matthew.trout1@dc.gov

Counsel for Defendant District of Columbia

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER

★ ★ ★

Request Received Acknowledgement Letter
10/08/2019

Dear **Mr. Aaron Davis**:

Your FOIA request has been official received on **10/08/2019** and the due date is **10/30/2019**. Please see the below summary of your FOIA request Details.

Request Number: **20191008_345**

Description: **All private letter rulings (PLRs), general information letters (GILs) and technical advice memoranda (TAM) created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019.**

Requester Name: **Mr. Aaron Davis**

Requester Title: **Reporter**

Requester Address: **400 S Maple Ave Falls Church VA 22046 USA**

Phone Number: **703-533-4414**

Requester Email Address: **aaron.davis@taxanalysts.org**

Organization: **Tax Analysts**

Date Range for Record Search From: **01/01/2016**

Date Range for Record Search To: **10/08/2019**

Attachments: **Aaron Davis reporter identity.png**

Category: **News Media**

Delivery Method of Response: **Email**

Request a Fee Waiver: **Yes**

Waiver Request Requires Reason: **I am a member of the press and request a fee waiver in this instance as the information will be used in a news article.**

Amount Willing to Pay: **All fees up to $25.00**

Received Date: **10/08/2019**

Request Due Date: **10/30/2019**

Please allow up to 15 business days to complete the request. Unless the District requests an extension (the FOIA process allows 10 additional business days), your request will be completed by: **10/30/2019**

If you have any questions or concerns, please contact:

Laverne Lee
FOIA Information Officer
Office of the Chief Financial Officer
ocfo.foia@dc.gov
Phone: (202) 727-9528

Right to Appeal

Under D.C. Official Code § 2-537 and D.C. MUN. REGS. tit.1, § 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to:

Mayor's Office of Legal Counsel
FOIA Appeal
1350 Pennsylvania Avenue, N.W., Suite 407
Washington, DC 20004

Electronic versions of the same information can instead be e-mailed to foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to:

LaVerne Lee, FOIA Officer
Office of the Chief Financial Officer
Office of the General Counsel
1350 Pennsylvania Avenue, N.W., Room 200
Washington, DC 20004

Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER

Re: FOIA Request Number **20191008_345**

Delivered by Electronic Mail

Dear **Mr. Aaron Davis**:

The District of Columbia Office of Chief Financial Officer (OCFO) is in receipt of your Freedom of Information Act (FOIA) request(s), DC FOIA **20191008_345**. The OCFO has reviewed the request, related correspondence, and applicable law. Based upon this review, DC FOIA **20191008_345** fails to comply with FOIA and is denied.

Requestor's FOIA Request(s)
Initial request
On **10/08/2019**, you submitted a FOIA request DC FOIA **20191008_345**, seeking the following information:

"All private letter rulings (PLRs), general information letters (GILs) and technical advice memoranda (TAM) created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019."

OCFO Decision
The OCFO has determined request DC FOIA **20191008_345** does not comply with the FOIA and denies the request in full, for the following reason(s):

Exemptions Intro
Pursuant to D.C. Official Code § 2-534 the District government is not required to provide information that is exempt from disclosure. The information requested is exempt from disclosure, pursuant to D.C. Official Code § 2-534(a)(1) and (6)(A).

- **Privacy**
  - **Business:** the information is exempt from disclosure, pursuant to D.C. Official Code § 2-534(a)(1) on the basis that it includes 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. The privacy interests of the business entity, outweighs the benefit of releasing such information without providing an overwhelming public interest beyond the personal value of the information to the requestor. *See e.g.*, Freedom of Information Act Appeal 2017-49, Rachel George, April 25, 2017.

(6) Information specifically exempted from disclosure by statute (other than this section), 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.

Conclusion:
DC FOIA **20191008_345** request is denied.

Any previous actions taken or partial or full responses to similar FOIA requests have no affect the legal validity of this decision.

Right to Appeal

Under D.C. Official Code § 2-537 and D.C. MUN. REGS. tit.1, § 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to:

Mayor's Office of Legal Counsel
FOIA Appeal
1350 Pennsylvania Avenue, N.W., Suite 407
Washington, DC 20004

Electronic versions of the same information can instead be e-mailed to foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to:

LaVerne Lee, FOIA Officer
Office of the Chief Financial Officer
Office of the General Counsel
1350 Pennsylvania Avenue, N.W., Room 200
Washington, DC 20004

Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

Should you have any questions regarding this letter, please contact me.

Respectfully,

Tracye Y. Peters
Federal/State Program Coordinator/FOIA Officer
General Counsel Office, Office of Tax and Revenue (OTR)
1101 4th Street, SW
Suite 7000/Office Room Number 7606
Washington, DC 20024
Telephone Number: (202) 442-6515
Facsimile Number: (202) 442-6479

ATTN:
Mayor's Office of Legal Counsel
FOIA Appeal
1350 Pennsylvania Avenue, N.W., Suite 407
Washington, DC 20004

LaVerne Lee, FOIA Officer
Office of the Chief Financial Officer
Office of the General Counsel
1350 Pennsylvania Avenue, N.W., Room 200
Washington, DC 20004

RE: Freedom of Information Act Appeal, DC FOIA **20191008_345**

Dear Legal Counsel at the Office of the Mayor,

I am writing to you to appeal the denial of DC FOIA 20191008_345, which I initially submitted to the Office of the Chief Financial Officer on 10/08/2019 and which was denied on 11/14/2019. I have attached my initial request and the OCFO's denial to this email and have also pasted them below.

The OCFO's office denied my appeal on the basis of D.C. Official Code § 2-534(a)(1), which protects trade secrets that would result in substantial harm to the competitive position of the person from whom the information was obtained; and D.C. Official Code § 2-534(6)(A), which exempts information which is specifically exempted from disclosure by statute (other than section 2-534) provided that the statute "Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue."

My reasons for appealing this denial are several.

1. D.C. Official Code § 2-534 (b) requires that "any reasonably segregable portion of a public record shall be provided... after deletion of those portions which may be withheld from disclosure". The OCFO's office "shall" provide this information after redaction and provide justification for each separate deletion and these exemptions are permitted "only to the extent that" competitive harm would ensue. Particularly when General Information Letters are considered in this light, the wholesale denial appears to have abrogated its duty to disclose, even if in part. Furthermore, the denial letter cites "See e.g., Freedom of Information Act Appeal 2017-49, Rachel George, April 25, 2017" as a reason for denying this request under § 2-534(a)(1). In that FOIA appeal, the request was granted in part and denied in part and the inspector general report was released with the names of individuals redacted. This appeal appears to bolster my case more than it does a denial. Redacting the name of any taxpayer and identifying information is enough to ensure privacy can be protected.
2. The OCFO FOIA officer denied my request under D.C. Official Code § 2-534(6)(A), in which information that is specifically exempt from disclosure by a statute or statutes which "leave no discretion on the issue". This statute explicitly justifying the exemption of these documents was not provided in the denial letter.

3. These are routinely released at the federal and state level. These are not tax returns that are protected under 26 U.S. Code § 6103. These private letter rulings are letters in which the OCFO's office issues written decisions interpreting and applying tax laws to a specific set of facts. General information letters are similar, however they are on general facts, not specific to a particular company. The district is out-of-step with the IRS and the states in simply not publicly publishing these letters periodically on their website. However, denying a public records request for them is even more concerning. Our organization, Tax Analysts, fought the IRS for private letter rulings and technical advice memoranda and won in US District Court for the District of Columbia in 1973. This ruling, among many in the same vein for Tax Analysts, is why these formerly private letters establishing "secret law" are now available to any citizen, particularly citizens of a district which espouses 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."

For these reasons, I believe **DC FOIA 20191008_345** should be granted.
I can be reached at:

Aaron R. Davis
Tax Analysts
400 S. Maple Avenue, Suite 400
Falls Church, VA, 22046
Aaron.davis@taxanalysts.org
703-533-4414

I look forward to hearing from you.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF THE CHIEF FINANCIAL OFFICER

Re: FOIA Request Number **20191008_345**

Delivered by Electronic Mail

Dear Mr. Aaron Davis:

The District of Columbia Office of Chief Financial Officer (OCFO) is in receipt of your Freedom of Information Act (FOIA) request(s), DC FOIA **20191008_345**. The OCFO has reviewed the request, related correspondence, and applicable law. Based upon this review, DC FOIA **20191008_345** fails to comply with FOIA and is denied.

Requestor's FOIA Request(s)

Initial request

On **10/08/2019**, you submitted a FOIA request DC FOIA **20191008_345**, seeking the following information:

"All private letter rulings (PLRs), general information letters (GILs) and technical advice memoranda (TAM) created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019."

OCFO Decision

The OCFO has determined request DC FOIA **20191008_345** does not comply with the FOIA and denies the request in full, for the following reason(s):

Exemptions Intro

Pursuant to D.C. Official Code § 2-534 the District government is not required to provide information that is exempt from disclosure. The information requested is exempt from disclosure, pursuant to D.C. Official Code § 2-534(a)(1) and (6)(A).

- **Privacy**
  - **Business:** the information is exempt from disclosure, pursuant to D.C. Official Code § 2-534(a)(1) on the basis that it includes 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. The privacy interests of the business entity, outweighs the benefit of releasing such information without providing an overwhelming public interest beyond the personal value of the information to the requestor. *See e.g.*, Freedom of Information Act Appeal 2017-49, Rachel George, April 25, 2017.

(6) Information specifically exempted from disclosure by statute (other than this section), 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.

Conclusion:

DC FOIA **20191008_345** request is denied.

Any previous actions taken or partial or full responses to similar FOIA requests have no affect the legal validity of this decision.

Right to Appeal

Under D.C. Official Code § 2-537 and D.C. MUN. REGS. tit.1, § 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to:

Mayor's Office of Legal Counsel

FOIA Appeal

1350 Pennsylvania Avenue, N.W., Suite 407

Washington, DC 20004

Electronic versions of the same information can instead be e-mailed to foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to:

LaVerne Lee, FOIA Officer

Office of the Chief Financial Officer

Office of the General Counsel

1350 Pennsylvania Avenue, N.W., Room 200

Washington, DC 20004

Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

Should you have any questions regarding this letter, please contact me.

Respectfully,

Tracye Y. Peters

Federal/State Program Coordinator/FOIA Officer

General Counsel Office, Office of Tax and Revenue (OTR)

1101 4th Street, SW

Suite 7000/Office Room Number 7606

Washington, DC 20024

Telephone Number: (202) 442-6515

Facsimile Number: (202) 442-6479

Request Received Acknowledgement Letter
10/08/2019

Dear **Mr. Aaron Davis**:

Your FOIA request has been official received on **10/08/2019** and the due date is **10/30/2019**. Please see the below summary of your FOIA request Details.

