



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

11.3.13

AUGUST 3, 2023

## EFFECTIVE DATE

(08-03-2023)

## PURPOSE

- (1) This transmits revised IRM 11.3.13, Disclosure of Official Information, Freedom of Information Act.

## MATERIAL CHANGES

- (1) IRM 11.3.13.1(5), Updated Program Scope and Objectives to align with the Primary Stakeholders section to conform with the internal controls requirement.
- (2) IRM 11.3.13.1.4, Program Management and Review - Added new Internal Control to provide information regarding reporting of the Disclosure program objectives.
- (3) IRM 11.3.13.1.5, Program Controls - Added new Internal Control to list program controls developed to oversee the Disclosure program.
- (4) Reviewed and updated the IRM where necessary for the following types of editorial changes: legal citations, published forms and documents and web addresses.

## EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 11.3.13, Disclosure of Official Information, Freedom of Information Act (FOIA), dated October 05, 2021.

## AUDIENCE

All Operating Divisions and Functions

## RELATED RESOURCES

- (1) The Disclosure and Privacy Knowledge Base can be found at: <https://portal.ds.irsnet.gov/sites/vl003/pages/home.aspx?bookshelf=disclosure>

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11.3.13

Freedom of Information Act

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11.3.13.1  
(07-16-2020)  
**Program Scope and Objectives**

- (1) **Purpose:** These procedures provide instructions for IRS employees when responding to requests for records pursuant to the Freedom of Information Act (FOIA), 5 USC 552.
- (2) **Audience:** These procedures apply to all IRS employees in connection with processing a request for agency records pursuant to FOIA.
- (3) **Policy Owner:** The Director of Governmental Liaison, Disclosure and Safeguards (GLDS) is responsible for oversight of Disclosure policy.
- (4) **Program Owner:** The Disclosure office, under GLDS, is responsible for the Disclosure program and guidance. Each IRS organization is responsible for ensuring its employees are aware of and follow Servicewide Disclosure policy.
- (5) **Primary Stakeholders:** All IRS employees, that process requests for records pursuant to the Freedom of Information Act.

11.3.13.1.1  
(10-05-2021)  
**Background**

- (1) The Freedom of Information Act (FOIA), 5 USC 552, as amended, provides for public access to records and information maintained by Federal agencies. FOIA has been amended a number of times, most recently by the FOIA Improvement Act of 2016. This Act addresses many procedural issues, including administrative appeals time frames, dispute resolution services, the Department of Justice foreseeable harm standards, as well as other FOIA program requirements. This IRM incorporates guidance regarding all new FOIA Improvement Act of 2016 provisions.
- (2) Prior to the enactment of FOIA, first effective July 4, 1967, there were no practical guidelines to help a person obtain information about how the government operated, and no judicial remedies for those denied access to governmental records. With the passage of FOIA, the burden shifted from the requester having to justify access to governmental records, to the government having to justify why information would not be released.
- (3) The premise of FOIA is that the public has a right to know what goes on in government without having to demonstrate a need or reason, and a right to file an administrative appeal or a suit in U.S. District Court if denied access to records.
- (4) On December 31, 2007, the President signed into law the OPEN Government Act of 2007. This amendment to FOIA codified many procedures and guidelines that were already being practiced by the IRS. It also established additional requirements to track and report statistical data to Congress. Some of the provisions were effective upon enactment while others were not effective until December 31, 2008.
- (5) This IRM deals primarily with processing requests pursuant to 5 USC 552(a)(3) for reasonably described records maintained by the IRS which are not required to be published or otherwise made available under Sections (a)(1) or (a)(2).

**Note:** See IRM 11.3.7, Freedom of Information Reading Room Operations, for the interaction of these provisions and maintenance of the IRS Freedom of Information Act Library.

**Note:** Disclosure employees should also see IRM 11.3.41, Disclosure Case Processing and Inventory Management, for FOIA case processing guidance.

- (6) *Treasury Directive 25-05*, dated March 1, 2000, establishes policy and procedures and assigns responsibilities for carrying out the requirements of the Act within the Department of the Treasury.
- (7) On March 19, 2009, the Department of Justice issued a *FOIA Policy Directive* and a call for "Openness in Government." By this action, the Attorney General rescinded the October 12, 2001 Attorney General Memorandum on the FOIA and established a new standard for defending agency decisions to withhold information. When a FOIA request is denied, the Department of Justice will now defend an agency's determination "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."
- (8) Effective April 23, 2004, the IRS issued Policy Statement 11-13, Freedom of Information Act Requests (formerly P-1-192), found in IRM 1.2.1.11.1. This Policy Statement affirms the commitment of the IRS to administer FOIA in a manner consistent with "the fundamental values held by our society, including public accountability, safeguarding national security, enhancing the effectiveness of law enforcement agencies and the decision-making processes, protecting sensitive business information, and protecting personal privacy." The policy statement goes on to note that the "administrative cost and impact on operations involved in furnishing information in response to a FOIA request is not to be a material factor in deciding to deny a request unless the cost or impact would be so substantial as to seriously impair IRS operations."

**Note:** See IRM 11.3.13.5.2.6, Exemption (b)(5), for further discussion of applying these guidelines when processing FOIA requests and asserting the (b)(5) exemption.

- (9) All actions taken, and determinations made, in response to FOIA requests will be in accordance with procedural rules appearing at:
  - 31 CFR Part 1, Appendix B ; and
  - 26 CFR 601.702
- (10) All FOIA activities must be reported under Single Entry Time Reporting (SETR) code 800-85330.

11.3.13.1.2  
(10-05-2021)  
**Authority**

- (1) The Director, Governmental Liaison, Disclosure and Safeguards (GLDS) and their delegate, have authority to make FOIA determinations concerning the release of most IRS agency records. See IRM 1.2.2.12.6 and IRM 1.2.2.12.7, FOIA/PA Delegation Orders, for additional information.
- (2) The Executive Order issued in December 2005, the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016 require the IRS to designate FOIA Public Liaisons to serve as supervisory officials to whom a FOIA requester can raise issues about the service the FOIA requester received.

11.3.13.1.3  
(07-16-2020)  
**Responsibilities**

- (1) This IRM is used by all IRS employees to help comply with the procedures pertaining to requests for agency records under the Freedom of Information Act.
- (2) The IRS is committed to openness in Government and complying with FOIA. FOIA requires all federal agencies to respond timely to requests for records



and information the agency maintains. This statutory obligation is a responsibility shared by all IRS employees and Disclosure is committed to meeting this obligation.

11.3.13.1.3.1  
(10-05-2021)  
**Disclosure Manager**

- (1) Disclosure Managers are responsible for administering the FOIA Program. Responsibilities related to processing FOIA requests may involve:
  - a. Ensuring uniform and consistent responses to FOIA requests. This can be accomplished by encouraging Disclosure staff to use standardized language or paragraphs in communications with requesters.
  - b. Educating requesters on the proper procedures for filing a valid FOIA request, and educating IRS employees on the provisions of FOIA that affect them.
  - c. Using the inventory management system to control FOIA inventory to ensure timely responses.
  - d. Completing reviews of work in process for accuracy, completeness, and timeliness.
  - e. Coordinating requests with the functions providing responsive data.
  - f. Providing direction to IRS employees in other business units conducting searches for responsive records.
  - g. Providing assistance with respect to administrative appeals and lawsuits.
  - h. Determining if records marked "official use only" or "sensitive but unclassified" (OUO or SBU) should be declassified and released to a FOIA requester.

**Note:** See IRM 10.5.8, Privacy and Information Protection, Sensitive But Unclassified Policy: Protecting SBU in Non-Production Environments, and IRM 11.3.12, Designation of Documents, regarding designating records OUO or SBU.

- (2) Disclosure Managers have delegated authority to make agency determinations. This authority includes making determinations about the release of records and signing the response letter to the requester when denying records in part or in full, or in cases where we locate no responsive records. Other Disclosure personnel may sign correspondence and release records in response to FOIA requests when making full grants, responding to imperfect requests, or referring requests. See IRM 1.2.2.12.6 and IRM 1.2.2.12.7, FOIA/PA Delegation Orders, for additional information, and Delegation Order 11-2, found in IRM 1.2.2.12.2.
- (3) Disclosure Managers are responsible for reducing delays in processing, knowing the status of requests in their offices, and assisting in the resolution of disputes raised by FOIA requesters for cases completed by their staffs. Disclosure staff must notify the Disclosure Manager promptly of any inquiries or disputes raised by requesters.

