

Disclosure Litigation **BULLETIN**

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ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996

On October 2, 1996, President Clinton signed the "Electronic Freedom of Information Act Amendments of 1996," P.L. No. 194-231, 110 Stat. 2422, which addresses electronic records issues and other procedural aspects of Freedom of Information Act (FOIA) administration.

The new amendments revise the definition of the term "record" to specifically cover information in an electronic form. Agencies are also required to make reasonable efforts to conduct searches for records that are in electronic formats and to provide records in any format requested if readily reproducible in that format. Further, all FOIA reading room materials created on or after November 1, 1996, are to be made available in electronic form.

The new amendments also address FOIA processing time limits and backlogs. Specifically, the time for an agency to respond to a FOIA request is increased from 10 working days to 20 working days. An amendment for "multitrack processing" allows agencies to process relatively simple FOIA requests received later in time ahead of relatively complex requests received prior in time. Moreover, the amendments require agencies to issue regulations to provide for expedited processing of FOIA requests in which the requester demonstrates a compelling need. Finally, the amendments contain provisions requiring agencies to be more specific with regard to the information denied in response to a FOIA request.

Various effective dates apply to the statutory amendments. The Department of Treasury is planning to issue new FOIA regulations this year to interpret and implement the provisions.

A FEW FOIA QUESTIONS AND ANSWERS

QUESTION - If a record is covered by a FOIA exemption must it be withheld?

ANSWER - No, even though it is covered by a FOIA exemption there is no obligation to withhold a record so long as disclosure of the record or information contained in the record is not barred by statute. To the contrary, to the extent information sought under the FOIA is not barred from disclosure by statute, e.g., I.R.C. § 6103, Privacy Act of 1974 (5 U.S.C. § 552a), Bank Secrecy Act (31 U.S.C. § 5319), or F.R.Cr.P. Rule 6(e), consideration is to be given whether, as a matter of discretion, the agency will choose not to assert an available FOIA exemption and release the information.

QUESTION - Is there a standard to be used in determining whether to release a record otherwise covered by an exemption?

ANSWER - Yes, the Service's disclosure policy may be found in IRM 1230, Internal Management Document System Handbook, text 293(2). It provides that IRS "will grant a request under the Freedom of Information Act for a record which is not prohibited from disclosing by law or regulations unless the record is exempt from required disclosure under the FOIA and public knowledge of the information contained in such record would significantly impede or nullify IRS actions in carrying out a responsibility or function, or would constitute an unwarranted invasion of personal privacy." Similarly, see Statement of Procedural Rules, § 601.704(b)(2).

QUESTION - What material is exempt under the deliberative process privilege component of exemption (b)(5)?

ANSWER - The deliberative process (governmental or executive) privilege protects material reflective of the deliberative process of government agencies, i.e., internal agency documents that contain the opinions, deliberations, recommendations, and analyses of government officials in connection with their official duties. In order to qualify for the exemption the material must be both predecisional and deliberative. Moreover, it is important to distinguish between deliberative material and purely factual material, as the latter is generally not exempt.

QUESTION - If there is a FOIA request by the petitioner or representative for the underlying administrative file during the pendency of a Tax Court case what should a district counsel attorney do?

ANSWER - The district counsel attorney handling a petitioner's docketed Tax Court case, when notified of a FOIA request for the administrative file, should assist the local disclosure officer by making disclosure recommendations with regard to responsive records. FOIA case law does not support the withholding of all records, i.e., a blanket denial of the entire file, simply because the file relates to pending litigation. Rather, a document by document approach is to be taken in determining the releasability of the records. Several FOIA exemptions, including exemption (b)(7)(A) (authorizing the withholding of records which could interfere with the on-going litigation if released), might well come into play to withhold particular records. See IRM 1272, Disclosure of Official Information Handbook, text (13)51(5)and(6).

QUESTION - If a document contains some return information is it exempt from disclosure in its entirety pursuant to FOIA exemption (b)(3), in conjunction with I.R.C. § 6103(a)?

ANSWER - If a document is generated in connection with determining the liability or possible liability of a particular taxpayer it constitutes, in its entirety, the return information of that taxpayer. For example, a revenue agent's report with respect to a particular taxpayer, because it was prepared with respect to a return or with respect to a liability of that taxpayer, would constitute return information in its entirety. As such, it would be exempt in its entirety under FOIA exemption (b)(3), in conjunction with I.R.C. § 6103(a).

On the other hand, a document which is not generated in connection with determining the liability of a particular taxpayer may, nevertheless, contain some return information. For example, a Service management report on the functioning of a particular Service program may refer to particular taxpayer cases. Such a document while containing some return information does not constitute, in its entirety, return information. As such, only the information relating to the particular taxpayer cases constitutes return information the disclosure of which is exempt under (b)(3), in conjunction with

§ 6103(a). The document can be released once the return information has been redacted and there are no other FOIA exemptions to assert.