Request Number: **20191008_345**

Description: **All private letter rulings (PLRs), general information letters (GILs) and technical advice memoranda (TAM) created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019.**

Requester Name: **Mr. Aaron Davis**

Requester Title: **Reporter**

Requester Address: **400 S Maple Ave Falls Church VA 22046 USA**

Phone Number: **703-533-4414**

Requester Email Address: **aaron.davis@taxanalysts.org**

Organization: **Tax Analysts**

Date Range for Record Search From: **01/01/2016**

Date Range for Record Search To: **10/08/2019**

Attachments: **Aaron Davis reporter identity.png**

Category: **News Media**

Delivery Method of Response: **Email**

Request a Fee Waiver: **Yes**

Waiver Request Requires Reason: **I am a member of the press and request a fee waiver in this instance as the information will be used in a news article.**

Amount Willing to Pay: **All fees up to $25.00**

Received Date: **10/08/2019**

Request Due Date: **10/30/2019**

Please allow up to 15 business days to complete the request. Unless the District requests an extension (the FOIA process allows 10 additional business days), your request will be completed by: **10/30/2019**

If you have any questions or concerns, please contact:

Laverne Lee
FOIA Information Officer
Office of the Chief Financial Officér
ocfo.foia@dc.gov
Phone: (202) 727-9528

Right to Appeal

Under D.C. Official Code § 2-537 and D.C. MUN. REGS. tit.1, § 412, you have the right to appeal this letter to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain "Freedom of Information Act Appeal" or "FOIA Appeal" in the subject line of the letter as well as on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, and e-mail and/or U.S. Mail address at which you can be reached. The appeal must be mailed to:

Mayor's Office of Legal Counsel
FOIA Appeal
1350 Pennsylvania Avenue, N.W., Suite 407
Washington, DC 20004

Electronic versions of the same information can instead be e-mailed to foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to:

LaVerne Lee, FOIA Officer

Office of the Chief Financial Officer
Office of the General Counsel
1350 Pennsylvania Avenue, N.W., Room 200
Washington, DC 20004

Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

Office of the General Counsel

December 16, 2019

Mayor's Correspondence Unit
FOIA Appeal
1350 Pennsylvania Avenue, NW, Suite 316
Washington, DC 20004

Re: FOIA Appeal 2020-033

Dear Sir or Madam:

This letter timely responds to the above-referenced Freedom of Information Act (FOIA) Appeal submitted by Aaron R. Davis (Requestor). The due date for this response has been extended to December 16, 2019.

Requestor seeks "All private letter rulings (PLRs), general information letters (GILs) and technical advice memoranda (TAM) created by the District of Columbia's Office of Tax and Revenue between January 1, 2016 and October 8, 2019."

A search disclosed no responsive general information letters or technical advice memoranda. While a number of PLRs were located, the Office of Tax and Revenue (OTR) denied the request pursuant to D.C. Official Code § 2-534(a)(1) (Exemption 1) and (a)(6) (Exemption 6). 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." 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.

Additionally, these PLRs are protected from disclosure pursuant to D.C. Official Code § 2-534(a)(2) (Exemption 2), which prevents disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."

OTR requests that your office uphold OTR's decision to deny access to the records in issue.

In general, PLRs are OTR's response to taxpayer requests for guidance on specific tax matters. A taxpayer may request a PLR by providing, under penalties of perjury, the taxpayer's name, business address and federal taxpayer identification number, a statement of the facts and circumstances concerning the specific tax matter for which the taxpayer is requesting guidance, a statement of statutory or judicial authority upon which the taxpayer is relying, and the ruling requested. The PLR issued by OTR will incorporate personally identifying information and a statement of facts and circumstances provided by the taxpayer on which the ruling is based, as well as OTR's legal analysis and conclusion as to the matter ruled upon. The ruling may be relied upon by the taxpayer concerning the specific tax matter ruled upon. However, no opinion is provided on the tax treatment of the matter except as expressly stated in the ruling.

A PLR may be withdrawn or revoked or modified if the taxpayer's facts and circumstances change, the law changes or the ruling was issued in error. A ruling may not be used or cited as precedent. A ruling is applicable solely to the taxpayer to which it is directed and may not be used by any other taxpayer.

A PLR expires 10 years from the date of the ruling. The taxpayer may request that the ruling be extended after being reviewed by OTR.

D.C. Official Code § 2-534(a)(6)

First of all, disclosure of the PLRs is precluded under the laws protecting taxpayer information from disclosure. These laws satisfy the criteria of Exemption 6 in that they preclude disclosure of tax returns and tax information, leaving OTR no discretion in the matter, as well as establish criteria for withholding information and refer to particular types of matters to be withheld.

Tax 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. Maintenance of confidentiality is one of the cornerstones of sound tax administration, as it encourages taxpayers to provide complete and accurate information to the government for purposes of determining tax liability. Disclosure of this information is allowed only under circumstances specifically enumerated in the governing statutes.

Certain PLRs in question involve sales and use tax, income and franchise tax, which are governed by specific nondisclosure statutes. D.C. Official Code §§ 47-1805.04 (income and franchise tax); 47-2018 (sales and use tax). The nondisclosure provision for income and franchise taxes provides in pertinent part as follows:

> [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;

D.C. Official Code §§ 47-1805.04(a). This law provides specific circumstances in which income tax information may be disclosed, none of which are applicable here. While subsection (d) permits discretionary release of some types of information contained in reports, applications, licenses, or returns required under the income tax law, this discretion does not extend to information as may be contained in these documents relating to the amount of income or any particulars relating thereto or the computation thereof. D.C. Official Code §§ 47-1805.04(d). Unauthorized disclosure is subject to a fine and imprisonment for up to 1 year, or both. D.C. Official Code § 47-1805.04(e).

The sales tax statute incorporates a similar disclosure prohibition which provides in pertinent part as follows:

> (1) . . . it 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 gross proceeds or tax due or any particulars relating thereto or the computation thereof set forth or disclosed in any return required to be filed under this chapter . . . .
>
> (2) The provisions of paragraph (1) of this subsection shall also apply to any state or local sales tax returns, copies thereof, and any other state or local sales tax information either submitted by the taxpayer or otherwise obtained.

D.C. Official Code § 47-2018(a). While the statute allows disclosure in certain circumstances, none of those are applicable here. Moreover, while the statute permits discretionary disclosure of some types of information contained in reports, applications, or returns required under the sales tax law, this discretion does not extend to information in those documents relating to the amount of gross proceeds or tax thereon or any particulars relating thereto or the computation thereof. D.C. Official Code § 47-2018(c). Unauthorized disclosure is subject to a fine and imprisonment for up to 1 year, or both. D.C. Official Code § 47-2018(d).

There is also a general nondisclosure statute, section 47-4406, which provides in pertinent part as follows:

> . . . 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.

D.C. Official Code § 47-4406(a). While the statute allows disclosure in certain circumstances, none of those are applicable here. There is no provision for discretionary disclosures under section 47-4406. Unauthorized disclosure is subject to a fine and imprisonment for up to 6 months, or both. D.C. Official Code § 47-4406(f).

Moreover, OTR has entered into a memorandum of understanding with the Internal Revenue Service (IRS) covering sharing of tax information between these agencies which incorporates nondisclosure provisions that must be observed if OTR is to continue to have access to federal tax information, which is vital to proper administration of the District's tax law.

OTR believes that its interpretation of the nondisclosure statutes discussed above should be given deference in deciding this appeal, as the D.C. Court of Appeals has ruled that both the courts and administrative tribunals such as the Office of Administrative Hearings (OAH) are bound to give an administering agency's interpretations of law the same deference that the courts do. District of Columbia Department of the Environment (DDOE) v. East Capitol Exxon, 64 A.3d 878, 881 (D.C. 2013) (stating that "[j]ust as DDOE's interpretation of the laws and regulations it administers is entitled to deference by this court, it likewise warrants deference by OAH"); Murphy v. District of Columbia Dep't of Empl. Servs., 935 A.2d 1066, 1070 (D.C. 2007) (stating that "[t]he agency's interpretation of the statute it administers is binding on this court unless it conflicts with the plain meaning of the statute or its legislative history"). This deference is accorded where the agency has reasonably interpreted an ambiguous statute. East Capitol Exxon, 64 A.3d at 881. Moreover, deference is accorded to the agency's interpretation even if other reasonable interpretations of the statute are advanced. Asylum Co. v. District of Columbia Dep't of Empl. Servs., 10 A.3d 619, 625 (D.C. 2010) (stating that "we 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"). Furthermore, a consistent and longstanding interpretation is entitled to the most deference. Johnson v. D.C. Dep't of Empl. Svcs., 111 A.3d 9, 11 (D.C. 2015) (stating that "[c]onsistent and longstanding agency interpretations, . . . merit the most deference"). Because OTR's interpretation of the nondisclosure statutes that it administers is reasonable, has been consistent and is of long standing, OTR's position that the private rulings in issue are not disclosable under those statutes should be given deference for purposes of deciding this appeal.

While the Requestor contends that rulings are not tax returns under section 6103 of the Internal Revenue Code (IRC), the Internal Revenue Code does not govern the present case. The nondisclosure provisions of District tax law differ from this federal tax provision. The controlling District statutes discussed above protect not only amounts reported on returns, but also tax information submitted by the taxpayer or otherwise obtained, which encompasses a broad class of information relating to taxation. The PLRs in issue, representing 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 tax shown on the return, and so are integral to these returns. As such, the PLRs also constitute tax information that is protected under these statutes, as they relate to the tax computations and tax liabilities of the taxpayers receiving the rulings. Moreover, in view of the penalties provided for unauthorized disclosure of tax information, OTR limits disclosures of information relating to specific taxpayers and their tax liabilities to situations in which there is clear statutory authority supporting the disclosure. In the present case, the relevant statutes do not provide any exception that would permit disclosure of these PLRs.

While the Requestor notes that private letter rulings issued by the IRS are subject to disclosure, disclosure of such rulings is governed by specific provisions of the Internal Revenue Code, such as IRC § 6110, the District has no such statute. Since the District does not have specific authority to release private letter rulings, such rulings and the taxpayer information disclosed therein are strictly confidential as taxpayer information per D.C. Official Code §§ 47-1805.04, 47-2018 and 47-4406. Additionally, there is an established process for the redaction and disclosure of IRS rulings which allows participation by the person to whom the ruling is issued so as to ensure that identifying information is removed from the publicly released version of the ruling. See Rev. Proc. 2019-1, sec. 7.01(12). Since OTR does not release its private rulings, no such procedures are in place. OTR believes disclosing rulings, even in redacted form, without allowing the taxpayers to whom rulings are issued an opportunity to identify any information that should be deleted would be detrimental to those taxpayers' interests. Any such release, especially given the smaller District market versus the United States as a whole, could not ensure confidentiality and thus would likely violate the aforementioned statutes. Additionally, redacting sufficient information to protect confidentiality would render any remaining portion of the ruling meaningless.

Moreover, the practice of other jurisdictions is not determinative here, as these disclosure issues must be decided under District law.

Furthermore, the PLRs hardly constitute a body of "secret law" because they are directed only to the taxpayers requesting them and they may not be relied on by other taxpayers. They are not binding on OTR in other situations or if there is a change in the facts, law or regulations on which the rulings are based. They only apply to the particular taxpayer requesting the ruling and the particular set of facts disclosed by the taxpayer in requesting the ruling. The rulings, accordingly, do not furnish any guidance for other taxpayers or for OTR in other situations.