11.3.13.1.3.2  
(10-05-2021)  
**The Roles of Other IRS Employees in Processing FOIA Requests**

- (1) The Disclosure Office relies heavily on the support and cooperation of all IRS employees in order to meet FOIA processing requirements. Many of the records requested under FOIA are under the control of front-line employees in the various functional areas. While the specific roles of other IRS employees in processing FOIA requests will depend upon local circumstances, it is important that these employees cooperate with the Disclosure Office in the FOIA

process. FOIA SETR time code (800-85330) must be used by all IRS employees to document the time spent in researching, processing and releasing documents.

11.3.13.1.4  
(08-03-2023)

**Program Management  
and Review**

- (1) Disclosure inventory management and case processing is facilitated within FOIAXpress (FX), which is monitored and maintained by the GLDS Data Services office. FX allows management to validate program compliance through generating reports and requiring inventory to be processed under IRC 6103 statutory authority.

11.3.13.1.5  
(08-03-2023)

**Program Controls**

- (1) Disclosure program oversight also includes participation in operational and quality reviews. The Disclosure Office uses the Embedded Quality Review System (EQRS) to perform quality review on Disclosure specific casework.

11.3.13.1.6  
(10-05-2021)

**Definitions/Acronyms**

- (1) The following is a list of the acronyms that are used in this IRM section:

Acronym	Definition
CCA	Chief Counsel Advice
CCDM	Chief Counsel Directives Manual
CD	Compact Disk
CFO	Chief FOIA Officer
CFR	Code of Federal Regulations
CI	Criminal Investigation
CMIR	Currency or Monetary Instruments Report
CTR	Currency Transaction Report
DOJ	Department of Justice
DMV	Department of Motor Vehicles
DVD	Digital Versatile Disc
EEO	Equal Employment Opportunity
EPF	Employee Performance Folder
FAR	Federal Acquisition Regulation
FBAR	Foreign Bank and Financial Accounts Report
FOIA	Freedom of Information Act
FPM	Federal Personnel Manual
FRC	Federal Records Center
FRCrP	Federal Rules of Criminal Procedure

<b>Acronym</b>	<b>Definition</b>
GLDS	Governmental Liaison, Disclosure and Safeguards
GSS	GLDS Support Services
HQ	Headquarters
IDRS	Integrated Data Retrieval System
IPSU	Identity Protection Specialized Unit
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
IT	Information Technology
JCT	Joint Committee on Taxation
LGM	Litigation Guideline Memoranda
MEF	Modernized E-file
MF	Master File
NTEU	National Treasury Employees Union
OGIS	Office of Government Information Services
OIC	Offer in Compromise
OPF	Official Personnel Folder
OPM	Office of Personnel Management
OUO	Official Use Only
PA	Privacy Act
P&A	Procedure and Administration, Counsel
PGLD	Privacy, Governmental Liaison and Disclosure
PIL	Public Information Listing
PLR	Private Letter Ruling
PPO	Policy and Program Operations, Disclosure
PTIN	Preparer Tax Identification Number
RA	Revenue Agent
RAR	Revenue Agent Report
RFP	Request for Proposal

Acronym	Definition
RRA 98	IRS Restructuring and Reform Act of 1998
SA	Special Agent
SBU	Sensitive but Unclassified
SERFE	Selection of Exempt Organization Returns for Examination
SETR	Single Entry Time Reporting
SFR	Substitute for Return
SSN	Social Security Number
TAM	Technical Advice Memoranda
TLS	Tax Law Specialist
TIGTA	Treasury Inspector General for Tax Administration
TP	Taxpayer
UIDIF	Underreported Income DIF
UIL	Uniform Issue List
USC	United States Code

11.3.13.1.7  
(10-05-2021)

#### Related Resources

- (1) The following are other sources of guidance related to disclosures of information pursuant to the Freedom of Information Act:
  - *FOIA and the Privacy Act*
  - *What every IRS employee needs to know about the FOIA*
  - *Respond Directly*

11.3.13.2  
(04-19-2017)

#### Overview and Processing

- (1) Processing a request under FOIA consists of five basic steps:
  - a. Receipt and control - classifying, assigning and controlling requests in inventory. (See IRM 11.3.13.2.1, Receipt and Control of FOIA Requests.)
  - b. Analysis - determining validity, identifying expedited processing or fee waiver requests, and other special features. (See IRM 11.3.13.3, Initial Analysis of FOIA Request.)
  - c. Search - searching IRS systems or offices for responsive records. (See IRM 11.3.13.4, Search Process.)
  - d. Review - reviewing records located in the search and applying exemptions or exclusions, if appropriate. (See IRM 11.3.13.5, Review and Redacting.)
  - e. Response and closing - drafting responses to the requester and closing the case. (See IRM 11.3.13.6, Response and Closing.)
- (2) Each of the five basic steps has specific procedural and technical requirements discussed in detail in the IRM sections listed above.

**Note:** Caseworkers will take substantial and follow-up action as soon as possible to move a case forward toward completion (i.e. ordering Integrated Data Retrieval System (IDRS) research or sending a search memo) based on inventory management and other program duties. Document all activities, including reasons for any delays, in the inventory management system by notating the case history.

11.3.13.2.1  
(10-05-2021)  
**Receipt and Control of  
FOIA Requests**

- (1) Receipt and control of requests for information under FOIA includes:
  - a. Date stamping or marking the paper request by hand with the date received.
  - b. Determining the type of request using the definitions found in the FOIA.
  - c. Inputting the request into the inventory management system (including all required information).
  - d. Assigning the request to a caseworker.
- (2) Requests are classified as either 5 USC 552 (a)(1), (a)(2), or (a)(3), depending upon the nature of the information requested.
- (3) Section (a)(1) pertains to requests for agency records required to be published in the Federal Register. Requests for IRS Regulations or for Privacy Act System of Records Notices fall under this category.
- (4) Section (a)(2) pertains to requests for agency records required to be made publicly available for inspection and copying. Requests for FOIA Library materials such as Internal Revenue Manuals (IRMs), IRS FOIA Logs, and Field Directives fall under this category.
- (5) Section (a)(3) pertains to requests for agency records that are not required to be made available to the public under Section (a)(1) or (a)(2). Requests for tax records or information protected by the Privacy Act fall under this category.
- (6) The order of priority for requests seeking records that fall under more than one category is (a)(3), (a)(2), and (a)(1). The request will be categorized and controlled under the highest category of records requested, with (a)(3) being the highest.

**Example:** A request for IRM 11.3 (under (a)(2)), combined with a request for tax records (under (a)(3)) will be logged as an (a)(3) request.

- (7) Agencies are required to make available for public inspection in an electronic format, records that have been requested three or more times.

**Note:** Release of records that meet this requirement must be coordinated through the FOIA Senior Policy Analyst.

11.3.13.3  
(10-05-2021)  
**Initial Analysis of FOIA  
Request**

- (1) The FOIA, as implemented through regulations found at 26 CFR 601.702(c)(4), requires that a request:
  - a. Be made in writing and signed by the person making the request,

**Note:** When an authentication or signature required to establish identity and process the request is missing, such as for requests for

records protected by specific statutes (i.e. IRC 6103 protected tax records), please contact the requester to have them send you any needed documentation.

**Note:** IRS will waive the signature requirement for FOIA requests if the request is seeking records that are not protected by a specific statute such as IRC 6103 and do not have privacy concerns, such as requests for contracts.

**Note:** If a request is received from a third party, seeking records protected by specific statutes (i.e. IRC 6103 protected tax records), regardless of the method the request was received such as mail/fax or FOIA online portal, and the request contains an authorization document with:

1) A signature of the requesting individual which meets the requirement of 26 CFR 601.702(c)(4)(i)(A) and

2) The handwritten signature of the appropriate individual or business that the protected records pertain to, which meets the requirement of 26 CFR 601.702(c)(5)(iii)(C)

Then IRS accepts the signatures applied to the authorization document as having met the IRS FOIA signature requirement. Do **not** close a third-party request as imperfect when it meets these requirements unless the request is also missing information required to perfect a FOIA request per 26 CFR 601.702 and as shown below in IRM 11.3.13.3(4)(b) through (g).

**Note:** A stamped signature is not sufficient to establish a requester's identity or right to obtain access to records the disclosure of which is restricted by statute or other authority. A FOIA request for such records under 5 USC 552(a)(3) must, therefore, be physically signed by the requester. Any such request for (a)(3) records that is "signed" with a stamped signature will be rejected as imperfect.

**Note:** IRS generally does not accept digital signatures for FOIA requests for access to tax records, but will accept an email that contains a scanned version of the original request bearing the signature of the requester or authorized representative. IRS will accept a digital signature, such as that sent with an email, for most FOIA requests involving records other than those subject to IRC 6103 or the Privacy Act.

