SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION—CIVIL ACTIONS BRANCH

WILLIAM SCOTT,	*	
	*	
Plaintiff,	*	Civil Case No. 2018 CA 002275 B
	*	Civil II, Calendar I
v.	*	Judge John M. Mott
	*	
DISTRICT OF COLUMBIA,	*	
	*	
Defendant.	*	

ORDER

This matter comes before the court on the defendant District of Columbia's ("District's") Motion for Summary Judgment and plaintiff's opposition thereto. For the reasons stated herein, the court denies the motion.

Background

Plaintiff brings this action against the District of Columbia under the District of Columbia Freedom of Information Act ("D.C. FOIA") to seek the disclosure of certain documents related to the United States Internal Revenue Service's ("IRS'") examination of the tax-exempt status of bonds issued to fund the James F. Oyster Elementary School. Plaintiff submitted a D.C. FOIA request to the District of Columbia Office of the Chief Financial Officer ("OCFO") on July 12, 2016, which provided some documents and withheld others. Plaintiff challenged OCFO's decision pursuant to D.C. Code § 2-537, and the Mayor's Correspondence Unit affirmed it. Plaintiff seeks to compel OCFO to produce two documents: "(a) the IRS Form 886-A, which was prepared by the IRS and sent to the District of Columbia as part of its examination of the outstanding bond issue, and (b) a legal response prepared on behalf of the District of Columbia and sent to the IRS."

Standard

To prevail on a motion for summary judgment, the movant must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56 (c). The non-movant then assumes the burden of establishing that there is a genuine issue of material fact in dispute. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). When considering a motion for summary judgment, the trial court must view the pleadings, discovery materials, and affidavits or other materials in the light most favorable to the non-movant. *Johnson v. Washington Gas Light Co.*, 109 A.3d 1118, 1120 (D.C. 2015).

When the District moves for summary judgment to establish the applicability of a D.C. FOIA exemption, the District "can satisfy its burden to provide a sufficiently detailed description of what it is refusing to produce and why by including all the necessary information in a *Vaughn* index" and the omission of supporting affidavits is "not necessarily fatal." *FOP v. District of Columbia*, 79 A.3d 347, 358 (D.C. 2013). Such an index, however, "must supply enough information to enable the court to assess whether the District properly invoked the privilege," and conclusory assertions are insufficient to confirm the application of an exemption. *Id.* at 358-59.

Analysis

Defendant argues that the documents at issue, the IRS Form 886-A and the District's Legal Response to the IRS, are exempt from disclosure under the D.C. FOIA. In its *Vaughn* index,[1] defendant explains that the IRS Form 886-A "was provided by the IRS," "reads as an argumentative brief seeking to find the District in violation of the law," and "contains a summary

[1] This index itemizes each document withheld, the exemptions claimed for the item, and the reasons why the exemption applies, and was first described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

of the IRS's investigation, including identifying documents supporting its investigation." The "Legal Response" was prepared by OCFO's outside counsel and similarly "reads as an argumentative brief in support of finding the District's actions lawful and the bonds as tax-exempt."

Defendant asserts that the documents are exempt pursuant to D.C. Code § 2-534 (a)(3) and (4). The (a)(3) exemption applies to "[i]nvestigatory records compiled for law-enforcement purposes" to the extent that their production would interfere with "[e]nforcement proceedings" or "[d]eprive a person of a right to a fair trial or an impartial adjudication." Defendant contends that because both documents were compiled for the purposes of the IRS' investigations of whether the bonds at issue are tax exempt, they qualify as "records compiled for law-enforcement purposes." In addition, defendant asserts that disclosure would harm the District's right to a fair trial by granting its adversaries an unfair advantage. Alternatively, the District argues that the (a)(4) exemption protects the documents as "[i]nter-agency or intra-agency memorandums or letters, including memorandums or letters" that contain advisory opinions and recommendations reflecting the deliberative process of an agency.

Plaintiff argues that the District has failed to demonstrate that the claimed exemptions should be upheld and that no genuine issue of fact exists. With respect to the "investigatory records" exemption, plaintiff argues that defendant fails to support its assertions that the enforcement proceeding is ongoing and that disclosure would harm the District's right to an impartial adjudication with any affidavit or other proof. Moreover, plaintiff argues that the documents were not "compiled by the OCFO within its law-enforcement" role. In addition, plaintiff argues that the inter-agency or intra-agency privilege of (a)(4) does not apply because the IRS is not an "agency" for purposes of the D.C. FOIA.