While disclosure of the PLRs is precluded under Exemption 6 and the foregoing provisions, Exemptions 1 and 2 will also be discussed in the interest of completeness.

D.C. Official Code § 2-534(a)(1)

As noted above, D.C. Official Code § 2-534(a)(1) exempts from disclosure "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." 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. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979). The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms "commercial" and "financial" used in the federal FOIA should be accorded their ordinary meanings. Id at 1290. Records are "commercial" if the submitter has a commercial interest in them. Id.

This has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987). See Washington Post Co. v. Minority Business Opportunity Com., 560 A.2d 517, 522 (D.C. 1989), citing CNA Financial Corp. v. Donovan. In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." Essex Electro Eng'rs, Inc. v. United States Secy. of the Army, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). See also McDonnell Douglas Corp. v. United States Dep't of the Air Force, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party ... to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would "likely" do so. [citations omitted]").

The determination of economic harm may be made by considering the cost of obtaining the withheld information, and the possible windfall to competition that would result from its release, such as whether:

> a competitor could use the content of the [records] affirmatively to wreak competitive harm on Pfizer by acquiring records that, according to Pfizer and undisputed by the plaintiff, show what is and is not working in companies' marketing from the perspective of its customers. See id. . . .In applying the National Parks test, the D.C. Circuit noted that when commercial information "is freely or cheaply available from other sources ... it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm." Id. at 51. Nevertheless, when "competitors can acquire the information only at considerable cost, agency disclosure may well benefit the competitors at the expense of the submitter." Id.

Pub. Citizen v. United States Dep't of Health & Human Servs., 66 F. Supp. 3d 196, 213 (D.D.C. 2014). In the context of federal FOIA, the D.C. Circuit has held that a requester cannot bolster the case for disclosure by claiming an additional public benefit in release. Public Citizen Health Research Group v. FDA, 185 F.3d 898, 904 (D.C. Cir. 1999).

A PLR is issued pursuant to the request of a taxpayer for OTR's opinion as to the tax treatment of a particular set of facts involving the requester. The ruling sets forth the transaction or activity as described by the taxpayer, an analysis of the law as applied to those facts and circumstances and OTR's conclusion based on the facts provided by the taxpayer. The ruling is specific to the taxpayer and its facts and circumstances, and it cannot be relied on by other taxpayers. The information is obtained from outside the government, and the matters described by the taxpayer relate to its own business activities and operations, such as transactions, products, services, business models or methods of operation. The information provided by the taxpayer that is summarized in the ruling deal with products, services or business practices developed at the expense of the taxpayer and is generally not the type of information that would ordinarily be publicly disclosed by the taxpayer.

Businesses seeking private rulings are generally in competition with other businesses in their field or must deal with other businesses to obtain the products and services needed for their operations. Disclosure of information contained in these rulings presents a substantial likelihood of substantial competitive injury, as the details of a particular taxpayer's methods of business operation or financial data such as income, expenses and other operating information could be useful to its competitors or others in in attempting to gain an advantage over it in the marketplace.

For instance, this potential for harm was recognized in FOIA Appeal 2018-30, where the Mayor accepted DMPED's representation that disclosure of a business' commercial and financial information could cause substantial harm by allowing competitors unfair insights regarding the business's pricing and operations. The Mayor noted that disclosure of the information could allow competitors to undercut the company and replicate its business model. In FOIA Appeal 2016-14, the Mayor also protected commercial information that could be copied by competitors and used to take potential clients and business from the originator if it was to be disclosed. In FOIA Appeal 2015-101, the Mayor protected commercial information that would likely cause substantial harm to a business by allowing competitors to copy the business's practices and methods, to make targeted advertisements against it, or to gain an advantage competing against it for customers. Moreover, disclosure of information about the taxpayer's business activities would not shed light on the functions of OTR, which is the statutory purpose of FOIA.

Accordingly, these documents are protected from disclosure under Exemption 1.

D.C. Official Code § 2-534(a)(2)

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). The first part of the analysis is determining whether a sufficient privacy interest exists. Id.

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). In general, there is a sufficient privacy interest in personal identifying information. Skinner v. U.S. Dep't. of Justice, 806 F. Supp. 2d 105, 113 (D.D.C. 2011).

As stated in Skinner:

> Information protected under Exemption 6 [the federal FOIA equivalent of Exemption (2)] includes such items as a person's name, address, place of birth,

> employment history, and telephone number. See Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989); see also Gov't Accountability Project v. U.S. Dep't of State, 699 F.Supp.2d 97, 106 (D.D.C.2010) (personal email addresses); Schmidt v. Shah, No. 08-2185, 2010 WL 1137501, at *9 (D.D.C. Mar. 18, 2010) (employees' home telephone numbers); Schwaner v. Dep't of the Army, 696 F.Supp.2d 77, 82 (D.D.C.2010) (names, ranks, companies and addresses of Army personnel); United Am. Fin., Inc. v. Potter, 667 F.Supp.2d 49, 65-66 (D.D.C.2009) (name and cell phone number of an "unknown individual").

Skinner v. U.S. Dept. of Justice, 806 F.Supp.2d 105, 113 (D.D.C. 2011).

Accordingly, there is a personal privacy interest in the name, address, taxpayer identification number and other identifying information of the person or persons to whom the ruling is addressed. Moreover, to the extent that the ruling is requested by an individual with respect to his or her own tax liabilities does not strip the personal privacy interest associated with the identifying information. Moreover, because each ruling describes a unique set of circumstances pertaining the particular taxpayer, simply redacting the taxpayer's name from the ruling, as the Requestor suggests, would not be sufficient to protect the taxpayer's privacy. Accordingly, under the case law, there is more than a de minimis privacy interest associated with the name, address and other identifying information of the taxpayer, and this substantial privacy interest justifies their protection pursuant to Exemption 2. See Skinner, 806 F. Supp. 2d at 113.

The second part of the Exemption 2 analysis examines whether an individual privacy interest is outweighed by the public interest. 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.

The personal privacy interests associated with the personal information reflected in the rulings outweigh the interest in disclosure. There has been no showing of how the release of the personal information in the ruling concerning the taxpayer or the taxpayer's transactions or activities would shed light on OTR's performance of its statutory duties. In the absence of a relevant countervailing public interest, the personal information is protected from disclosure pursuant to Exemption 2.

For the foregoing reasons, the records are not disclosable under Exemption 2.

No Portions of the Rulings are Reasonably Segregable

The phrase "reasonably segregable" is not defined under District's 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). Here, the personal and confidential business information that must be redacted from these rulings is so intertwined with the remainder of the document that any portion of the ruling remaining after redaction would have little to no informational value. Accordingly, reasonable redaction is not possible, because the end product after redaction would be of little to no informational value.

Accordingly, OTR's determination to deny access to these records should be sustained.

Sincerely,

Bazil Facchina
Assistant General Counsel
Office of Tax and Revenue

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR

★ ★ ★

Mayor's Office of Legal Counsel

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)

HITCHCOCK LAW FIRM PLLC
5614 CONNECTICUT AVENUE, N.W. • NO. 304
WASHINGTON, D.C. 20015-2604
(202) 489-4813 • FAX: (202) 315-3552

CORNISH F. HITCHCOCK
E-MAIL: CONH@HITCHLAW.COM

4 February 2020

Mayor's Office of Legal Counsel
1350 Pennsylvania Avenue, NW Suite 407
Washington, DC 20004

By electronic mail (FOIA.Appeals@dc.gov)

Re: FOIA Appeal 2020-033 (OCFO FOIA Request No. 20191008_345)

Dear Counsel:

I write on behalf of Tax Analysts and Aaron Davis to ask that you reconsider the decision in your letter dated 14 January 2020 that the Office of Chief Financial Officer ("OCFO") acted properly in responding to a request under the District of Columbia Freedom of Information Act ("DC FOIA), That letter contains some serious factual errors that warrant reconsideration and reversal of that decision.[1]

At issue is the request for all "private letter rulings" ("PLRs") issued between 6 January 2016 and 8 October 2019. OCFO identified 24 such PLRs, but denied the request. Your Office upheld that denial, finding that these PLRs were exempt under DC FOIA Exemption 1 (confidential commercial information), Exemption 2 (personal privacy) and Exemption 6 (information exempted from disclosure by a separate "withholding statute"), D.C. Code §§ 2-534(a)(1), (2) and (6), respectively. Your Office also rejected any claim that OCFO should disclose the "reasonably segregable" portions of these PLRs, based on your review of only one such PLR, from which you concluded that redaction "would be useless and does not further any public interest sufficient to outweigh the privacy interest of the taxpayer.

There are several errors in this decision that warrant reconsideration and reversal..

1. <u>The federal FOIA requires disclosure of IRS private letter rulings.</u>

---

[1] Although your letter is addressed to Mr. Davis, we wish to clarify that he is a reporter for Tax Analysts, a non-profit publisher of tax periodicals, and he made this request is on behalf of Tax Analysts.

Your letter correctly notes that the DC FOIA "was modeled on the corresponding federal Freedom of Information Act" and that "decisions construing the federal statute are instructive and may be examined to construe local law." However, your letter fails to acknowledge that federal courts have held that IRS PLRs must be made public, with suitable redactions, under the federal FOIA. That has been the law for the past 45 years.

In Tax Analysts and Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), the District Court held that PLRs cannot be withheld in full under the FOIA. In rejecting that decision, the court rejected claims that PLRs could be withheld under parallel FOIA exemptions that allow the withholding of sensitive commercial information and records exempt from disclosure under a separate "withholding statute," in that case, a provision of the Internal Revenue Code (§ 6103) that protects the confidentiality of taxpayer return information.[2] The court ordered in camera submission of the PLRs at issue, with proposed redactions of specific portions of each PLR and an explanation of the IRS's reasoning.

On appeal the IRS argued only that PLRs could be withheld in order to protect taxpayer privacy under the exemption barring disclosure of records under a separate "withholding statute." The District of Columbia Circuit affirmed, rejecting claims that PLRs could be withheld in their entirety and allowing in camera inspection. Tax Analysts and Advocates v. IRS, 505 F.2d 350 (D.C. Cir. 1974).[3]

Your letter does not cite this case law and seems to reject the need to consider federal precedent because Congress enacted Internal Revenue Code § 6110, which creates procedures for the processing of requests for PLRs and other "written determinations." I.R.C. § 6110 does indeed govern production of PLRs, but your letter fails to acknowledge that I.R.C. § 6110 was enacted after the cited decisions in Tax Analysts and Advocates v IRS . The enactment of I.R.C. § 6110 thus has nothing to do with the IRS's legal duty to make PLRs available under the FOIA.

2. <u>A "reasonably segregable" argument is not available as to these rulings.</u>

Your letter concludes that although the DC FOIA requires agencies to make public any "reasonably segregable" portions of a requested record after exempt portions are excised, D.C. Code § 2-534(b), such redactions here would be "useless"

---

[2] The District Court did not examine the FOIA's personal privacy exemption, as the IRS relied solely on the taxpayer confidentiality provisions in Internal Revenue Code § 6103, which is a "withholding statute" of the sort contemplated in the FOIA's Exemption 3 (5 U.S.C. § 552(b)(3).

