

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-86**

September 3, 2015

Mr. William M. Scott

RE: FOIA Appeal 2015-86

Dear Mr. Scott:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a) (“DC FOIA”), in which you assert that the Office of the Chief Financial Officer (“OCFO”) improperly withheld records in response to your request for information under DC FOIA.

Background

On June 25, 2015, you submitted a request to the OCFO for “[a]ll communications sent to and received from the U.S. Internal Revenue Service (“IRS”) from November 2014 to present, and all agreements entered into with the IRS, regarding an IRS examination of the tax-exempt status of the \$11,000,000 District of Columbia James F. Oyster Elementary School Pilot Revenue Bonds, Series 1999.” The OCFO denied your request on July 16, 2015, on the grounds that the records in question are investigatory files exempt from disclosure under D.C. Official Code § 2-534(a)(3)(A) and (E) (“Exemption 3”).

Subsequently, you appealed the OCFO’s denial to this office, contending that the OCFO improperly asserted Exemption 3. In specific, you argue that it is unclear that an investigation exists, and even if it did, the OCFO’s denial is insufficient because it constitutes a blanket exemption that does not adequately articulate the potential risk of harm posed by the release of the withheld documents. You also argue that the District, which is the target of the investigation at issue, lacks standing to assert an argument of interference on behalf of a federal agency.

The OCFO responded to your appeal in a letter to this office reasserting that the release of any records responsive to your request would interfere with an ongoing IRS enforcement proceeding and would disclose investigatory techniques.¹ The OCFO further states that an investigation is in fact ongoing. Along with its response to your appeal, the OCFO provided this office with a copy of the withheld documents for our *in camera* review. We have reviewed the documents and accept the OCFO’s representation that an ongoing investigation exists.

¹ A copy of the OCFO’s response is attached.

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, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). That right is subject to various exemptions, however, which may form the basis for the denial of a request. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The DC FOIA contains an exemption for investigatory records that were compiled for law enforcement purposes and whose disclosure would interfere with enforcement proceedings, but only to the extent that production of the records would have certain enumerated consequences (e.g., interfering with an enforcement proceeding). D.C. Official Code § 2-534(a)(3). Exemption 3 is modeled after Exemption 7 of the federal Freedom of Information Act, which exempts from disclosure the same type of documents. *See* 5 § U.S.C. 552(b)(7). The purpose of the investigatory exemption, as determined by the Supreme Court, is to prevent “the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding.” *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978). With respect to the duration of the exemption’s validity, the District of Columbia Court of Appeals has held that “[s]o long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of the evidence, the investigatory record exemption applies.” *E.g. Fraternal Order of Police, Metro. Labor Comm. v. D.C.*, 82 A.3d 803, 815 (D.C. 2014) (internal quotation and citation omitted). Conversely, “where an agency fails to demonstrate that the documents sought relate to any ongoing investigation or would jeopardize any future law enforcement proceedings, the investigatory records exemption would not provide protection to the agency’s decision.” *Id.*

To invoke Exemption 3, an agency must articulate a concrete harm that would occur if a record were released. Here, the OCFO asserts that release of the requested communications between the District and the IRS would reveal the “scope, path and extent of the investigation, thus potentially compromise[ing], interfere[ing] with or harm[ing] the investigation.” The OCFO does not explain how releasing correspondence² between the IRS and the District would actually harm the investigation.³

² Because the OCFO appears to acknowledge in its response to the appeal that no settlement agreements exist, we limit our analysis to the requested correspondence. (“...Mr. Scott requested ‘all agreements entered into with the IRS,’ implying his erroneous belief that the investigation was completed and the District entered into a settlement agreement with the IRS. . .”).