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The court begins by noting that in any FOIA analysis, the statute's "exemptions from disclosure are to be narrowly construed, with ambiguities resolved in favor of disclosure." *FOP v. District of Columbia*, 79 A.3d 347, 354 (D.C. 2013). In addition, "[b]ecause many provisions of the D.C. FOIA mirror provisions in the federal Freedom of Information Act … case law interpreting the federal FOIA [may] be 'instructive authority'" when interpreting the D.C. FOIA. *Id.* The court assesses defendant's arguments against this legal backdrop.

Investigatory Records Compiled for Law Enforcement Purposes

Defendant has not established that it is entitled to withhold the requested documents pursuant to D.C. Code § 2-534 (a)(3), which protects from disclosure "[i]nvestigatory records compiled for law enforcement purposes" and is "modeled on the corresponding exemption in the federal FOIA." *FOP v. District of Columbia*, 82 A.3d 803, 814 (D.C. 2014). To establish this exemption, "the District has the burden of showing (1) the documents requested by [plaintiff] have been compiled for law enforcement purposes and (2) disclosure of those documents would 'interfere with enforcement proceedings'" or deprive a person of a right to a fair trial. *Id.* at 815. The purpose of this exclusion is to "prevent premature disclosure of investigatory materials which might be used in a law enforcement action." *FBI v. Abramson*, 456 U.S. 615, 622 (1982).

The Form 886 A and Legal Response both qualify as documents "compiled for law enforcement purposes." Documents compiled for IRS investigations of tax liability qualify as documents "compiled for law enforcement purposes" even when the potential enforcement action is a civil administrative enforcement proceeding. *E.g.*, *Church of Scientology Int'l v. IRS*, 995 F.2d 216, 919 (9th Cir. 1993) (records of investigation into church's tax exempt status qualified as records "compiled for law enforcement purposes" because the IRS "performs a law

enforcement function by enforcing the provisions of the federal tax code that relate to qualification for tax exempt status"). As explained in the OCFO initial decision, which is referenced as an exhibit by the District, the Form 886 A constitutes a preliminary accusation of wrongdoing to which the District submitted its Legal Response, and "[a]fter review of the Legal Response, the IRS will issue a final order indicating the tax status of the Bonds," which the District will then have the right to appeal to the IRS Office of Appeals. The Form 886 A summarized facts found by the IRS during its investigation and the agency's legal conclusion based on those facts, while the Legal Response similarly recounted facts and applied the law to those facts to support the District's legal position that the bonds are tax exempt.

The District fails to demonstrate, however, that the disclosure of the Form 886 A or the Legal Response would interfere with enforcement proceedings. In general, disclosure of investigatory materials could interfere with an investigation when it would disclose to the "investigation's target … the scope and direction of the investigation and could allow the target to destroy or alter evidence, fabricate fraudulent alibis, or intimidate witnesses." *North v. Walsh*, 881 F.2d 1088, 1098 (D.C. Cir. 1989); *see also Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987) (stating that the "premature release" of IRS investigation records to the subject of an investigation would interfere with the investigation). In this case, the target of the investigation, the District, already possesses the investigatory materials, and thus, disclosure carries no risk of prematurely advising the target of the investigation's scope or direction.

In addition, the District has not established that disclosure of the documents would harm the District's right to an impartial adjudication. The "phrase 'impartial adjudication' … refers to determinations made by administrative agencies" including the "agency process for the formulation of an order." *Chiquita Brands, Int'l, Inc. v. SEC*, 805 F.3d 289, 296 (D.C. Cir.

2015). Thus, the IRS' process of reaching a final decision with respect to the tax exempt status of the bonds at issue qualifies as an "adjudication." The District's only argument that disclosure would prevent the IRS from fairly adjudicating the bond issue is the conclusory assertion that because plaintiff is inclined to "publish the information he receives under FOIA … to the public at large," the "release of the documents will harm the District's right to an impartial adjudication."

This decision turns on whether disclosure would unfairly influence the outcome of proceedings. *Chiquita*, 805 F.3d at 209 ("[e]xemption … is not a tool to protect reputation … interests … unless the damage disclosure might pose to such interests is likely to impact the ultimate fairness of [an adjudication.]"). Disclosure could impact the fairness of a proceeding when it "confer[s] an unfair advantage on one of the parties," which is absent here because both parties already possess the information at issue, or, under extraordinary circumstances, when "release of the document … could be expected to lead to publicity which was not just disadvantageous to [an entity] but of a nature and degree that judicial fairness would be compromised." *Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988). At this stage, viewing the facts in the light most favorable to the non-movant, the District has failed to establish that any alleged attempt to publicize the records by plaintiff would be of such a degree that it would compromise the fairness of the IRS adjudication.