[3] The Court of Appeals did reverse with respect to a second type of record (Technical Advice Memoranda), but Congress reversed that decision when it enacted Internal Revenue Code § 6110 several years later.

and would "not further any public interest sufficient to outweigh the privacy interest of the taxpayer." You reached this conclusion after asking OCFO to provide you one of the 24 requested PLRs 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." From that showing, you concluded that the "redactions of taxpayer information, financial data and analysis drawing on the financial date left the document '. . . with little to no informational value,'" quoting Antonelli v. BOP, 625 F. Supp. 55, 60 (D.D.C. 2009). This conclusion is flawed, both methodologically and substantively.

First, in terms of methodology, asking OCFO to provide a single document out of 24 does not assure an accurate assessment of whether the exemption claims are applicable as to all 24 documents. There is no indication that you asked OCFO to provide a representative sampling of the requested records, and it is entirely possible that OCFO chose the one letter that OCFO might think best made the case for total confidential treatment.

Representative sampling of requested documents is an acceptable methodology in cases where the request is for a voluminous number of documents and when the agency justifies its sampling methodology. See Bonner v. Department of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991). A universe of 24 PLRs would is not a voluminous set of records to warrant the use of sampling.

Second, your legal argument cites a footnote in Yeager v. DEA, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982) for the proposition that "the precise meaning of the term 'reasonably' when used in conjunction with 'segregable' has not yet been settled." "Not yet settled" may have been the state of the law when Yeager was argued and submitted 38 years ago. However, the Court of Appeals – in the same footnote you cite – sought to rectify the situation by stating that in deciding what is "reasonable segregable," the "court looks to a combination of intelligibility and the extent of the burden in 'editing' or 'segregating' the nonexempt material," citing Simpson v. Vance, 648 F.2d 10, 17 (D.C.CIR.1980), and Mead Data Central, Inc. v. Dep't of the Air Force, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977). There has been additional guidance on this issue since 1982, as we discuss in more detail below.

Your letter cites Antonelli v. Bureau of Prisons, 623 F. Supp. 2d 55, 60 (D.D.C. 2009), for the proposition that reasonable segregation of non-exempt portions of a record is not possible when non-exempt and exempt portions are "inextricably intertwined." However, once again, your letter misstates that decision.

Antonelli and other cases are clear that the "inextricably intertwined" doctrine comes into play only if the volume of requested records is significant, the non-exempt material is slight, and redaction would significantly strain agency resources. Differently put, the "inextricably intertwined" rationale permits withholding an entire document only if the "excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." Neufeld v. IRS, 646 F.2d 661, 646 (D.C. Cir. 1981). See also Solar Sources, Inc. v. United States, 142 F.3d 1033, 1039 (7th Cir. 1998) (requested records not "reasonably segregable" when it would take eight work-years to identify all nonexempt documents in millions of pages of files, and only a small percentage could be released).

Here, by contrast, we deal with only 24 documents, each probably no more than several pages, for a total of probably 100 or so pages. Processing this request would not strain agency resources to the extent required to denial access entirely. See Rugiero v. Department of Justice, 234 F. Supp. 2d 697, 707-09 (E.D. Mich. 2002) (finding the burden of segregating non-exempt portions not significant when the request covered 364 pages).

Third, any notion that the separating exempt from non-exempt material is unreasonably burdensome is belied by the fact that the IRS routinely produces redacted versions of its PLRs, with taxpayer names and personal identifiers omitted. It is true, as you point out, that IRS currently operates pursuant to a statutory protocol for redacting exempt material. However, the fact that IRS can regularly redact exempt portions of a ruling argues powerfully against your position that not a single word can be made public.

Moreover, and based on Tax Analysts' experience with PLRs and letter rulings from state revenue departments, PLRs tend to have fairly standard components:

- A summary of the pertinent facts;
- A citation of a tax code provision to be construed and the question presented; and
- The agency's analysis and conclusion.

An individual PLR may or may not go into a lot of detail about the facts, but those basics and that format – familiar to first-year law students learning how to summarize a court case or the law on a particular point – tend to be the heart of those rulings.

3. <u>The cited exemptions do not support total denied of this request.</u>

Your letter's analysis of OCFO's three exemption claims is similarly flawed. As a general proposition, we note that D.C. Code § 2-531 declares as the "public policy of the District of Columbia, the principle 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. To that end, provisions of this subchapter shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information."

The Council added this policy statement to "make clear that any actions should serve the purpose of access and that any restriction on that access should be construed narrowly." Comm. on the Judiciary and Criminal Law, Report on Bill No. 1-119, the "D.C. Freedom of Information Act of 1975," at 6 (1976), quoted in Dunhill v. Director, District of Columbia Department of Transportation, 416 A.2d 244, 247 n.5 (D.C. 1980). This policy of openness requires courts to construe all exemptions narrowly and to resolve all doubts in favor of disclosure. Newspapers Inc. v. Metro. Police Dep't, 546 A.2d 990, 993 (D.C. 1988); Barry v. Washington Post Co., 529 A.2d 319, 321 (D.C. 1987).

We make these points because your letter never mentions these principles.

We begin with your discussion of Exemption 6 (records exempt from disclosure by other statutes), in which you rely upon several tax statutes that protect confidential tax information. To the extent any such information is contained within the PLRs in question, redaction is the appropriate solution.[4]

Moreover, your letter leaps from citing various tax statutes to a conclusion that: "There is no general grant of discretion to city officials to release tax information outside of the very narrow parameters provided by various District statutes," adding a footnote that OCFO's interpretation is entitled to deference because of cases involving the Department of Employment Services.

This statement is unsupportable for multiple reasons. First, we are not talking about a "discretionary" disclosure of information, we are talking about obeying the law and the mandatory obligation on OCFO and other agencies to follow the DC FOIA. OCFO cannot pick and choose which statutes it chooses to heed. Second, to the extent that tax information may be confidential, that is not an argument for withholding a requested record in its entirety. Third, among the laws that OCFO is required to heed is the requirement in the DC FOIA that reasonably segregable portions of a requested record be made available.

As to the other exemptions you cite, your letter is not clear what information would be protected under Exemption 2 (personal privacy) that is not protected

[4] Your letter states that OTR has entered in a memorandum of understanding with 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." Your letter does not provide a citation to that MOU or an explanation of how that MOU allows OTR to ignore its statutory obligations under the DC FOIA or any other statute.

under Exemption 6 (withholding statutes), and the federal case. In any event, to the extent that personal privacy may be implicated, that would argue for withholding a taxpayer's name and personal identifiers, not the entire record.

As for Exemption 1 (trade secrets and commercially sensitive information), your letter acknowledges that the DC FOIA is modeled after the federal FOIA, but you do not acknowledge that the federal FOIA has been construed as not allowing the withholding of IRS PLRs under the parallel exemption in the FOIA (5 U.S.C. § 552(b)(4)). Your letter does acknowledge that this exemption is available only to those businesses that are operating in a "competitive" market, not to individuals. However, there is nothing in your letter to indicate which (if any) of the 24 letters at issue here were filed by businesses operating in a competitive environment.

Conclusion.

For these reasons, we respectfully ask your office to reconsider the denial of this request and to order OCFO to make the requested records available to Tax Analysts and Aaron Davis.

Respectfully submitted,

Cornish F. Hitchcock

Cornish F. Hitchcock

cc: Ms. LaVerne Lee, OCFO (laverne.lee@dc.gov)
Mr. Bazil Facchina, OCFO/OTR (bazil.facchina@dc.gov)

Office of Tax and Revenue

Form D-40EZ is no longer available for use for Tax Year 2019 and later. Taxpayers who used this form in the past must now use Form D-40.

Office of Tax and Revenue

OFFICE OF TAX AND REVENUE

Office Hours
Monday to Friday, 8:15 am to 5:30 pm, except District holidays

Connect With Us
1101 4th Street, SW, Suite 270 West, Washington, DC 20024
Phone: (202) 727-4829
Fax: (202) 442-6890
TTY: 711

Ask the Chief Financial Officer
Agency Performance

Listen ▶

SHARE

Tax Law and Guidance

Contact the Office of Tax and Revenue's Office of the General Counsel at (202) 442-6500 or via email for clarification of a District tax statute or to comment on information posted here.

Reference Materials

- Declaratory Orders
- Notices
- Private Letter Rulings
- Rulemakings
- Sales Tax Information
- Tax Rulings

Legislative Information

- DC Code
- Ballpark Tax Legislation
- FY 2010 Budget Support Congressional Review Emergency Act of 2009 [PDF]
- FY 2006 Budget Support Act Tax Law Changes [PDF]
- FY 2003 Budget Support Amendment Emergency Act Tax Law Changes [PDF]
- Tax Clarity Act of 2000 [PDF]

* This link is provided by the CFO office as a courtesy. The District government is not responsible for information on websites outside the DC portal. Inquiries should be made to the sponsoring organization.

MyTax.DC.gov

MyTax.DC.gov

MyTax.DC.gov is now live with 24/7 access. Visit the District's new online tax portal to view and pay your taxes. For many tax types, you can even file.

- MyTax.DC.gov

Check Your Refund Status Online

CHECK YOUR
REFUND STATUS

Check your refund status online. What you will need:

-Social security number
-Tax year
-Your exact refund amount

- MyTax.DC.gov

Resources

Office of Tax and Revenue

Form D-40EZ is no longer available for use for Tax Year 2019 and later. Taxpayers who used this form in the past must now use Form D-40.

Office of Tax and Revenue

OFFICE OF TAX AND REVENUE

Office Hours
Monday to Friday, 8:15 am to 5:30 pm, except District holidays

Connect With Us
1101 4th Street, SW, Suite 270 West, Washington, DC 20024
Phone: (202) 727-4829
Fax: (202) 442-6890
TTY: 711

Ask the Chief Financial Officer
Agency Performance

Listen

SHARE

Private Letter Rulings - Tax and Law Guidance

District Private Letter Rulings are the official tax positions of the Office of Tax and Revenue (OTR). The rulings are OTR's response to taxpayer requests for guidance on specific tax matters. A ruling may be relied upon by a taxpayer concerning a specific tax matter, since the ruling binds OTR as to the specific tax matter.

A ruling may be withdrawn or revoked or modified if the taxpayer's facts and circumstances change, the law changes or the ruling was issued in error. A ruling may not be used or cited as precedent. While a ruling is applicable solely to the taxpayer to which it is directed and may not be used by any other taxpayer, rulings provide guidance to other District taxpayers as to the interpretation and development of the DC Tax Code.

A ruling sunsets 10 years from the date of the ruling. The taxpayer may request that the ruling be extended after being reviewed by OTR.

How to Request a Private Letter Ruling

A taxpayer or their representative may request a private letter ruling by forwarding the following information to OTR:

1. Taxpayer's name, business address and federal taxpayer identification number,
2. Taxpayer's facts and circumstances concerning the specific tax matter for which the taxpayer is requesting guidance,
3. Statutory or judicial authority upon which the taxpayer is relying,
4. The relief requested, and
5. A penalties of perjury statement signed and dated by the taxpayer with the following declaration:

"Under penalties of perjury, I declare that I have examined this request for a private letter ruling, including accompanying documents, and, to the best of my knowledge and belief, this request for a private letter ruling contains all the relevant facts relating to the request, and such facts are true, correct, and complete."