³ The OCFO cites FOIA Appeal 2011-17 in support of its position; however, we disagree with the decision in this appeal because it failed to address how release of the documents at issue there would interfere with an enforcement proceeding. Instead, the decision concludes

We find the citations the OCFO references to be unpersuasive in establishing that releasing the records at issue would interfere with an enforcement proceeding. The OCFO cites to *Willard v. IRS*, 776 F.2d 100, 102 (4th Cir. 1968) and *White v. IRS*, 707 F.2d 897, 901 (6th Cir. 1983), both of which involve targets of a federal investigation who requested documents about themselves under the federal FOIA while ongoing federal enforcement proceedings were being conducted against them. In both cases, the courts held that disclosing the requested records would interfere with enforcement proceedings by allowing the targets of the investigation an opportunity to fabricate alibis or defenses through access to open investigatory files. *Willard*, 776 F.2d at 103; *White*, 707 F.2d at 901. These cases are distinguishable from the instant matter.

Here, the target of the investigation (the District) is not requesting the investigatory information; rather, it possesses it. As such, there is no potential that releasing the records would provide an unfair litigation advantage to the target of the enforcement proceeding. Further, the documents concern a public bond issued and administered by a public body. It is unclear how releasing correspondence between the IRS and the OCFO could affect the likelihood of the IRS continuing its investigation into the District. Therefore, we conclude that release of the requested correspondence would not interfere with an enforcement proceeding.

The OCFO advances an additional argument that the requested correspondence is protected from disclosure under D.C. Official Code § 2- 534(a)(3)(E) because releasing it would reveal techniques that are “unique and particular to the IRS and are not readily known to the public.” D.C. Official Code § 2-534 (a)(3)(E) provides that investigatory records compiled for law enforcement purposes are exempt from disclosure if producing them would disclose investigative techniques and procedures not generally known outside the government. The following are examples of specific IRS investigative techniques that courts have found to be protected by an investigatory technique exemption:

- IRS settlement guidelines. *Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190 (D.C.Cir. 2009).
- IRS techniques with respect to tax protesters. *Becker v. I.R.S.*, 34 F.3d 398 (5th Cir. 1994).
- IRS policy for enforcing summonses in international cases. *Vento v. I.R.S.*, 714 F.Supp.2d 137 (D.D.C. 2010).
- IRS’s electronic database detailing vast majority of all evidence obtained by government in criminal tax administration. *Shannahan v. I.R.S.*, 680 F.Supp.2d 1270 (W.D. Wash. 2010) *aff’d*, 672 F.3d 1142 (9th Cir. 2012).
- Documents that reveal how IRS agent detected diesel fuel excises tax dodger. *McQueen v. United States*, 264 F.Supp.2d 502 (S.D. Tex. 2003).
- An IRS statistical technique used to flag tax returns for auditing. *Church of Scientology of Texas v. I.R.S.*, 939 F.Supp. 429 (E.D. Va. 1996).

summarily that because an investigation existed, releasing documents related to the investigation would potentially harm the investigation.

Courts have rejected attempts by the IRS to invoke the investigative techniques exemption when the IRS provided little insight as to the particular technique used, did not articulate to what degree the technique was known to the public, or failed to establish how the disclosure could be reasonably expected to be used to circumvent the law. *Shannahan v. I.R.S.*, 637 F. Supp. 2d 902 (W.D. Wash. 2009); *Church of Scientology of Texas v. I.R.S.*, 816 F. Supp. 1138 (W.D. Tex. 1993).

In this matter, the OCFO appears to be asserting the investigative technique exemption on behalf of the IRS; yet, the OCFO fails to articulate what specific IRS technique would be revealed or the degree to which the technique is not already known to the public. The OCFO has also failed to explain how disclosing the requested correspondence could be used to circumvent the law. Unlike the cases described above, we do not envision how the requested correspondence could be used by an individual or entity to interfere with an IRS proceeding.

Lastly, the OCFO brings to our attention your previous employment with the IRS and speculates about why you seek the documents at issue. We shall not substantively address these points because a requestor's identity and motives in obtaining records have no bearing on whether the records should be released. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 771 (1989) ("Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.").

Conclusion

Based on the foregoing, the decision of OCFO is reversed and remanded to the OCFO to provide the withheld documents within 10 business days from the date of this decision.

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 the DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor's Office of Legal Counsel

cc: Stephen B. Lyons, Deputy General Counsel, OCFO (via email)
Ching Hua, Assistant General Counsel, OCFO (via email)