- b. State that it is made pursuant to FOIA or its regulations,
- c. Be mailed, faxed or provided through an online portal to the GLDS Support Services (GSS), or hand delivered to the Disclosure office having jurisdiction for the records, generally this is the office serving the state where the requester resides,
- d. Reasonably describe the records sought,
- e. Provide an address for making a response,
- f. State whether the requester wishes to inspect the records or desires to have a copy made and furnished without first inspecting them,

**Note:** Do **not** close a request as improper if it does not contain this item. A request that does not contain a statement requesting inspection will have records provided in accordance with normal processing procedures. If a request does contain a statement requesting in-

spection, the requester should be made aware that, with limited IRS resources to conduct in-person inspections, inspection is not necessary as all provided documents would be the same whether reviewed through inspection or provided via electronic media in an interim or final response.

- g. State the requester's agreement to pay for search, review, and reproduction charges as applicable, and
- h. Furnish an attestation under penalty of perjury as to the status of the requester, unless the requester is an "other" requester. Valid categories of requester include commercial use, media, noncommercial, scientific, educational, or other.

**Note:** The caseworker may challenge the status of the requester, on a case by case basis, if sufficient information is not provided to determine the category of requester. This challenge is considered an adverse determination and the requester would be granted appeal rights.

#### 11.3.13.3.1 (10-05-2021) Tolling

- (1) FOIA permits agencies to toll, or "stop the clock", on the 20-day statutory time period to respond to perfected FOIA requests under two circumstances:
  - a. Make one attempt to obtain information from the requester or
  - b. Obtain information to clarify issues regarding fee assessments

**Note:** Caseworkers MUST provide written notification that the request is being tolled in order to advise the requester what clarifying information is needed to continue processing a request, what date the information is needed to avoid closing the request with no further actions, and to advise the requester that their request is being tolled and the statutory time frame to respond is being suspended. Caseworkers should use the date of the written notification when determining the date to stop the clock.

- (2) The standard to use for tolling is limited to situations where IRS has reasonably requested information needed from the requester. There is only one opportunity to toll the 20-day statutory time period to obtain reasonably requested information. Caseworkers must ensure to ask all their informational questions during this one-time attempt.

**Note:** While caseworkers can only toll a request one time to receive reasonably requested information, they are not prohibited from contacting requesters as many times as needed to facilitate processing of the request.

**Example:** A valid request seeking an examination administrative file produces a large volume of responsive records which include records provided by the taxpayer. Contact is made with the requester to re-scope the request in an attempt to remove records previously requested by the taxpayer since they already have those records. Caseworkers may contact the requester as many times as needed to obtain "reasonably requested" information but may only toll (stop the clock) the 20-day period once.

- (3) Tolling also applies when necessary to clarify requester issues pertaining to fee assessments. There is no statutory limit on the number of times an agency may toll for this purpose.



**Example:** The 20-day statutory time period was suspended to obtain a commitment to pay \$100. During processing of the request, it is determined there will be additional fees incurred. Caseworkers may contact the requester to obtain a new fee commitment and suspend the 20-day statutory timeframe again.

- (4) In either of the two circumstances cited above, the agency's receipt of the requester's response ends the tolling period and the response time clock resumes.

**Note:** Requesters have 35 calendar days to respond, in writing, from the date of notification that additional information is needed (i.e. additional fee commitment letter, etc.) or the request will be closed.

11.3.13.3.2  
(10-05-2021)  
**Identity of Requester**

- (1) Establishing the identity of the requester is an important part of determining the overall validity of the FOIA request. This is necessary prior to releasing any records which would be available to the requester only, such as tax or personnel records. It is not required when providing records that are available to the general public.

**Example:** A request is received seeking a copy of a Public Information Listing (PIL) for an employee and the request is not signed by the requester. Since PIL information is available to the public, a signature is not required on the request and there is no need for the requester to establish identity.

- (2) Requesters may establish identity with a combination of signature and address on the request and one other official document identifier (such as a photocopy of a driver's license) bearing the requester's signature.

**Caution:** Do not accept expired identification documents.

**Caution:** Do not invalidate a request that contains a driver's license marked with restrictions such as "Federal Limits Apply", "Not for Federal Identification" or similar language. These identification markings are for the purposes of the "REAL ID Act" which is currently only for the purposes of boarding federally regulated aircraft and entry into federal buildings.

- (3) An individual may also establish identity by presenting a notarized statement swearing to or affirming their identity.
- a. The notarized statement need not meet all the requirements of State law, so long as it appears to be adequate to establish the requester's identity.

**Note:** For factors to consider when determining whether to accept the notarized statement, see IRM 11.3.13.3.2(7).

- b. The notarized statement need not be on the same sheet of paper as the request or bear the same date, as long as it is consistent with the request and is adequate to allow access to the records requested. The notary seal must be on the same page as the sworn statement.

**Note:** If the notarized statement is on a page separate from the FOIA request, the requester's signature on the notarized statement is sufficient to meet the regulatory signature requirement.



**Note:** Do not accept an expired notary seal.

- c. If the notarization does not swear to or affirm the requester's identity, then it does not meet the FOIA identification standard. The following is an example of a valid notary statement.

**Example:** John Maple, known to me to be the person who executed the foregoing instrument and having acknowledged to me that they executed the same as their free act and deed.

- d. After consideration of all the factors, Disclosure personnel must exercise sound judgment in determining whether the requester has proven their identity. The notarized statement must be sufficient to reasonably assure an employee that the requester is the taxpayer whose records are sought. Notarizations meeting that standard suffice to establish the requester's identity and the validity of the FOIA request. If reasonable doubt persists, deny the records citing FOIA exemption (b)(3)/26 USC 6103 and seek additional identity verification.
- (4) A sworn statement as to identity, under penalty of perjury, is acceptable in lieu of a notarized statement. The sworn statement must meet the requirements of 28 USC 1746. If the declaration is sworn **outside** the United States, the sworn statement must include the following language:

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)."

If the declaration is sworn **within** the United States, its territories, possessions, or commonwealths, the sworn statement must include the following language:

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."

- (5) The Disclosure Manager may require additional proof of an individual's identity if it is necessary to verify the requester's right of access.

**Note:** When requesting additional proof of identity, provide full documentation in the case history to explain why the verification submitted was not sufficient.

- (6) Caseworkers must consider the consistency of names, addresses, Social Security Numbers (SSNs), and other identifying information in the request with similar items in the records requested. Copies of notices, correspondence, and other records which the requester received from the IRS can help to establish identity, especially when the records requested are closely related to the subject matter of the record presented. See IRM 11.3.13.3.8, Requests for All Records Concerning Me.
- (7) Persons requesting records pertaining to another person must provide adequate proof of the legal relationship under which they assert the right to access the requested records. Requests for tax records must be consistent with the provisions of 26 CFR 301.6103(c)-1 and IRC 6103(e). A valid Form 2848 is sufficient authorization. A Form 8821 meeting the standards of 26 CFR 301.6103(c)-1(b) is also sufficient authorization.

- (8) If there are multiple requests, separate documentation of identity for each request is unnecessary. Once a caseworker establishes the identity of the requester the identification will suffice for a continuing series of requests, as long as the key elements of the requests such as the address and the signature of the requester remain constant.

**Example:** A single envelope contains six specific requests for information from the same requester. One of the requests does not establish identity when the remaining five are adequate. Do not consider the one request imperfect for this reason alone.

**Example:** You receive requests routinely from the same requester and have received sufficient identifying information in past requests. A new request does not adequately identify the requester. To the extent that all other information is consistent, do not consider the new request imperfect for this reason alone.

**Note:** Caseworkers can research the electronic versions of prior requests using the inventory management system, when the feature is available in that system. However, because a Form 8821, Form 2848, or equivalent can be revoked by the taxpayer, Disclosure caseworkers are expected to make reasonable efforts to confirm their continued validity.

**Note:** If the reason for accepting the requester's identity is not readily apparent, document the case history notes to explain your determination.

#### 11.3.13.3.3 (08-14-2013) Definition of Agency Record

- (1) FOIA provides for the disclosure of agency records. Not every record within the possession of an agency is an agency record subject to FOIA. Agency records are records that are either created or obtained by an agency, and are under agency control at the time of the FOIA request. Courts have identified four relevant factors to consider when determining whether a record is an agency record:
- The intent of the record's creator to retain or relinquish control over the record.
  - The ability of the agency to use and dispose of the record as it sees fit.
  - The extent to which agency personnel have read or relied upon the record for agency business.
  - The degree to which the record was integrated into the agency's record keeping system or files.
- (2) Records that are not agency records are not responsive to a FOIA request, regardless of whether the subject matter or type of record would otherwise appear to be responsive to the request.
- (3) Whenever a request seeks records that originated outside of the IRS, Disclosure personnel will make a determination, after coordination with the records' originator, whether the records are agency records based upon the factors mentioned above.
- (4) If the IRS transfers records to a government contractor for records management purposes, those records remain agency records subject to FOIA, even though they are no longer in the physical custody of the agency. By contrast,

records created by the contractor as part of the contractor's own business (such as the contractor's personnel files) are not agency records and are not subject to FOIA.