Requests should be sent to:

OTR Ruling Committee
Office of Tax and Revenue
1101 4th Street, SW, Suite W750
Washington, DC 20024

Please note that requests for rulings will not be accepted once the taxpayer has been contacted by OTR concerning the specific tax matter that is the subject of the ruling request.

Internal Revenue Service

Number: **202021006**
Release Date: 5/22/2020

Index Number: 1361.00-00, 1361.03-00, 1361.03-03, 1362.00-00, 1362.02-00, 1362.02-02, 1362.04-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:01
PLR-119416-19
Date:
February 06, 2020

Legend

X =

Trust =

Date 1 =

Date 2 =

Date 3 =

State =

Dear :

This responds to a letter dated August 20, 2019, requesting relief under section 1362(f) of the Internal Revenue Code (the Code).

Facts

According to the information submitted and representations within, X was incorporated on Date 1, under the laws of State. Effective Date 2, X elected to be taxed as an S corporation.

On Date 3, Trust acquired shares in X. However, a timely election to treat Trust as an Electing Small Business Trust (ESBT) was not made, causing X's S corporation election to terminate effective Date 3.

X represents that Trust has at all times met the requirements of an ESBT within the meaning of section 1361(e), except that the trustee of Trust did not make a timely ESBT election under section 1361(e)(3).

X represents that upon discovering that its S election had terminated, X took corrective action by filing this request for relief. X represents that the circumstances resulting in the inadvertent termination and the failure to make a timely ESBT election were inadvertent and not motivated by tax avoidance or retroactive tax planning. X further represents that X has filed its income tax returns consistent with having a valid S election in effect for all taxable years since X elected to be an S corporation. X represents that other than the failure to make a valid ESBT election on Date 3, X has qualified as a small business corporation at all times since its election on Date 2. Lastly, X and its shareholders agree to make any adjustments required as a condition of obtaining relief under § 1362(f) that may be required by the Secretary.

Law and Analysis

Section 1361(a) provides that an S corporation is a small business corporation for which an election under § 1362(a) is in effect.

Section 1361(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for the year.

Section 1361(b)(1) provides that the terms "small business corporation" means a domestic corporation which is not an ineligible corporation and which does not (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1361(c)(2)(A)(i) provides that for purposes of section 1361(b)(1) a trust all of which is treated (under subpart E of part I of subchapter J of chapter 1) as owned by an individual who is a citizen or resident of the United States may be an S corporation shareholder.

Section 1361(c)(2)(A)(v) provides that for purposes of § 1361(b)(1)(B), an ESBT is a permissible shareholder.

Section 1361(e) provides that an ESBT means any trust if (i) such trust does not have as a beneficiary any person other than (I) an individual, (II) an estate, (III) an organization described in § 170(c)(1) which holds a contingent interest in such trust and is not a potential current beneficiary, (ii) no interest in such trust was acquired by purchase, and (iii) an election under § 1361(e) applies to such trust.

Section 1361(e)(3) provides that an election under § 1361(e) shall be made by the trustee. Any such election shall apply to the taxable year of the trust for which made and all subsequent taxable years of such trust unless revoked with the consent of the Secretary.

Section 1.1361-1(m)(2)(i) provides that the trustee of an ESBT must make the ESBT election by signing and filing, with the service center where the S corporation files its income tax return, a statement that meets the requirements of § 1.1361-1(m)(2)(ii).

Section 1.1361-1(m)(2)(iii) provides that the trustee of an ESBT must file the ESBT election within the time requirements prescribed in § 1.1361-1(j)(6)(iii) for filing a QSST election (generally within the 16-day-and-2-month period beginning on the day that the stock is transferred to the trust).

Section 1362(a) provides that a small business corporation may elect to be an S corporation.

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the 1st day of the 1st taxable year for which the corporation is an S corporation) such corporation ceases to be a small business corporation.

Section 1362(f) provides, in relevant part, that if (1) an election under § 1362(a) by any corporation terminated under § 1362(d)(2); (2) the Secretary determines that the circumstances resulting in such termination were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in such termination, steps were taken so that the corporation for which the termination occurred is a small business corporation; and (4) the corporation for which the termination occurred, and each person who was a shareholder in such corporation at any time during the period specified pursuant to § 1362(f), agrees to make the adjustments (consistent with the treatment of such corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such termination, such corporation shall be treated as an S corporation during the period specified by the Secretary.

Conclusion

Based solely on the facts submitted and the representations made, we conclude that the failure of Trust to make an ESBT election effective Date 3 caused an inadvertent termination of X's S corporation election within the meaning of § 1362(f). Pursuant to the provisions of § 1362(f), X will be treated as continuing to be an S corporation beginning on and after Date 3, unless X's S corporation election is otherwise terminated under § 1362(d).

This letter ruling is subject to the condition that within 120 days from the date of this letter, an election to treat Trust as an ESBT effective Date 3 must be made with the appropriate service center. A copy of this letter should be attached to the ESBT election. If this condition is not met, then this ruling is null and void. Furthermore, if this condition is not met, X must send notification that its S election has terminated to the service center with which X's S election was filed.

Except as specifically ruled upon above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding X's eligibility to be an S corporation or whether Trust was or is otherwise eligible to be an ESBT.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

Pursuant to the power of attorney on file with this office, we are sending a copy of this letter to X's authorized representative.

Sincerely,

Joy Spies
Joy Spies
Senior Technician Reviewer, Branch 1
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2):
Copy of this letter
Copy for §6110 purposes

cc:

Internal Revenue Service

Number: **202019007**
Release Date: 5/8/2020

Index Number: 1362.04-00, 1362.02-02, 1361.01-04

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B01
PLR-111829-19

Date:
November 29, 2019

LEGEND

X =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

State =

Dear :

This responds to a letter dated May 17, 2019, submitted on behalf of X by X's authorized representative, requesting relief under § 1362(f) of the Internal Revenue Code.

FACTS

According to the information submitted and representations within, X was formed on Date 1, under the laws of State. Effective Date 2, X elected to be treated as an S corporation.

On Date 2, X's operating agreement contained terms causing X to have more than one class of stock. Specifically, the agreement provided for the maintenance of capital accounts for each member with each account adjusted for capital contributions, income, gain, loss, deductions, and distributions made to the member. The capital accounts were not proportionate to membership interests. The agreement also provided that liquidation proceeds were to be distributed in accordance with capital accounts rather than pro rata based on membership interests. In addition, on Date 2, X's Form 2553 was missing the signature of one of X's shareholders. Thus, X's S election on Date 2 was ineffective.

On Date 3, X amended its operating agreement. However, the operating agreement still contained the same terms that caused X to have more than one class of stock. Thus, had X's S corporation election not been ineffective on Date 2, X's S corporation election would have terminated on Date 3.

X represents that it has taken corrective action by amending its operating agreement on Date 4 to provide that all outstanding units in X have identical distribution and liquidation proceeds.

X represents that neither X nor its shareholders intended to terminate X's S election and that X and its shareholders have filed consistently with X being an S corporation. In addition, X represents that, other than the ineffective S election on Date 2 and the potential termination due to a second class of stock on Date 3, X has qualified as a small business corporation at all times since its election on Date 2. Lastly, X and its shareholders agree to make any adjustments required as a condition of obtaining relief under the inadvertent termination rule as provided under § 1362(f) as may be required by the Secretary.

LAW AND ANALYSIS

Section 1361(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for the year.

Section 1361(b)(1) defines a "small business corporation" as a domestic corporation which is not an ineligible corporation and which does not (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, and a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the first day of the first taxable year for which the corporation is an S corporation) such corporation ceases to be a small business corporation. Section 1362(d)(2)(B) further provides that the termination shall be effective on and after the date of cessation.

Treas. Reg. § 1.1361-1(l)(1) of the Income Tax Regulations provides that a corporation is generally treated as having only one class of stock if all outstanding shares of stock of the corporation confer identical rights to distribution and liquidation proceeds.

Section § 1.1361-1(l)(2)(i) provides, in part, that the determination of whether all outstanding shares of stock confer identical rights to distribution and liquidation proceeds is made based on the corporate charter, articles of incorporation, bylaws, applicable state laws, and binding agreements relating to distribution and liquidation proceeds (collectively, governing provisions). Although a corporation is not treated as having more than one class of stock so long as the governing provisions provide for identical distribution and liquidation rights, any distributions (including actual, constructive, or deemed distributions) that differ in timing and amount are to be given appropriate tax effect in accordance with the facts and circumstances.

Section 1362(f) provides, in relevant part, that if (1) an election under § 1362(a) by any corporation was not effective for the taxable year for which made (determined without regard to § 1362(b)(2)) by reason of a failure to meet the requirements of § 1361(b) or to obtain shareholder consents; (2) the Secretary determines that the circumstances resulting in such ineffectiveness were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in such ineffectiveness, steps were taken so that the corporation for which the election was made is a small business corporation; and (4) the corporation for which the election was made, and each person who was a shareholder in such corporation at any time during the period specified pursuant to § 1362(f), agrees to make the adjustments (consistent with the treatment of such corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such ineffectiveness, such corporation shall be treated as an S corporation during the period specified by the Secretary.

CONCLUSION

Based on the facts submitted and the representations made, we conclude that X's S election was ineffective on Date 2, and the ineffectiveness of X's S corporation election was inadvertent within the meaning of § 1362(f). Therefore, X will be treated as an S corporation effective Date 2 and thereafter, provided X's S election is not otherwise terminated under § 1362(d).

As a condition of this ruling, any shareholder of X that did not sign X's Form 2553 must sign a written statement as described in § 1.1362-6(b)(1) consenting to X's S election effective Date 2. The written statement(s) must be filed with the appropriate service center within 120 days from the date of this letter, indicating that the statement(s) are to be associated with X's originally filed Form 2553.

Except as specifically ruled upon above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding X's eligibility to be an S corporation.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the ruling request, it is subject to verification on examination.

Pursuant to the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Joy C. Spies
Joy C. Spies
Senior Technician Reviewer, Branch 1
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy of this letter
Copy of this letter for section 6110 purposes

cc:

GENERAL COUNSEL MEMORANDUM

Issue: Sales Tax on Hotel Attrition Fees and Cancellation Fees
Statute Ref: D.C. Official Code § 47-2002(2), Imposition of Sales Tax; D.C. Code § 47-2002.2(1), Tax on Gross Receipts for Transient Lodging; D.C. Code § 47-2001(n)(1)(C), Definitions.
January 4, 2002 [Originally Issued as a Private Letter Ruling]

ISSUES:

(1) Whether the Attrition Fee charged by HOTEL is subject to District sales tax in circumstances where a Convention CLIENT cancels part or all of a block of reserved rooms without proper notice?
(2) Whether the Cancellation Fee charged by HOTEL is subject to District sales tax in circumstances where a Convention CLIENT reserves a meeting room or banquet facility for an event and subsequently cancels that reservation?