Inter-Agency or Intra-Agency Documents

In addition, the District has not established that it is entitled to withhold the documents as "inter-agency or intra-agency memorandums or letters" under D.C. Code § 2-534 (a)(4).[2] This exemption is "substantively equivalent" to its federal counterpart, *FOP v. District of Columbia*,

[2] This provision incorporates "deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege" pursuant to D.C. Code § 2-534 (e).

79 A.3d 347, 354 n.17 (D.C. 2013), and the "first condition" for its application is that the documents are "inter-agency or intra-agency" materials. *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001).

The federal exemption does not apply to communications between federal and state agencies, unless the state agency is performing a "consultative" role. The federal FOIA defines an "agency" as an authority of the Government of the United States. *Id.* Thus, courts have declined to apply this exemption to communications between federal agencies and state entities. *See, e.g.*, *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999) (stating that inter-agency exemption did not apply to communications between a federal agency and a City Council member because the latter entity is not an agency as defined by FOIA); *People for the American Way Found. v. United States Dep't of Educ.*, 516 F. Supp. 2d 28, 36-7 (D.D.C. 2007) (finding that communications between the Mayor's Office and the United States Department of Education were neither "inter-agency" nor "intra-agency" communications). Communications between a federal and state agency may be deemed "intra-agency," however, when the state agency plays a consultative role and the interests of the communicating entities are aligned. *See Klamath*, 532 U.S. at 10 (stating that the "intra-agency" exemption applies when the outside entity's documents "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel."); *Citizens for Responsibility & Ethics v. United States Dep't of Homeland Security*, 514 F. Supp. 2d 36, 45 (D.D.C. 2007) (finding that the "intra-agency" consultation exemption applied when "state officials worked with FEMA to make and inform agency decisions regarding evacuation").

The court finds that the exemption provided in the D.C. FOIA similarly does not apply to communications between federal and state agencies, with the possible exception of when an

outside agency plays a consultative role, which did not occur in this case. D.C. FOIA defines "agency" to include any agency of the District of Columbia Government. *See* D.C. Code § 2-539 (incorporating definition of agency in D.C. Code § 2-502). Thus, the IRS is not an "agency" within the scope of the D.C. FOIA, and, therefore, communications between the District and the IRS do not qualify as "inter-agency" communications, just as they would not be considered "inter-agency" documents under the federal FOIA. In addition, the communications at issue here do not qualify as "intra-agency" because no consultative role exists. Neither the IRS nor OCFO acted as a consultant toward the other agency; instead, as the District states in its *Vaughn* index, each document "reads as an argumentative brief" and the Legal Response advocates for "the District's position" that its actions were "lawful" and the bonds should be "tax exempt," which is adverse to the IRS' position. In such a situation, OCFO acts as a "self-advocate" and has "its own interests in mind," and therefore, the consultant exemption does not apply. *See Public Empls. For Envt'l Responsibility v. United States Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 202 (D.C. Cir. 2014) (stating that the exemption does not apply in such circumstances).

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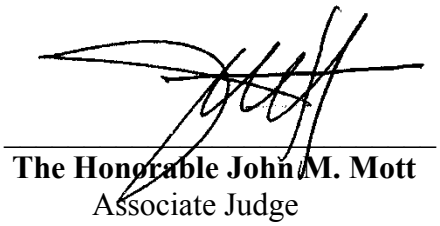
In sum, the District fails to establish that undisputed facts entitle it to judgment as a matter of law. When viewing the evidence in the light most favorable to the non-moving party, the District fails to establish that disclosure of the documents at issue, the IRS Form 886-A and the District's Legal Response, will interfere with enforcement proceedings or harm the District's right to an impartial adjudication. In addition, the District fails to establish as a matter of law that the "intra-agency" or "inter-agency" exemptions apply to the documents.

Accordingly, it is this **16th** day of **October, 2018**, hereby

ORDERED that District of Columbia's Motion for Summary Judgment is **DENIED**.



The Honorable John M. Mott
Associate Judge
(Signed in Chambers)

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