11.3.13.3.4  
(10-05-2021)  
**Joint Committee on  
Taxation**

- (1) The Joint Committee on Taxation (Joint Committee or JCT) is authorized under IRC 8021 to obtain and inspect information, including returns and return information pursuant to IRC 6103(f) , for the purpose of carrying out its general oversight responsibilities.
- (2) The Joint Committee is authorized under IRC 8023 to secure directly from the IRS information for the purpose of making investigations, reports and studies relating to internal revenue taxation, including returns and return information, as to any action taken or proposed to be taken by the Service as a result of any audit of the return.
- (3) When the Joint Committee corresponds with the IRS under its general oversight authority, it generally includes a legend on the incoming correspondence that restricts the dissemination and use of both the inquiry and responsive records. The Joint Committee reserves the right to adjust the legend as needed, after coordination with the Service.

**Note:** At this time, the legend reads, "This document is a record of the Joint Committee on Taxation (Joint Committee) and is entrusted to the Department of the Treasury for your use only in handling this matter. Additionally, any documents created by the Department of the Treasury in connection with a response to this Joint Committee document, including (but not limited to) any replies to the Joint Committee, are records of the Joint Committee and shall be segregated from agency records and remain subject to the control of the Joint Committee. Accordingly, the aforementioned documents are not agency records for purposes of the Freedom of Information Act. Absent explicit Joint Committee authorization, access to this document and any responsive documents shall be limited to Treasury personnel who need such access for the purposes of providing information or assistance to the Joint Committee."

- (4) The incoming JCT document, as well as any documents created by the IRS in connection with a response to the JCT document, including (but not limited to) any replies to the Joint Committee, are records of the Joint Committee and shall be segregated from agency records and remain subject to the control of the Joint Committee. Accordingly, the aforementioned documents are not IRS agency records for purposes of FOIA.
- (5) Whenever the Joint Committee's inquiry letter includes the restrictive legend, the file that is created for the IRS's reply, as well as any accompanying documents, may only be accessed by IRS personnel for the purpose of providing information to, or otherwise assisting, the Joint Committee. Copies of the inquiry letter and the IRS response are available through the Office of Legislative Affairs in the Communications and Correspondence Tracking System. Copies of records compiled by the IRS to respond to the Joint Committee inquiry are maintained in the office of the IRS component chiefly responsible for preparing the response.
- (6) Whenever the Joint Committee's inquiry letter includes the restrictive legend, that letter remains a congressional record and is not an agency record of the IRS. In addition, any records created by the IRS in connection with the agency's response to the Joint Committee's inquiry, including (but not limited

to) the IRS reply letter, are congressional records and are not IRS agency records. Such documents shall not be considered as responsive to a FOIA request directed to the IRS, and must not be released under FOIA. Moreover, the IRS file(s) associated with providing records to the Joint Committee need not be searched for responsive records because the records that the files may contain are not agency records.

- (7) The legend is included as a matter of best practice. It identifies the document as a congressional record, not an IRS agency record. The legend is also an indication of the intent of the parties on how the records should be categorized. However, the absence of the legend is not legally determinative. If a JCT document fails to contain a legend, generally, IRS practice is to treat the JCT document and any IRS response thereto as a congressional record.

**Note:** Consider consulting Chief Counsel (Procedure & Administration) on the treatment of JCT originated documents that do not contain a legend.

- (8) In addition to its general oversight authority under IRC 8023, the Joint Committee is also entitled to reports by the IRS under IRC 6405 of the IRS's proposed issuance of refunds or credits that meet the jurisdictional threshold. Section 6405 directs the IRS to delay the issuance of large refunds or credits for a thirty-day period after the report is submitted to the Joint Committee. Correspondence or other documentation reflecting the Joint Committee's inquiries relating to the proposed credits or refunds will be maintained separately within the administrative file of the taxpayer to whom it pertains. Based upon best practice, Joint Committee correspondence in this context may not contain a legend, and any documents or information received from the Joint Committee or prepared by the IRS in response to the Joint Committee's inquiries regarding the proposed refund will not constitute IRS agency records subject to FOIA. IRS practice is to treat these records as congressional records. Accordingly, the Joint Committee's response to the IRS's letter concerning the proposed refund, and any records created by the IRS as a result of, or in response to, the Joint Committee's response, are not IRS agency records responsive to a FOIA request and must not be released under FOIA. Moreover, the IRS file(s) associated with providing records to the Joint Committee need not be searched for responsive records because any records the files may contain are not IRS agency records.

#### 11.3.13.3.5 (10-05-2021) Imperfect Requests

- (1) FOIA requires requesters to reasonably describe the records sought. While compliance with the procedural regulations is also required, Disclosure personnel must take care not to read a request so strictly that the requester is denied information the agency knows exists. However, if the request is not specific enough to process or it is too broad in scope, including language such as "I request all records concerning me," or otherwise lacks specificity, it is imperfect and must be closed accordingly after making reasonable attempts to perfect the request. See IRM 11.3.13.3.8, Requests for All Records Concerning Me.
- (2) Requests are not imperfect because they lack an agreement to pay fees if, based upon the information requested, it appears no fee would be charged. See IRM 11.3.5.4.1, Commitment to Pay.

**Note:** However, if the requester has an outstanding unpaid bill for any request(s) previously processed by the IRS, close any current request and notify the

requester that IRS will process no further requests until the balance due is paid in full. See IRM 11.3.5.4.2, Requests Involving Late Payment or Non-payment.

- (3) In some instances, it may be necessary to inform a requester that FOIA does not require agencies to answer questions, enter into doctrinal discussions, create records, or perform research. See IRM 11.3.13.3.9, Pseudo Requests, for more information about responding to interrogatories.

**Note:** Transferring data into or out of electronic format, including printing information retrieved from IDRS through input of a command code, does not constitute creating a new record.

11.3.13.3.6  
(10-05-2021)

**Records of Other  
Treasury Components or  
Other Agencies**

- (1) There are times when IRS files may contain records of other non-IRS Treasury components and/or non-Treasury agencies. The files may also contain records which other components and/or agencies have an interest in prior to their release. These records must either be referred to the appropriate non-IRS component and/or other agency if they are records originating outside the IRS or a consultation must be conducted to receive release recommendations if they have an interest in the records prior to the records being released.

**Example:** An administrative tax file is received from an IRS record holder which contains copies of Social Security Administration (SSA) forms and case histories indicating discussions were had with Federal Bureau of Investigation (FBI) agents on an FBI criminal investigation. The SSA records should be referred to the SSA FOIA office and a consultation should be sent to the FBI FOIA office to get release recommendations on the FBI discussions and agent names prior to releasing the records.

**Note:** Requests seeking records clearly under the control of non-Treasury agencies (i.e. requests seeking non-IRS forms or emails for other agency employees) do not require communications with non-Treasury FOIA contacts. Disclosure caseworkers may refer requesters to the non-Treasury agencies using pattern correspondence and process FOIA requests for documents maintained by the IRS.

**Reminder:** Requests received by the IRS for other Treasury component records (i.e. emails for Treasury employees) must be sent to the appropriate Treasury component by the IRS within 10 business days of receipt. Caseworkers receiving these requests should follow the instructions below in IRM 11.3.13.3.6, Records of Other Treasury Components or Other Agencies, (2) through (5).

- (2) Disclosure caseworkers must discuss records involving potential referrals and/or consultations with their Disclosure Manager prior to making any releases.
- (3) If the Disclosure Manager agrees with the potential referral and/or consultation request, they must discuss the referral and/or consultation with a FOIA Policy Analyst.
- (4) The FOIA Policy Analyst will reach out to non-IRS Treasury component and non-Treasury agency FOIA contacts, if appropriate.

**Caution:** In order to prevent potential unauthorized and inadvertent disclosures, as well as inappropriate FOIA case closures, caseworkers may not reach out directly to the non-IRS FOIA contacts. FOIA Policy Analysts will complete all communications with non-IRS contacts.

- (5) Following an agreement from the non-IRS FOIA contacts to accept the consultation and/or referral, the Disclosure caseworker may take any appropriate actions needed to forward records to the appropriate contacts and continue processing the IRS FOIA request as necessary.
- (6) The referral of a record to another Federal agency does not constitute a denial of access to such record. No appeal rights will be afforded the requester solely because a record has been referred to another agency.