CONCLUSION:

(1) The Attrition Fee charged by HOTEL is subject to District sales tax in circumstances where a Convention CLIENT cancels part or all of a block of reserved rooms without proper notice.
(2) The Cancellation Fee charged in the form of a forfeited deposit by HOTEL is not subject to District sales tax.

FACTS:

(1) HOTEL is a large hotel in Washington DC that caters to Convention Clientele. Convention CLIENT entered into a contract with HOTEL for the reservation of *X* number of rooms for *Y* number of days in the month of *Z*. HOTEL and Convention CLIENT negotiated a specific rate for the rooms, banquet service and other charges. The contract contained a cancellation clause under which Convention CLIENT agreed to pay for the rooms not used at the special contract room rate plus an additional sum to offset lost banquet food and beverage revenue unless 30 days notice is provided to HOTEL. These fees are called "attrition fees." The contract does not address whether the attrition fee is subject to District sales tax. Convention CLIENT failed to use all the rooms contracted for. HOTEL billed Convention CLIENT for the unused rooms but does not charge District sales tax.

(2) In the event that a meeting room or banquet facility has been reserved for an event and subsequently cancelled, HOTEL retains any previous deposit or charges a fee representing a non-performance penalty.

TAXPAYER ARGUMENT:

The HOTEL asserts that a charge for a guestroom is not taxable unless the room is "furnished" to a "transient." HOTEL states that the attrition fee was for a person who did not occupy the room when contracted to do so. HOTEL states that the fee charged constitutes non-taxable liquidated damages for not using reserved rooms and for failing to give notice of cancellation in time to permit those rooms to be re-sold.

HOTEL asserts that under the definition in Section 47-2001(n)(1)(C), the charge for rental of a public meeting room or banquet facility does not meet the definition of a "retail sale." Therefore, any charge relating to the usage or non-usage, i.e., cancellation, should not be subject to sales tax.

LAW:

D.C. Code § 47-2002. Imposition of tax *[in pertinent part]*

> A tax is imposed upon all vendors for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services (defined as "retail sale" and "sale at retail" in this chapter).
>
> > * * *
> >
> > (2) The rate of tax shall be 10.05% of the gross receipts from the sale *of or charges for any room or rooms,* lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients; * * * [Emphasis added.]

D.C. Code § 47-2002.2. Tax on gross receipts for transient lodgings or accommodations; * * * *[in pertinent part]*

> A tax, separate from, and in addition to, the tax imposed pursuant to § 47-2002, is imposed on vendors engaging in the business activities listed in paragraphs (1) and (2) of this section for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services (defined as "retail sales" and "sale at retail" pursuant to § 47-2001(n)(1)). The rate of the tax shall be:
>
> > (1) 4.45% of the gross receipts for the sale *or charges for any room or rooms,* lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients; * * * [Emphasis added.]

D.C. Code § 47-2001.-Definitions. *[in pertinent part]*

> (n) (1) "Retail sale" and "sale at retail" means the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this chapter. Said term shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, or to use or incorporate the property so transferred as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining. For the purpose of the tax imposed by this chapter, these terms shall include, but not be limited to, the following:
>
> > * * *
> >
> > (C) The sale *or charge for any room or rooms*, lodgings, or accommodations furnished to transients by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration. The term "transient" means any person who occupies or who has the right to occupy any room or rooms, lodgings, or accommodations * * * [Emphasis added.]

ANALYSIS:

(1) Attrition Fee. Convention CLIENT's contract with HOTEL required HOTEL to set aside a number of rooms for a specified time frame. HOTEL complied with the terms of the contract by furnishing the number of room agreed upon. Convention CLIENT failed to use the number of rooms set aside. HOTEL billed Convention CLIENT the agreed room rate and sales tax on the room used and charged the agreed room rate on the unused rooms but did not charge sales tax.

For the sale or charge of any room or rooms to be subject to District sale tax, the room must be furnished to a transient by the hotel. D.C. Code § 47-2001(n)(1)(C). The statute does not require that the room be occupied. The statute does require that the person be provided with a room with the right to occupy the room.

When HOTEL furnished or provided the agreed upon number of rooms with the right of Convention CLIENT to occupy the rooms, Convention CLIENT was obligated to pay for the rooms furnished, whether occupied or not and the HOTEL is obligated to collect the District sales tax on the hotels rooms furnished, whether occupied or not. Even though Convention CLIENT did not occupy the complete block of rooms, the attrition fee is subject to tax.

(2) Cancellation Fee. Since the rental charges for meeting and banquet rooms are not subject to District sales tax, the cancellation fee charged for the non-performance of the rental contract relating to meeting and banquet rooms would not be subject to District sales tax.

For further information, please contact Ed Blick, General Counsel Office, at (202) 442-6509.

From: Jennifer Carr <jennifer.carr@taxanalysts.org>
Sent: Friday, May 29, 2020 8:20 AM
To: Aaron Davis <aaron.davis@taxanalysts.org>
Subject: FW: Private Letter Rulings

From: Hashmi, Aaishah (OCFO) <aaishah.hashmi@dc.gov>
Sent: Wednesday, January 28, 2015 4:28 PM
To: Jennifer Carr <jennifer.carr@taxanalysts.org>
Subject: RE: Private Letter Rulings

We sometimes convert PLR to Notices which are then published on our website under "Law & Guidance"

From: Jennifer Carr [mailto:jennifer.carr@taxanalysts.org]
Sent: Wednesday, January 28, 2015 4:27 PM
To: Hashmi, Aaishah (OCFO)
Subject: RE: Private Letter Rulings

Thank you.

From: Hashmi, Aaishah (OCFO) [mailto:aaishah.hashmi@dc.gov]
Sent: Wednesday, January 28, 2015 4:27 PM
To: Jennifer Carr
Subject: RE: Private Letter Rulings

No – we don't publish them.

From: Jennifer Carr [mailto:jennifer.carr@taxanalysts.org]
Sent: Wednesday, January 28, 2015 3:18 PM
To: Hashmi, Aaishah (OCFO)
Subject: RE: Private Letter Rulings

Will get in touch with Alan. Thanks.

Also, are the actual PLRs on the website? I can only find a page explaining what they are and how to request one.

From: Hashmi, Aaishah (OCFO) [mailto:aaishah.hashmi@dc.gov]
Sent: Wednesday, January 28, 2015 3:06 PM
To: Jennifer Carr
Subject: RE: Private Letter Rulings

Alan would be a good person to talk about the dec. orders. Our PLR guidance is on our website.

From: Jennifer Carr [mailto:jennifer.carr@taxanalysts.org]
Sent: Wednesday, January 28, 2015 3:05 PM
To: Hashmi, Aaishah (OCFO)
Subject: Private Letter Rulings

Ms. Hashmi,

I am writing a story about the OTR's provision of guidance -- particularly private letter rulings and declaratory orders. Could you answer a few questions about this? If not, can you direct me to the proper person? It would probably be easier for me to submit the questions in writing with maybe a follow up call if necessary.

Thank you,

Jennifer Carr
Deputy Editor
State Tax Notes
703-533-4423 (O)
571-239-6220 (C)
jennifer.carr@taxanalysts.org

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

★ ★ ★

DO 2015-2
District of Columbia Declaratory Order
Regarding District of Columbia Qualified High Technology Company (QHTC) Status

This Declaratory Order is issued pursuant to Title 9, chapter 42 of the District of Columbia Municipal Regulations.

I. ISSUE

Whether Petitioner ("Petitioner" or "Company" or "Taxpayer" or "Platform") is eligible to claim benefits as a Qualified High Technology Company ("QHTC").

II. CONCLUSION

Petitioner, considering its sales and services and its proposed DC office, would meet the eligibility requirements for a Qualified High Technology Company under D.C. Code Ann. §47-2001(n)(2)(G) and D.C. Code Ann. §47-1817.06(a)(1).

III. FACTS

Company, through its online platform, provides promotion and marketing services for Sellers who sell admittance to various events ("Licenses") to Purchasers. Sellers can use the Company's website tools to facilitate the sale of Licenses to Purchasers. In some situations, the Company leases tangible property to the Seller for Seller's use. The Company also sells a credit card swiper ("Swiper") to the Seller for a nominal fee. The Swiper is used by the Seller for processing in person credit card sales to the Purchasers. Finally, the Company sometimes sends consultants and staff to the Seller's location to assist Sellers. Compensation for leased property, Swipers, and the provision of consultants makes up a small minority of the Company's revenue.

The Seller's Purchasers can purchase Licenses through the Company's website or the Company's mobile phone application. If the Seller utilizes the Swiper, Purchasers can make purchases of Licenses at the Seller's location.

The bulk of the Company's revenue comes from the following 2 streams:

1. Service Fee = The service fee is earned only when the Purchaser purchases Licenses through the Company's online platform. The service fee is a percentage of the selling price, which is set by the Sellers.

2. Credit Card Processing Fee = The Company charges a credit card processing fee for all credit card transactions which are processed by the Company.

The Company currently has an employee in DC working from a home office and is proposing to hire additional employee(s) in the District, who may also work from home. The potential employee(s) would be qualified consultant(s) to help the Sellers coordinate events, or engineer(s) to assist in the development and maintenance of the Company's platform. In addition, the Company is considering acquiring an office location within the District.

IV. LAW

In order for an entity to qualify as a QHTC in the District of Columbia (the "District"), the entity must meet the following requirements as provided in D.C. Code Ann. §47-1817.01(5)(A):

> (i) Be an individual or entity organized for profit and maintaining an office, headquarters, or base of operations in the District of Columbia;
>
> (ii) Have 2 or more employees; and
>
> (iii) Derive at least 51% of its gross revenues earned in the District from:
>
>> (I) Internet-related services and sales, including website design, maintenance, hosting, or operation; Internet-related training, consulting, advertising, or promotion services; the development, rental, lease, or sale of Internet-related applications, connectivity, or digital content; or products and services that may be considered e-commerce;
>>
>> (II) Information and communication technologies, equipment and systems that involve advanced computer software and hardware, data processing, visualization technologies, or human interface technologies, whether deployed on the Internet or other electronic or digital media. Such technologies shall include operating and applications software; Internet-related services, including design, strategic planning, deployment, and management services and artificial intelligence; computer modeling and simulation; high-level software languages; neural networks; processor architecture; animation and full-motion video; graphics hardware and software; speech and optical character recognition; high-volume information storage and retrieval; data compression; and multiplexing, digital signal processing, and spectrum technologies;
>>
>> (III) Advanced materials and processing technologies that involve the development, modification, or improvement of one or more materials or methods to produce devices and structures with improved performance characteristics or

special functional attributes, or to activate, speed up, or otherwise alter chemical, biochemical, or medical processes. Such materials and technologies shall include metal alloys; metal matrix and ceramic composites; advanced polymers; thin films; membranes; superconductors; electronic and photonic materials; bioactive materials; bioprocessing; genetic engineering; catalysts; waste emissions reduction; pharmaceuticals; and waste processing technologies;

(IV) Engineering, production, biotechnology and defense technologies that involve knowledge-based control systems and architectures; advanced fabrication and design processes, equipment, and tools; or propulsion, navigation, guidance, nautical, aeronautical and astronautical ground and airborne systems, instruments, and equipment. Such technologies shall include: computer-aided design and engineering; computer-integrated manufacturing; robotics and automated equipment; integrated circuit fabrication and test equipment; sensors; biosensors; signal and image processing; medical and scientific instruments; precision machining and forming; biological and genetic research equipment; environmental analysis, remediation, control, and prevention equipment; defense command and control equipment; avionics and controls; guided missile and space vehicle propulsion units; military aircraft; space vehicles; and surveillance, tracking, and defense warning systems; or

(V) Electronic and photonic devices and components for use in producing electronic, optoelectronic, mechanical equipment and products of electronic distribution with interactive media content. Such technologies shall include microprocessors; logic chips; memory chips; lasers; printed circuit board technology; electroluminescent, liquid crystal, plasma, and vacuum fluorescent displays; optical fibers; magnetic and optical information storage; optical instruments, lenses, and filters; simplex and duplex data bases; and solar cells.