USE OF TAX INFORMATION
IN MULTI-AGENCY GRAND JURY INVESTIGATIONS

The question often arises as to the disclosure authority for the Service's participation in multi-agency grand jury investigations. The authority for the use of tax information in tax/non-tax multi-agency grand jury investigations is Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii), which prescribes conditions that must be met for the use of tax information in such investigations.

- The tax portion of the proceeding must have been authorized by or on behalf of the Assistant Attorney General (Tax Division) at the request of the Service.
- The non-tax matter must involve or arise out of the particular facts and circumstances giving rise to the tax proceeding.

The regulations provide additional rules for use of the tax information if the tax administration portion of the proceeding terminates, *i.e.*, the Title 26 charges are dropped or are severed to be tried separately from the non-tax charges. In that case, the Justice Department can continue to use return information so long as that return information was not provided by the taxpayer or the taxpayer's representative. However, the Justice Department must obtain an ex parte order under I.R.C. § 6103(i)(1) in order to continue to use tax returns and return information provided by the taxpayer or the taxpayer's representative ("taxpayer return information"). See IRM 1272, Disclosure of Official Information Handbook, text (22)56.

Often, state and local law enforcement officers assist the United States Attorney in both tax and non-tax federal grand jury investigations. I.R.C. § 6103 does not permit disclosure of returns or other tax information to such state and local officials assisting in the investigation. However, tax information can be disclosed to state and local officials for purposes of the federal investigation if those officials have been made federal employees. This is accomplished, for example, by making the state or local employee a Special Deputy U.S. Marshal or by formal appointment under the Intergovernmental Personnel Act. Additional guidance is provided at IRM 9781, Special Agent's Handbook, text 9267.9 and Exhibit 9260-6 and, IRM 1272, Disclosure of Official Information Handbook, text (28)34.5(12).

CASE DEVELOPMENTS

Bayview Farms et al. v. Internal Revenue Service et al., Civ. Action No. DKC-94-2135 (D.Md. November 20, 1996)

In this case a service center photocopy unit processed a number of Forms 4506 (Request for Copy of Tax Form) with subpoenas attached, and provided returns and return information of plaintiffs to an attorney who had provided no evidence of a material interest under I.R.C. § 6103(e) entitling him to the information. Notwithstanding notification by the plaintiffs to Inspection of the unauthorized disclosures, processing of the Forms 4506 continued. Plaintiffs brought suit under I.R.C. § 7431 and the Privacy Act seeking actual and punitive damages in excess of \$10 million dollars. The government conceded that the disclosures were not authorized by I.R.C. § 6103. The case went to trial on the issues of negligence and damages. At trial, the photocopy unit clerks testified they honored the requests because they felt the accompanying subpoenas compelled them to do so. However, additional testimony revealed that there were procedures in place requiring that subpoenas seeking tax information be forwarded to the disclosure officer for consideration, rather than be processed by the photocopy unit.

The court found that no Service employee, including Inspection personnel, was grossly negligent or willful in handling this matter; thus, there were no punitive damages awarded or violations of the Privacy Act found. The court also determined that the plaintiffs failed to prove any actual damages as a result of the disclosures. However, the court did find 61 unauthorized disclosures of returns and return information to the attorney. In limiting the award to statutory damages, the court concluded that because the Forms 4506 were invalid on their face, the photocopy unit was negligent in processing them. The Government has made a motion to alter or amend the judgement based on an error in the calculation of the number of disclosures.

Peddie v. United States, No. 2 95Cv00792 (M.D.N.D. December 16, 1996)

In this case the Service informally solicited financial information from three financial institutions regarding the plaintiffs, husband and wife. The institutions cooperated by providing the requested information. In soliciting the information, the Service did not use a summons or otherwise comply with the procedural requirements of the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422. Plaintiffs brought suit under the RFPA, seeking damages for the Service's failure to comply with 12 U.S.C. § 3402, which specifies the only means by which a government agency may access records held by financial institutions concerning its customers.

The Service argued (consistent with Neece v. IRS, A.O.D. 1992-013 (June 12, 1992)) that its request was exempt from those requirements. The RFPA exempts from its requirements the disclosure of financial records in accordance with procedures authorized by the Internal Revenue Code. The district court agreed with the plaintiffs, however, and held that this exemption did not include informal Service requests for records under the general authority to examine books and records contained in I.R.C. § 7602(a)(1). Following the Tenth Circuit in Neece v. IRS, 922 F.2d (10th Cir. 1990), the district court held that the Service was not exempt from the procedural requirements of the RFPA "merely because a financial institution . . . voluntarily chooses to allow the I.R.S. to examine financial records pertaining to a taxpayer." Statutory damages of \$100 were awarded to each spouse. The appeal period expires on February 14, 1997.

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Several topics in this Bulletin were based on suggestions and comments received as a result of the survey in Disclosure Litigation Bulletin No. 96-2. Your future suggestions for topics are invited.