11.3.13.3.7  
(10-05-2021)

**IRS Records Located in  
Other Agencies or Other  
Treasury Components**

- (1) IRS information is sometimes included in the files of other Federal agencies. When a FOIA request seeking access to those records is received by another Federal agency or Treasury component, the agency or component will refer the records to GSS for case assignment.

**Note:** If Disclosure personnel receive any correspondence marked “Confidential”, “Secret”, or “Top Secret” the employee must immediately contact their manager who will then contact the Disclosure HQ PPO Manager for additional guidance. The Disclosure employee(s) must not open any envelopes and/or transfer any records to their computer which are marked “Confidential”, “Secret”, or “Top Secret”.

- (2) Other federal agencies may request IRS involvement in FOIA requests they have received for two reasons - referrals or consultations.
  - a. A referral occurs when another agency identifies IRS documents in records responsive to their agency request. Employees of that agency will forward the records to the IRS and ask the IRS to respond directly to the requester. Disclosure personnel will control a referral on the inventory management system as a FOIA request. All the statutory and procedural requirements of FOIA apply (20-day response time, extension letters, backlog counts, etc.). If the referred request is assigned as a miscellaneous case and the caseworker determines it needs to be controlled as a FOIA case, the case type must be changed in the inventory management system, if allowed by that system.
  - b. A consultation occurs when another agency has responsive records that originated in that agency, but which contain items of information that were furnished by (or perhaps are of special interest to) the IRS. Disclosure personnel will control a consultation on the inventory management system using the appropriate, designated case type allowed by the inventory management system. Consultations must be handled expeditiously because they affect the statutory processing of another federal agency. If the consultation request is assigned as a FOIA and the caseworker determines it should be controlled as a different case type, the case type must be changed in the inventory management system to the appropriate case type appropriate to that system.
  - c. For a request that contains both referred and consultation documents, a FOIA and a consultation case needs to be controlled and processed separately. If you have been assigned the FOIA case and you cannot



locate an associated consultation case in the inventory management system, it will need to be created and vice-versa.

- (3) Disclosure personnel may need to contact the business function that has jurisdiction over the documents referred from another agency to obtain redaction recommendations. Make contact with business functions on a case by case basis as needed in order to review records for release. This referral shall be made expeditiously.

**Note:** Occasionally records are erroneously referred that did not originate in the IRS. When this occurs, the records shall be referred back to the originating agency. If the requester was notified of the transfer to the IRS, a letter shall be prepared informing the requester that an error was made and that the records are being returned for the consideration of the original agency.

11.3.13.3.8  
(10-05-2021)  
**Requests for All  
Records Concerning Me**

- (1) Usually, requests for “all records concerning me” or “all records containing my name” are not specific enough to process because they do not reasonably describe the records in sufficient detail to allow an IRS employee to conduct an appropriate search. Requests for “all records” will be rejected as imperfect. This also includes requests for records where the description of the records request is extremely broad. For example, “any and all email records containing the key words...” which is not specific enough to process.
- (2) Review these requests thoroughly as they may contain minor references to records or enforcement actions that help to identify specific records.
- (3) Process any request containing enough information to permit a reasonable identification of records sought.

**Example:** The information could include the function where the records may be found, the tax year or years involved, the type of tax, or the type and/or location of any investigation conducted by the IRS.

- (4) If the request is not otherwise imperfect and does not specify tax years, then Disclosure personnel will consider the last three tax years when responding. If the request is otherwise imperfect, see IRM 11.3.13.3.5, Imperfect Requests.

**Note:** Where a response to a request is based on an analysis of the requester’s letter, any documents attached to the request, or it is based on assumptions authorized under this section, the response letter will include an explanation of how the scope of the request was determined. For example: “Your request did not clearly indicate the type of tax or tax year for which you are seeking information. Based on the notices you submitted with your request, we are providing information regarding xxx for the years yyyy through zzzz.”

11.3.13.3.9  
(10-05-2021)  
**Pseudo Requests**

- (1) Some requests, while otherwise valid, merely cite the FOIA while not conforming to its intended purpose. Analyze such requests to determine whether they can be processed by locating, analyzing, and releasing records.
- (2) Some characteristics which may assist in recognizing pseudo-requests:
  - a. Requesters tend to ask questions rather than seek specific records.

- b. Questions are frequently phrased in an accusatory or misleading manner, so that they appear to be intended to serve as harassment rather than to seek access to existing agency records.
- c. The correspondence consists of, or may imitate, form letters and may be part of a coordinated campaign involving similar requests from different requesters.
- d. The letters may include references to constitutional rights, challenges to the authority of Title 26, constitutional arguments that income taxes are not valid based on the 5th, 13th or 16th amendments, IRC 861 challenges disputing the taxability of wages, arguments that a requester is not a person subject to tax within the meaning of the IRC, that taxes are voluntary, or that a requester should be “untaxed” by withdrawing their Social Security Number and claiming sovereign immunity.

**Note:** Pseudo requests are often extensive and wordy, poorly described, incorrectly addressed, or otherwise written to make it difficult to respond. The objective may be to force a denial rather than to actually obtain access to records.

- (3) Requesters may sometimes ask for all records concerning or serving as background materials for certain “Decisions” or “Determinations” concerning themselves. Some of the descriptions frequently encountered are:
  - a. “...that I am a person required to file a tax return.”
  - b. “...that I didn’t file a tax return.”
  - c. “...that I am a person as defined by the Internal Revenue Code.”
  - d. “...that my commercial activity or employment is taxable.”
  - e. “...that classifies my job description as a taxable activity for revenue purposes.”
  - f. “...that I am an employee or an employer or an individual engaged in a trade or business as a sole proprietor.”
  - g. “...that I received diversification of corporate profits.”
  - h. “...that I am required to possess a Social Security Number absent any income derived from any source.”
  - i. “...that discloses that I am a fiduciary of a trust or estate.”
  - j. “...that a “substitute for return” has been or will be prepared for me.”
- (4) The FOIA does not require agencies to respond to questions, create records not already in existence in some format, or engage in doctrinal discussions with requesters.

**Note:** Printing an electronic record to paper or scanning a paper record to PDF does not constitute creating a record not already in existence. For example, process a request for a paper copy of an electronic audit trail, but consider a request to create a list of employees who worked on an Examination file a request for records not already in existence.

- (5) Do not allow pseudo-requests to drain Disclosure resources needed to administer the FOIA and other programs. Respond in a fashion consistent with statutory requirements and in a tone appropriately reflecting a spirit of openness in government.
- (6) Review all potential pseudo-requests to determine whether they seek information under the FOIA or other governing statute. Reference to the FOIA may be buried many pages into the document. A reference that “the FOIA requires a response within 20 days,” or inclusion of “FOIA” on the envelope, may be suffi-



cient to consider the letter a request under the FOIA. See IRM 11.3.13.3.10, Unclear Requests.

**Note:** An imperfect request under the FOIA may still qualify for response under IRC 6103(c) or (e) in situations where the request meets those standards of entitlement or identification. See (8)(c) below.

11.3.13.3.10  
(10-05-2021)  
**Unclear Requests**

- (1) After analysis, it may be unclear which statute the requester is using to seek access. The following variations may be encountered.
  - a. The request cites neither the FOIA nor the Privacy Act.
  - b. The request cites both the FOIA and the Privacy Act.
  - c. The request cites one Act, but the content of the request appears more appropriate to the other.
- (2) Resolve any lack of clarity about the applicable statute as closely as possible with the requester's stated intent and consistent with the law.
- (3) When the request cites neither the FOIA nor the Privacy Act:
  - a. Review the request for any other reference to the statute or accompanying regulations which may provide additional information regarding the requester's intent.
- (4) When a request cites both the FOIA and the Privacy Act, and it is from the following:
  - a. A first party individual seeking access to their own records, the request will be classified under the statute that allows the greatest access. The FOIA generally provides the greatest access.

**Example:** A request may cite the statute such as 552 for the FOIA or 552a for the Privacy Act, or may state the request is being made under 26 CFR 601.702 or 31 USC Part 1, Subpart A or C, which are the FOIA and Privacy Act regulations issued by the IRS and Treasury, or there may be the letters "FOIA" on the envelope.

- b. Determine if records can be provided under a routine established agency procedure as set forth in 26 CFR 601.702, or under some other statute. The request must be classified as that type of request and records provided under those provisions (See IRM 11.3.13.3.11, Routine Established Agency Procedures).
- c. Requests for tax returns and return information may be directed to a Service employee involved in open compliance activity. If the request does not cite the FOIA or Privacy Act, it may be handled by that IRS employee, consistent with Delegation Order 11-2 (Rev. 4), Authority to Permit Disclosure of Tax Information and to Permit Testimony or the Production of Documents, found in IRM 1.2.2.12.2.