According to the opinion in *NBC Subsidiary WRC-TV, LLC v. District of Columbia Office of Tax and Revenue*, OAH Case No. 2013-0TR-00017 (D.C. O.A.H. Jan. 17, 2014), appeal docketed, No. 14-AA-174 (D.C. Feb. 21, 2014), for purposes of the D.C. Code Ann. §47-1817.01(5)(A)(iii) requirement that a company derive 51% of its revenue from an enumerated activity, "derive" is properly defined to mean "to take, receive, or obtain especially from a specified source." In *NBC Subsidiary WRC-TV, LLC*, an Administrative Law Judge held that a broadcast television station was not a QHTC, even when using a variety of high technology equipment in its business, where its revenue was primarily derived from advertising.

Additionally, under D.C. Code Ann. § 47-1817.01(5)(B) a QHTC cannot be:

> (i) An individual or entity that derives 51% or more of its gross revenues from the operation in the District of:
>
> > (I) An on-line or brick and mortar retail store; or
> >
> > (II) An electronic equipment facility that is primarily occupied, or intended to be occupied, by electronic and computer equipment that provides electronic data switching, transmission, or telecommunication functions between computers, both inside and outside the facility;
>
> (ii) A professional athletic team, as defined in § 47-2002.05(a)(3); or
>
> (iii) A business entity located in the DC Ballpark TIF Area, as defined in [§ 2-1217.12a(a)].

V. ANALYSIS

A. District QHTC Qualifications: Office and Employees

Petitioner is an entity organized for profit. Petitioner proposes to establish an office in the District with 2 or more employees and/or employ more than 2 employees in the District at home offices. Petitioner's proposed office and/or staffing plan meet the criteria of D.C. Code Ann. §47-1817.01(5)(A)(i)&(ii).

B. District QHTC Qualifications: Gross Revenue

To qualify as a QHTC, a company must derive at least 51% of its gross revenue from any of the enumerated activities listed under D.C. Code Ann. §47-1817.01(5)(A)(iii). In this context, "derive" means to take, receive, or obtain especially from a specified source. *NBC Subsidiary WRC-TV, LLC v. District of Columbia Office of Tax and Revenue*, OAH Case No. 2013-0TR-00017 (D.C. O.A.H. Jan. 17, 2014), appeal docketed, No. No. 14-AA-174 (D.C. Feb. 21, 2014). Thus, in order to qualify as a QHTC, Petitioner must demonstrate that at least 51% of its District gross revenue comes directly from one of the activities enumerated in D.C. Code Ann. §47-1817.01(5)(A)(iii).

Petitioner has asserted that it derives revenue from "internet-related services and sales" as defined in D.C. Code Ann. §47-1817.01(5)(A)(iii)(I). Under D.C. Code Ann. §47-1817.01(5)(A)(iii)(I), qualified QHTC activities are defined to include:

> Internet-related services and sales, including website design, maintenance, hosting, or operation; Internet-related training, consulting, advertising, or promotion services; the development, rental, lease, or sale of Internet-related applications, connectivity,

or digital content; or products and services that may be considered e-commerce.

Based on a review of the facts presented, Petitioner's gross revenue is derived from two sources: service fees upon third party Sellers sales Licenses, and credit card processing fees. These fees are triggered only when Licenses are sold through the Company's platform.

Petitioner's contract with Sellers provides that the service fees charged are for the sale of Licenses to the Purchasers via the online platform. Only actual sales of Licenses by third party Sellers generate revenue for the Company—the promotion and marketing services do not generate revenue for the Company. Accordingly, it is clear that the Company "derives" its District gross revenue not from promotional or marketing services, but rather from sales of Licenses.

While the term "internet-related services and sales" is broad on its face, the context of the statute makes it clear that the term "internet-related" refers to services and sales performed with regard to the internet, not simply over the internet. The examples of "internet-related services and sales" in the statute are website design, maintenance, hosting, and operation—each of the activities described requires more than that a transaction simply occur via the internet.

However, gross revenues from "products and services that may be considered e-commerce" are also eligible for QHTC qualification. "E-commerce" is defined as activities that relate to the buying and selling of goods and services over the Internet. "E-commerce." Merriam-Webster.com. Merriam-Webster, n.d. Web. 25 June 2015. <http://www.merriam-webster.com/dictionary/e-commerce>. Company is deriving its District gross revenue from service fees for sales of Licenses over the internet. Given the broad definition of "e-commerce," it is clear that the revenues of the Company are derived from a qualified QHTC activity. Company does meet the gross revenue requirement under D.C. Code Ann. § 47-1817.01(5)(A)(iii)(I) for QHTC status.

C. District QHTC Qualification: Online Retailer Exclusion

D.C. Code Ann. § 47-1817.01(5)(B) states that 51% of the income of a QHTC must not be derived from the operation of an "on-line or brick and mortar retail store." Under the specific facts and relevant contractual relationships, the Company is not an on-line retail store.

VI. CONCLUSION

Company is eligible to receive the benefits of qualification as a QHTC because all the requirements of QHTC qualification will be met.

CAVEAT

This DO is based on the facts provided in the initial request and subsequently. This declaratory order shall be binding between the Chief Financial Officer and the petitioner on the stated facts alleged unless such order is altered or set aside by a court. Should the facts change, the QHTC qualification can be reevaluated. The declaratory order shall be binding as to a transaction in reliance upon the declaratory order, unless a change in the legal basis of the declaratory order or of any of the issues discussed above is made by statute, regulation, or judicial decision after the issuance of the declaratory order and before any affected transaction.

No opinion is expressed or implied concerning the tax treatment of any item discussed in this declaratory order except as expressly stated herein. This declaratory order does not have the force and effect of law and can be relied on only by the taxpayer who requested it.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

DO 2013-01

March 22, 2013

District of Columbia Declaratory Order Regarding District of Columbia Qualified High Technology Company Status

This Declaratory Order is issued pursuant to Title 9, chapter 42 of the District of Columbia Municipal Regulations.

ISSUE

Whether the Petitioner, considering its sales and services and its proposed DC office, would meet the eligibility requirements for a Qualified High Technology Company under D.C. Code Ann. §47-1817.01(5)(A) entitling the Petitioner to the benefits outlined in D.C. Code Ann. §47-2001 (n)(2)(G) and D.C. Code Ann. §47-1817.06(a)(1).

FACTS

The Petitioner provides information technology infrastructure services via the internet to customers. The Petitioner is a for profit entity. The services allow customers to access applications, platforms, server bandwidth, and storage capacity through the internet without having to spend capital purchasing their own servers, employing their own information technology support staff, or buying real estate to house their own servers.

The Petitioner's flagship services are the Service A and the Service B. Both services are accessed via the internet. The Service A service allows customers to store their information in data centers located across the globe, both uploading and retrieving data securely via the internet. The Service B service allows customers to remotely access the computing power of data centers to do any computing action an on-premises server could do. Customers use the computing power to run applications, process data, host websites, and perform many other functions. The Petitioner also offers a variety of other internet-based services with similar functionality to Service A and Service B. These other services allow customers to create and manage, through the internet, databases of information, their email infrastructure, their software applications, and to efficiently distribute content over the web. The Petitioner derives over 51% of its revenue from the sale of Service B, Service A, and all other internet-based services.

The Petitioner is headquartered and also has offices outside the District. While the Petitioner does not own any data centers, it does utilize large and small data centers to provide its services. Those data centers are owned by affiliated entities and are also located outside of the District of Columbia.

The Petitioner is proposing to establish a sales office in the District of Columbia. The office would be leased by an affiliated entity which is likely not a QHTC, but would be staffed by the Petitioner personnel. At a minimum, the sales office would employ two or more sales team members and support staff.

Employees of the proposed office would engage in sales and marketing related tasks such as phoning or visiting businesses, creating marketing collateral, showing prospective customers how they can use the Petitioner, and negotiating special pricing or terms and conditions that may differ from the standard online customer agreement. The goal of the sales team is to have customers sign up for an account whereby they can start requesting services on an as-needed basis in the future. No specific services would be requested from the sales office employees as those requests are sent to data centers through the internet after a customer has signed up for an account.

ANALYSIS

In order for an entity to qualify as a DC QHTC, it must meet the following requirements as provided in D.C. Code Ann. §47-1817.01(5):

- Be an individual or entity organized for profit and maintaining an office, headquarters, or base of operations in the District of Columbia;
- Have 2 or more employees in the District; and
- Derive at least 51% of its gross revenues earned in the District from:

(I) Internet-related services and sales, including website design, maintenance, hosting, or operation; Internet-related training, consulting, advertising, or promotion services; the development, rental, lease, or sale of Internet-related applications, connectivity, or digital content; or products and services that may be considered e-commerce;

(II) Information and communication technologies, equipment and systems that involve advanced computer software and hardware, data processing, visualization technologies, or human interface technologies, whether deployed on the Internet or other electronic or digital media. Such technologies shall include operating and applications software; Internet-related services, including design, strategic planning, deployment, and management services and artificial intelligence; computer modeling and simulation; high-level software languages; neural networks; processor architecture; animation and full-motion video; graphics hardware and software; speech and optical character recognition; high-volume information storage and retrieval; data compression; and multiplexing, digital signal processing, and spectrum technologies;

(III) Advanced materials and processing technologies that involve the development, modification, or improvement of one or more materials or methods to produce devices and structures with improved performance characteristics or special functional attributes, or to activate, speed up, or otherwise alter chemical, biochemical, or medical processes. Such materials and technologies shall include metal alloys; metal matrix and ceramic composites; advanced polymers; thin films; membranes; superconductors; electronic and photonic materials; bioactive materials; bioprocessing; genetic engineering; catalysts; waste emissions reduction; pharmaceuticals; and waste processing technologies;

(IV) Engineering, production, biotechnology and defense technologies that involve knowledge-based control systems and architectures; advanced fabrication and design processes, equipment, and tools; or propulsion, navigation, guidance, nautical, aeronautical and astronautical ground and airborne systems, instruments, and equipment. Such technologies shall include: computer-aided design and engineering; computer-integrated manufacturing; robotics and automated equipment; integrated circuit fabrication and test equipment; sensors; biosensors; signal and image processing; medical and scientific instruments; precision machining and forming; biological and genetic research equipment; environmental analysis, remediation, control, and prevention equipment; defense command and control equipment; avionics and controls; guided missile and space vehicle propulsion units; military aircraft; space vehicles; and surveillance, tracking, and defense warning systems; or

(V) Electronic and photonic devices and components for use in producing electronic, optoelectronic, mechanical equipment and products of electronic distribution with interactive media content. Such technologies shall include microprocessors; logic chips; memory chips; lasers; printed circuit board technology; electroluminescent, liquid crystal, plasma, and vacuum fluorescent displays; optical fibers; magnetic and optical information storage; optical instruments, lenses, and filters; simplex and duplex data bases; and solar cells.

The Petitioner is an entity organized for profit and proposes to open an office in the District employing at least 2 employees in the DC office to gain a larger customer base in the District. The Petitioner's proposed sales office and staffing plan meet the criteria of D.C. Code Ann. §47-1817.01(5)(A)(i)&(ii).

The Petitioner purports that more than 51% of its DC revenues will derive from information technology infrastructure services via the internet to customers using their Service A, Service B and other services. the Petitioner's sales of Service A, Service B, and other services qualify as internet-related services and/or information technologies for purposes of meeting the 51% threshold provided for in D.C. Code Ann. §47-1817.01(5)(A)(iii).

Additionally a QHTC cannot be:

- an individual or entity that derives 51% or more of its gross revenues from the operation in the District of:

    (I) A retail store; or

(II) An electronic equipment facility that is primarily occupied, or intended to be occupied, by electronic and computer equipment that provides electronic data switching, transmission, or telecommunication functions between computers, both inside and outside the facility;

- A professional athletic team, as defined in D.C. Code Ann. § 47-2002.05(a)(3); or
- A business entity located in the DC Ballpark TIF Area, as defined in D.C. Code Ann. § 2-1217.12a(a).

The Petitioner provides that they are not deriving 51% of their sales from a retail store nor an electronic equipment facility primarily occupied by data switching, transmission or telecommunication electronic and computer equipment. Nor are they a profession athletic team or a business entity in the Ballpark TIF area.

The Petitioner purports that they would be earning more than 51% of its income from qualifying activities and that 51% of its DC income will be earned from QHTC qualifying activities. If it meets these requirements in operation, the Petitioner will be a QHTC certified after January 1, 2012. Thus, under D.C. Code Ann. § 47-1817.06(a)(2)(A)(ii), it will not be subject to the franchise tax for the lesser of $15million or for the first five years that the QHTC has taxable income. It will also be exempt from collecting DC sales tax under D.C. Code Ann. § 47-2001(n)(2)(G) and from paying DC sales tax on purchases under D.C. Code Ann. § 47-2005(29).

This DO is based on the proposed facts provided in your request. This order shall be binding between the Chief Financial Officer and the petitioner on the stated facts alleged unless such order is altered or set aside by a court. The declaratory order shall be binding as to a transaction in reliance upon the declaratory order, unless a change in the legal basis of the declaratory order is made by statute, regulation, or judicial decision after the issuance of the declaratory order and before any affected transaction.

No opinion is expressed or implied concerning the tax treatment of any item discussed in this declaratory order except as expressly stated herein. This DO does not have the force and effect of law and can be relied on only by the taxpayer who requested it.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE

OTR REVENUE RULING 2007-02

Subject: Presidential Appointee Exception

Advice has been requested as to whether an officer of the executive branch of the U.S. government who was appointed by the President of the United States is subject to District of Columbia ("District") income taxes under the following facts:

FACTS

Taxpayer is an officer of the executive branch of the U.S. government who was appointed by the President of the United States. The officer's appointment was confirmed by the Senate. According to the federal act which governs the officer, the officer holds office for the designated term, unless removed before the end of the term *for cause* by the President. The officer resides in the District for 183 days or more during the taxable year.

ISSUE

Does an officer of the executive branch of the U.S. government under the above facts serve at the pleasure of the President of the United States, so that the officer is not considered a District resident for income tax purposes under D.C. Official Code § 47-1801.04 (17)?

CONCLUSION

An officer of the executive branch of the U.S. government under the above facts does not serve at the pleasure of the President of the United States because the officer can only be terminated for cause; therefore, the officer would be considered a resident of the District and subject to District income tax.

LEGAL ANALYSIS

Under D.C. Official Code § 47-1801.04(17), individuals who ". . . maintain a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not such other individual is domiciled in the District," are subject to District income taxes.

However, D.C. Official Code § 47-1801.04(17) provides an exception for:

> [A]ny officer of the executive branch of such government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and *whose tenure of office is at the pleasure of the President of the United States,* or any Justice of the Supreme Court of the United States, unless such officers or Justices are domiciled within the District at any time during the taxable year. In determining whether an individual is a "resident", such individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode. (emphasis added).

The federal act which governs the officer in the instant case provides that the officer holds office for the designated term, unless removed before the end of the term *for cause* by the President. Case law, in effect, interprets the phrase "at the pleasure of the President" as serving at the appointed position on an "at-will" basis. *See generally, SEC v. Blinder*, 855 F.2d 677, 682 (10th Cir. 1988). In *Blinder,* the court analyzed the constitutionality of the Securities and Exchange Commission's ("SEC") power to commence a civil enforcement action in federal court. According to the Securities Exchange Act of 1934, the SEC consists of five members who are appointed by the President with the advice and consent of the Senate. *Id.* at 681. The act does not provide for the appointment of a chairman; however, following the Reorganization Act of 1949, the President could designate the chairman. The act does not contain language which expressly allows the President to remove the commissioners. However, for the purposes of the case, the *Blinder* court, accepted appellant's argument that "the President may remove a commissioner only for efficiency, neglect or duty or malfeasance in office" (internal quotations omitted). *Id.* The court concluded that "as the President has the power to choose the chairman of the SEC to serve an indefinite term, it follows that the chairman serves at the pleasure of the President." *Id.* Contrarily, "the President has the power to remove a commissioner [only] for inefficiency, neglect of duty, or malfeasance in office." *Id.* The court in *SEC v. Blinder* clearly outlines the distinction between appointees who serve at the President's pleasure (SEC chairman) and those who can only be terminated for cause (SEC commissioners).

US v. Wilson, 290 F.3d 347, 350 (D.C. Cir. 2002), further illustrates the contrast between appointees who serve at the pleasure of the President and those who can only be terminated for cause. In *U.S. v. Wilson*, former President Clinton appointed appellee to the United States Commission on Civil Rights expressly stating that the appointment was "for the remainder of the term expiring November 29, 2001." *Id.* at 350. Under 42 U.S.C.S. § 1975(c), all commissioners were required to be appointed for six years, irrespective of whether their predecessors had completed their terms or not. President Bush appointed another commissioner to succeed appellee following November 29, 2001. The court held that appellee's term had in fact expired on November 29, 2001 and "that the fixed terms of six years for members of the Commission ran with the calendar regardless of delay in appointment or the filling of mid-term vacancies." *Id.* at. 361.

Although *U.S. v. Wilson* primarily analyzes the distinction between appointment terms which run with the person and those which run with the calendar, the court noted that:

> The US Commission was first created in 1957, and as originally established was composed of six members serving open-ended terms at the pleasure of the President. Congress reauthorized and reorganized the Commission in 1983 by (. . .) dividing the appointment power between the President and Congress [and] establishing that the President could only remove members for neglect of duty or malfeasance.

Id. at 350.

Congress clearly sought to differentiate between appointments where members served at the will or pleasure of the President and those that could only be removed for cause.

Similarly, here, the governing federal act divides the appointment power between the President and Congress by requiring that the President establish cause before removing an officer. As the officer can only be removed from office for cause, the officer is ineligible to benefit from the Presidential appointee exception, which requires that the appointee serves at the pleasure of the President. Thus the appointee would be considered a resident and subject to District taxes.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Chief Financial Officer
Office of Tax and Revenue

NOTICE
JULY 1, 2002

RECALL AND REVIEW OF OTR RULINGS

The Office of Tax and Revenue (OTR) announced on July 1, 2002, that it would conduct a review of all rulings relating to taxes administered by OTR. This action is taken due to changes to the District Tax Code (as well as to the Internal Revenue Code) over the years, and due to changes in facts supporting ruling requests submitted in past tax years.

As a result of this review, OTR will standardize written guidance, eliminate obsolete rulings, ensure consistency of treatment among similarly situated taxpayers, and update OTR records. This review will also facilitate publication of certain OTR rulings on the OTR Web site. OTR will determine whether a ruling is of general applicability and should be made available to all taxpayers, or released (in sanitized form) pursuant to the Freedom of Information Act.

SCOPE OF REVIEW

Rulings relating to the following taxes will be subject to this review process: income tax, franchise tax, tax on unincorporated business, personal property tax, sales tax, gross receipts tax, employer withholding tax and other taxes. *This action does not affect excise tax rulings, real property tax rulings (including exemptions from real property tax) or tax-exempt status rulings provided to nonprofit organizations.*

TAXPAYER ACTION

Taxpayers are being asked to submit to OTR any ruling that the taxpayer plans to utilize in determining an income tax, franchise tax, tax on unincorporated business, personal property tax, sales tax, employer withholding tax, or gross receipts tax return position after 12/31/2002. Taxpayer submission of rulings will ensure timely review of the ruling by OTR. During the period July 1, 2002 through December 31, 2002, OTR will review all letter rulings in its files, and any OTR ruling submitted by the taxpayer, where the taxpayer that received the ruling intends to utilize the ruling for tax years beginning after December 31, 2002.

OTR will review the appropriateness of all active rulings in the light of current tax law, the current facts, and current economics. Each ruling submitted for review, must be accompanied by the taxpayer's name, address and taxpayer identifying number [SSN or EIN]. Rulings that are not submitted to OTR for this review process will generally be revoked as of December 31, 2002.

RULING REVIEW PROCEDURE

Between July 1 and December 31, a cross-functional OTR technical Ruling Review Committee will review all OTR rulings to determine whether the ruling should be re-issued, the form in which it will be re-issued, whether the ruling should be issued as general guidance, or whether the ruling should be withdrawn. Where a taxpayer submits a ruling to OTR for this review procedure, the taxpayer will be notified of the determination made.

Where the OTR Ruling Review Committee determines that the ruling cannot be relied on in its current form, the taxpayer will have an opportunity to meet with the Committee to discuss the ruling.

If there is uncertainty as to whether a ruling is subject to this review, please contact the Ruling Review Committee at the number below for clarification.

Rulings that are not submitted to OTR during this recall and review process are hereby withdrawn as of 12/31/2002 by action of this Notice. Withdrawn rulings will not be allowed to be used for tax returns filed after 12/31/2002, unless specifically approved by the OTR Office of the General Counsel in writing.

POINT OF CONTACT

Rulings should be submitted to Janet James Mahon, Deputy General Counsel and Chairperson of the Ruling Review Committee, Office of General Counsel, OTR, 941 North Capitol Street, NE, Suite 810, Washington DC 20002. Questions can be directed to Janet James Mahon at 202-442-6500, or by e-mail to *OtrRuling@dc.gov*.