**Example:** Requests for records contained in an Examination administrative file, which is in a system of records that is exempt from access provisions of the Privacy Act, shall be classified and processed under the FOIA.

**Note:** A first party requester is an individual seeking access to their own records that are maintained in a Privacy Act system of records. A

party seeking access on behalf of an individual (i.e., as authorized by Form 2848 or Form 8821) meets the definition of first party requester.

**Note:** Remember that a sole proprietorship is considered an individual under the Privacy Act.

- b. A third party or from an individual seeking records that are not maintained in a system of records, classify as a FOIA request.

**Example:** Requests for a delegation order, IRM, or Form 23-C, which are not maintained in a system of records. These records statutorily fall outside of the Privacy Act, but access must be granted to the extent possible under the FOIA.

- (5) These instructions are not intended to require matters that can be processed under established agency procedures set forth in 26 CFR 601.702 be treated as FOIA requests. (See IRM 11.3.13.3.11, Routine Established Agency Procedures).
- (6) Regardless of which Act is cited, the request must satisfy the procedural requirements of the applicable Act and the commitment to pay fees must encompass the services being requested.

**Note:** A request requiring FOIA search fees because it seeks records that are not maintained in systems of records that contains an agreement only to pay Privacy Act (duplication) fees is imperfect if the anticipated fees exceed the commitment to pay (i.e., more than 2 hours of search will be involved).

**Exception:** FOIA search fees do not apply to first party requests for records about themselves maintained in systems of records. Only Privacy Act (duplication) fees apply. For further information about fees, see IRM 11.3.5, Fees.

11.3.13.3.11  
(07-16-2020)

#### Routine Established Agency Procedures

- (1) Requests for records that can be processed routinely in accordance with the established procedures identified in 26 CFR 601.702 are specifically excluded from the processing requirements of the FOIA. Analyze requests to determine if they should be handled according to these procedures. These types of requests will not be diverted to the FOIA or Privacy Act simply because the requester cites these Acts. Disclosure personnel will explain to the requester that the request is not diverted to the FOIA simply by mentioning that Act and will be processed under routine agency procedures. Generally, you may provide the requester with instructions to resubmit the request under the routine procedures.

- (2) Routine established agency procedures apply to requests for:

- a. Tax returns and attachments or transcripts. Use Form 4506, Request for Copy of Tax Return, Form 4506-F, Request for Copy of Fraudulent Tax Return, or Form 4506-T, Request for Transcript of Tax Return.

**Note:** When reviewing responsive administrative files that contain copies of tax returns, attachments and/or transcripts, do **NOT** remove these documents from the file and tell the requester to submit Form 4506, Form 4506-T and/or Form 4506-F.

**Note:** Use the following table for FOIA requests seeking a copy of the fraudulently filed income tax return or a request for the information that was redacted by the Identity Protection Specialized Unit (IPSU).

FOIA request for a copy of a fraudulently filed income tax return	FOIA request for the unredacted copy of a fraudulently filed income tax return or a request for the information redacted by IPSU
<p>Disclosure personnel will respond with the Routine Agency Procedures Letter, informing the requester to submit Form 4506-F, Request for Copy of Fraudulent Tax Return.</p> <p>IPSU will provide the taxpayer and/or their authorized representative a redacted copy of the fraudulently filed tax return. Instructions for requesting a copy of a fraudulent return are on IRS.gov.</p>	<ol style="list-style-type: none"> <li>1. Ensure the requester has previously received a copy of the redacted fraudulently filed income tax return.</li> <li>2. Use the pattern letter titled "Unredacted Fraudulent Return" to deny the request in full using FOIA exemptions (b)(3), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E).</li> <li>3. FOIA exemptions used to deny the document in full must be captured within the inventory management system.</li> <li>4. Adequately document all actions in case notes.</li> </ol>

**Note:** Requests for access to open case files directed to compliance

personnel may be processed outside of FOIA, even if they cite the FOIA, if doing so is in the best interests of customer service and the function with jurisdiction agrees. Because only Disclosure employees have delegated authority to respond to FOIA requests, the requester must withdraw the FOIA request and agree to obtain the records directly from compliance personnel. Disclosure personnel will provide assistance as necessary if the function plans to withhold information under IRC 6103(e)(7) due to an impairment determination. IRS functional employees should not insist a requester go through the FOIA process if the information is available informally, consistent with Delegation Order 11-2 (Rev. 4), Authority to Permit Disclosure of Tax Information and to Permit Testimony or the Production of Documents, found in IRM 1.2.2.12.2. Processing requests for access to closed case files is preferred under the FOIA.

**Note:** A request for a Substitute for Return (SFR) does not fall under the routine established agency procedures discussed in this section. An SFR is considered return information but is not considered a return under IRC 6103(b).

- b. Records of seizure and sale of real estate, found on Record 21, Part 2, are open to public inspection. These may be made available in the Collection Advisory Unit that maintains the record based on the location of

the property. The locations of the Collection Advisory Units are contained in Pub 4235, Collection Advisory Group Numbers and Addresses. Process requests for copies of Record 21, Part 2, under the FOIA. See IRM 11.3.11.9.1, Record of Seizure and Sale of Real Estate.

- c. Information returns, notices, and reports of certain tax exempt organizations and trusts, political organizations, applications by organizations granted tax exempt status, applications for certain deferred compensation plans and accounts, and their annual returns. IRC 6104 grants access to this type of information and requesters may seek this information by filing Form 4506-A, Request for Public Inspection or Copy of Exempt or Political Organization IRS Form. See IRM 11.3.9, Exempt Organizations, and IRM 11.3.10, Employee Plans Information.

**Note:** Requests seeking Form 990, Return of Organization Exempt from Income Tax, in machine readable format (MeF, Modernized e-File format, CSV format, etc.) may access this information through Amazon Web Services. Do not provide Form 4506-A for these types of requests.

- d. Statistics of Income publications. IRC 6108(a) and 26 CFR 301.6108-1 grants access. Requesters may access these products through the *Tax Stats* link, or request, in writing, that IRS conduct customized statistical studies or make statistical compilations under IRC 6108(b). Address your request to:

Statistics of Income  
Statistical Information Services  
Internal Revenue Service  
1111 Constitution Ave NW  
K-Room 4112  
Washington, DC 20224

See the applicable revenue procedure for further instructions. Copies of statistical studies or compilations previously made under IRC 6108(b) may be available upon written request to the above address.

- e. Public comments in rule making. See IRM 11.3.11.7, Comments on Proposed Rules and Regulations.
- f. Accepted offers-in-compromise (OIC) less than one year old (from date of execution).

**Caution:** Process requests for copies of accepted OICs more than one year old, or where no inspection is involved, under the FOIA. Routine procedures allow for inspection and copying only, not for copies independent of the inspection process.

**Note:** See IRM 11.3.11.8, Public Inspection of Accepted Offers-in-Compromise, for OICs less than one year old.

- g. Written determinations and background file documents under IRC 6110.

**Note:** See IRM 37.1.1, Disclosure, Written Determinations Under Section 6110, and IRM 11.3.13.7.1, Written Determinations (Including Private Letter Rulings, Technical Advice & Chief Counsel Advice, for discussions regarding requests for written determinations).

- (3) If any issues arise from requests for documents that fall under Routine Established Agency Procedures, contact the Disclosure FOIA Senior Policy Analyst using established communication protocols.
- (4) Letter forwarding requests are also processed under routine established agency procedures (see Policy Statement 11-96 (formerly P-1-187) found in IRM 1.2.1.11.11) and are excluded from FOIA processing. (See IRM 11.3.11.11, Forwarding Letters for Humane Reasons.)

11.3.13.4  
(10-05-2021)  
**Search Process**

- (1) After determining that a request is valid, Disclosure personnel must also determine the scope of the request and the manner in which to conduct a search for responsive records. Disclosure staff must use available procedures to retrieve records and provide the most expeditious response possible to the requester. These procedures may include such negotiated procedures as initial special searches and direct contact with federal records centers.

11.3.13.4.1  
(08-14-2013)  
**Search Efforts**

- (1) Disclosure personnel will conduct a reasonable search to ensure they locate the documents the requester seeks.
- (2) The FOIA requires requesters to describe “reasonably” the records sought. Disclosure personnel must be careful not to read a request so narrowly that the requester is denied information that the agency knows exists. Some requesters may have little or no knowledge of the types of records maintained by the Service while others have greater knowledge of IRS files.
- (3) The amendments under the Electronic Freedom of Information Act (EFOIA) amend the definition of the term “record” specifically to include information in an electronic format. Therefore, the Service is required to make reasonable efforts to conduct searches for records in electronic formats and to provide records in any format requested if readily reproducible in that format. The Service charges the requester direct costs for conversion to another medium, including the costs of exporting files and the time required to create the file on the electronic medium that will be mailed to the requester. See IRM 11.3.5, Fees.
- (4) With respect to electronic format, records that are readily reproducible generally are those that can be printed, downloaded, or transferred intact to a compact disk (CD), magnetic tape, Digital Versatile Disc (DVD), or other electronic media using equipment currently in use by the office(s) processing the request.
- (5) Disclosure personnel need to understand the types of records that may exist in the various functions in order to ensure adequate searches. Disclosure personnel may rely on their organizational knowledge, computer research, search memoranda, and any other resource available to determine how best to locate records responsive to the request.
- (6) If it can be readily ascertained (without additional research) that the requested record is a computer-generated record for which no paper or electronic copy is maintained, the requester shall be so advised. Case notes must be entered to document the process used to determine that the requested record is computer-generated with no associated paper copy.
- (7) Some requests seek records from a certain time period to the “present.” Interpret the “present” to mean the date the request is received by the respon-

sible office. For a discussion of the cut-off date for records searches, see IRM 11.3.13.4.2, Adequacy of Search. Records created after the received date of the request are not generally considered responsive to the request. However, even if the record was created after the received date of the FOIA, release should be considered based upon the concept of openness and transparency or based on the time it takes to locate and retrieve responsive records.

**Note:** For a discussion of when Disclosure personnel may elect to include data outside the scope of the request, see IRM 11.3.13.5.5, Outside of Scope.

- (8) Disclosure Managers and staff will attempt to meet both the letter and spirit of the statutes governing the FOIA process by applying a liberal interpretation to the intent of the requester and the scope of the request. It may be necessary to communicate with the requester to clarify the request as well as with those employees conducting the search. It is inappropriate to hold frequent requesters or professionals to a higher standard of exactitude because “they should have known better” or “they know the law, so we shouldn’t read anything into the request” while giving the “benefit of the doubt” to first time or infrequent requesters. The aim of the FOIA process is to provide consistent, top quality service to all requesters.

11.3.13.4.2  
(10-05-2021)  
**Adequacy of Search**

- (1) The Disclosure Manager is responsible for ensuring the adequacy of search efforts. IRM 11.3.13.1.3.1, Disclosure Manager, and IRM 11.3.13.1.3.2, The Roles of Other IRS Employees in Processing FOIA Requests, outline the roles of the Disclosure Manager and any functional employees assisting in completing the search.
- (2) Document the following information in the case history notes if it is not already apparent in the case file:
  - Which offices were contacted and why
  - Person contacted in each office and who conducted the search
  - Files searched
  - Search terms used
  - Volume and location of records found, and
  - Time spent in the search, copy, and review process
- (3) Disclosure Managers and staff must take steps to maintain a general awareness of other automated systems which could assist in the location of information. Such steps may include:
  - a. Arranging to be kept informed by local Information Technology (IT) management of new systems being developed.
  - b. Mentioning during disclosure awareness presentations that Disclosure has an interest in knowing how the new automated tools are being used by the functions.
  - c. Collecting a library of the news about the latest technological advances in the IRS so the Disclosure staff may research it when necessary.
- (4) When determining the scope of records that may be responsive to a request, it may be necessary to evaluate a requester’s knowledge of IRS practices. Evaluating this level of knowledge will not be an exact science, and will generally be left to local procedures. A professional tax preparer who deals with the IRS on a continuing basis may request a specific record or a specific file by the proper terminology. In such a request, it is not necessary to increase



the responsive data by including related data in the spirit of good customer service. On the other hand, a request from a taxpayer reflecting a limited knowledge of IRS procedures may require a broader interpretation even if the taxpayer uses a specific term. Occasionally, trends in requests which have been reported to Headquarters will trigger a national directive intended to achieve a level of consistency. The purpose of any directive issued will be to provide service that is more consistent to all requesters, not to penalize a particular type/class of requester.

- (5) Records created after the receipt date of the FOIA request are outside the scope of the request and functions should be made aware of this fact. In rare circumstances, a lengthy delay (i.e. 90 days) may be unavoidable before search efforts begin. If this occurs, document the case history to explain the delay and extend the search period to the date of search. Also, when appropriate in terms of good customer service or in the spirit of openness in government, Disclosure personnel may include records created after the receipt date of the request. Make this determination on a case-by-case basis.
- (6) When agency knowledge indicates that records responsive to the request would not exist, there is no need to perform futile searches. However, problems may arise when requesters are advised that no records exist in response to their requests. Examples include:
  - a. Advising the requester that there are no records responsive to a request for “notice and demand” letters affords the requester the opportunity to challenge the validity of a lien or levy in the requester’s substantive tax affairs. The requester must be advised that the IRS does not routinely maintain copies of these notices. If the IRS sent you a Notice and Demand, it was computer generated and would be shown as MF STAT-21 on the enclosed transcript of account. Where these records are available (i.e., located in a Collection file), they will be made available to the requester, if within the scope of the request.
  - b. Another area in which “no record exists” responses are being used by requesters in their substantive tax affairs deals with requests for the delegation order to a specifically named IRS employee that “authorizes them to file tax liens.” Although it may be true that no delegation order to a designated employee by name exists, the more appropriate response would be: “delegation orders are usually not issued to employees by name, but rather are issued to employees by position title. The attached copy of Delegation Order \_\_\_\_\_ is the authority for \_\_\_\_\_ to file tax liens.”
- (7) Pursuant to 26 CFR 601.702, Disclosure office personnel are required to maintain copies of all internal and external correspondence, including a copy of all signed and dated response letters, as well as the records identified as responsive to the request, or which may be deemed by a court to be responsive, in the FOIA processing case file. This case file must be preserved, notwithstanding otherwise applicable record disposition schedules, if the case is the subject of a pending FOIA request, administrative appeal, or lawsuit. This is achieved through the use of imaged documents maintained in the Disclosure inventory management system. No paper files are required to be maintained to the extent all records have been imaged.

**Note:** Disclosure staff will reference this regulation and instruct functional employees assisting in searches that correspondence between their offices and Disclosure office personnel, as well as the records deemed responsive

to the FOIA request, must be preserved during the pendency of a FOIA request, administrative appeal, or lawsuit, notwithstanding record disposition schedules. IRS employees assisting in searches should also be invited to discuss with Disclosure personnel any questions that arise concerning whether certain records are responsive, or may be deemed by a court to be responsive, to a particular FOIA request before record disposition schedules are followed. Whenever there are questions concerning the responsiveness of records, such records must be preserved, either by the function with jurisdiction over the records or employees of the Disclosure office, for cases that are the subject of pending FOIA requests, administrative appeals, or lawsuits. The function with jurisdiction over the records and staff of the Disclosure office will determine where such records will be maintained.

11.3.13.4.3  
(10-05-2021)  
**Search Efforts  
Pertaining to Email  
Records**

- (1) Title 44 USC 3301 defines records as “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.”

**Note:** This definition includes email records maintained by, or maintained on behalf of, current and separated IRS employees.

11.3.13.5  
(08-14-2013)  
**Review and Redacting**

- (1) Once the responsive records have been gathered, Disclosure personnel will review the material and determine what should be released or what should be withheld in full or in part.

**Note:** Disclosure personnel are responsible for determining the documents that are responsive to each request. Disclosure personnel will review documents provided by the functions to ensure the presence of all responsive documents and to separate and remove any non-responsive documents.

- (2) The determination to grant or deny access to a specific record is made for each request on a case-by-case basis. It requires an understanding of:
  - a. The purpose the record serves.
  - b. The relationship the record has to the objective of tax administration.
  - c. The effect disclosure of the record may have on tax administration.
  - d. The impact the disclosure of the information would have on the personal privacy of any individual weighed against the public interest in accessing the information.
- (3) The determination also requires an understanding of the nine (9) FOIA exemptions, three (3) special law enforcement exclusions, applicable statutes, relevant court cases, precedents, and IRS-wide guidelines issued by Headquarters Disclosure Policy and Program Operations.
- (4) The role of Disclosure personnel in this process is two-fold:
  - a. To ensure the requester’s needs are addressed to the extent possible, and



- b. To ensure confidential information or information that may harm tax administration, commercial or other institutional interests, or personal privacy is not released.

- (5) Generally, the advice of the function maintaining or originating the record requested weighs heavily in the determination regarding release of the information by Disclosure personnel. There are times, however, when the Disclosure Manager or staff interpretation of the facts of the case and the disclosure statutes may be different from the initial advice provided by the function. The ultimate responsibility for the disclosure determination resides with the Disclosure Manager pursuant to the disclosure authority outlined in 26 CFR 601.702, IRM 1.2.2.12.6 and IRM 1.2.2.12.7, FOIA/PA Delegation Orders, and, as appropriate, DO 11-2 (Rev. 4), found in IRM 1.2.2.12.2.

**Note:** For procedures involving disagreements with the affected function over the release of records, see IRM 11.3.13.1.2(3), Authority.

- (6) Disclosure Managers and staff must make an independent judgment on the disclosure or withholding of records after considering the views of the affected functions and their understanding of the law. Disclosure personnel are responsible for balancing the two roles described in (4) above. They are also responsible for explaining the reasoning behind the final determination to withhold or release information. Some determinations are discretionary and some are clearly nondiscretionary by statute.

**Note:** For a discussion of discretionary vs. nondiscretionary disclosures, see IRM 11.3.13.5.1, Approach to Exemptions.

#### 11.3.13.5.1 (07-16-2020)

##### Approach to Exemptions

- (1) The FOIA requires agencies to make the maximum possible information available to the public. In March 19, 2009, a Department of Justice (DOJ) FOIA policy memorandum was issued to support the notion that the FOIA reflects a fundamental national commitment to open government and to ensure that commitment was realized in practice. The memorandum also declared a presumption of openness and carried with it two implications:
  - a. Agencies should make discretionary disclosures of information where possible and not withhold merely because they can demonstrate that the records fall within the scope of a FOIA exemption.
  - b. When agencies determine that a full disclosure is not possible, they should take all reasonable steps to disclose what they can.
- (2) The DOJ policy directive also expressed a commitment to protecting other fundamental values including protecting national security, personal privacy, privileged records, and law enforcement interests.
- (3) Under the FOIA, once a record is determined to be responsive, only such portion as falls within one of the nine (9) specific exemption categories or three (3) special law enforcement exclusions may be withheld. Disclosure personnel shall clearly document in their case notes any decision to edit or withhold records. The decision must be made based on the application of one of the exemptions or exclusions contained in the FOIA statute. Each of the exemptions and exclusions is listed and discussed in IRM 11.3.13.5.2, Exemptions.
- (4) Some exemptions are mandatory in nature. Exemptions (b)(1), (b)(3) and (b)(4) of the FOIA are exemptions for which discretionary disclosures are not

appropriate since there are civil and/or criminal penalties for unauthorized disclosure of statutorily protected information.

- (5) Consideration of whether discretionary exemptions should be asserted will usually be made on a case-by-case basis. See Policy Statement 11-13 (Formerly P-1-192), Freedom of Information Act Requests, which is available at IRM 1.2.1.11.1.
- (6) Decisions to withhold information protected under the FOIA's discretionary exemptions will be made only when:
  - a. The Agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or
  - b. Disclosure is prohibited by law.
- (7) When considering discretionary disclosures related to personal privacy, Disclosure personnel will weigh the public's right to the information against the privacy interests of the individual(s) affected. Case history notes will fully document the reasons for the application of an exemption and include any discussions with the functions supporting that application.
- (8) Records will not be withheld from the public simply because they may be subject to misinterpretation, because there is no apparent public benefit to their release, to avoid embarrassment, or to hide instances of errors or wrongdoing by IRS officials or employees.
- (9) The designation of a record as "OUO" or "SBU" does not preclude the release of the record pursuant to FOIA. See IRM 11.3.12.4, Guidelines for Removing Administrative Controls, and IRM 10.5.1, Privacy Policy, for additional information on "OUO" or "SBU" determinations.

#### 11.3.13.5.2 (07-16-2020)

##### **Exemptions**

- (1) There are nine specific FOIA exemptions. They are listed in 5 USC 552(b) and form the legal basis for the IRS to withhold records or portions of records from the public. Careful consideration of the exemptions is required when reviewing responsive records. Consider the following:
  - Withhold information under the FOIA only if "the agency reasonably foresees that the disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law".
  - Whether partial disclosure of information is possible, whenever it is determined that a full disclosure of a requested record is not possible.
  - Taking reasonable steps to segregate and release nonexempt information.
- (2) "Outside the scope" or "out of scope" is not a legal FOIA exemption found in section 552(b) of the Freedom of Information Act and should never be used when processing a FOIA request. See IRM 11.3.13.5.5, Outside of Scope.

#### 11.3.13.5.2.1 (07-16-2020)

##### **Discretionary Release of Records**

- (1) Some FOIA exemptions allow for discretionary release of information. Agencies can redact out portions of documents or entire documents in full using these exemptions, but are not compelled to do so by the FOIA statute.
- (2) Determinations to withhold information using exemptions other than (b)(3) **must** be made in accordance with discussions with the business function who has control of the responsive records.

**Example:** Before applying FOIA exemption (b)(5) to “draft” counsel documents or a “draft” Revenue Agent Report (RAR), you must have a discussion with the Chief Counsel attorney or Revenue Agent who owns the documents to have the document owner articulate the harm of release before applying the redaction to determine if it should be applied. If they can not articulate a harm in release of the documents, a determination may be made to waive the application of the exemption.

**Caution:** Business functions **must** articulate, and support, how release of records would harm or interfere with IRS civil and/or criminal activities prior to Disclosure withholding records under discretionary FOIA exemptions. Any FOIA exemption may apply to records being withheld under one of the nine FOIA exemptions if the business function provides an appropriate basis for withholding the records. The basis for withholding must be documented in the case either in case notes or with a formal attestation provided by the business function. Disclosure personnel must ensure the response from the business function contains enough information to support any discretionary FOIA exemptions applied to records.

11.3.13.5.2.2  
(08-14-2013)  
**Exemption (b)(1)**

- (1) This exemption applies to classified records concerning national defense and foreign policy. This exemption refers to information which has been or may be properly classified as confidential, secret, or top secret under the terms and procedures of the Executive Order establishing the classification system. It is seldom used by the IRS.

11.3.13.5.2.3  
(04-19-2017)  
**Exemption (b)(2)**

- (1) This exemption covers matters that relate solely to the internal personnel rules and practices of an agency.
- (2) With the ruling in the Supreme Court case, *Milner v Dep’t of the Navy*, 131 S. Ct. 1259 (2011) (Kagan, J.), the Court overturned decades of established judicial interpretation and significantly narrowed the scope of the exemption. The exemption is no longer divided into “high 2” and “low 2.” Instead, the Court held that (b)(2), consistent with the plain meaning of the term “personnel rules and practices,” encompasses only records relating to issues of employee relations and human resources.

**Note:** Material cannot be withheld under (b)(2) if there is a genuine and significant public interest in its disclosure, since it would not satisfy the requirements that it relate “solely” to the “internal” personnel rules and practices of the agency.

**Example:** The Court included several examples of covered personnel rules and practices, such as rules dealing with employee relations or human resources which concern the conditions of employment at federal agencies – such matters as hiring and firing, working rules and discipline, compensation and benefits. The Court also described personnel-related rules and practices as including the selection, placement, and training of employees and the formulation of policies, procedures, and relations with, or involving, employees or their representatives.

- (3) Disclosure personnel should consider whether it is appropriate to withhold records previously withheld under (b)(2) under other exemptions. In particular,

exemption (b)(7)(F) may apply to building plans and other security information. These determinations should be made on a case-by-case basis.

- (4) Disclosure personnel may find conference call-in information in files responsive to FOIA requests in the form of printed emails, calendar invitations, case notes, or other documents. An employee who uses an assigned call-in number and access code on a recurring basis often organizes these calls. Information about conference call-in information no longer meets the (b)(2) standard because the information is not directly related to agency personnel rules and practices. However, because disseminating conference call-in information could lead to its misuse and impede the effectiveness of IRS law enforcement activities, consider redacting conference call in numbers and access codes found in documents responsive to FOIA requests using the (b)(7)(E) exemption (and not the (b)(2) exemption). Additionally, telephone numbers and pass codes assigned to participants of a conference call might be withheld under the (b)(6) exemption because the release of this information could constitute an unwarranted invasion of personal privacy. Disclosure personnel should make determinations about these requests and responsive documents on a case-by-case basis.

#### 11.3.13.5.2.4 (08-14-2013)

#### **Exemption (b)(3)**

- (1) This exemption protects information specifically exempted from disclosure by statute, 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 particular types of matters to be withheld.

- (2) Some examples are:

- a. IRC 6103 (most commonly used).

**Note:** The use of IRC 6103 as a supporting statute requires a determination that the information being denied is a return or return information, as defined in IRC 6103(b)(2). When citing this exemption to deny the requester access to another taxpayer's return information, a determination must be made that the information is the other taxpayer's return information as defined in IRC 6103(b)(2). For example, information gathered in connection with the examination of Taxpayer A's return includes DMV records of an individual with a similar name. Since the information was gathered in connection with the examination of Taxpayer A's return, it is the return information of Taxpayer A. Since it was not obtained by the IRS with respect to determining the liability under Title 26 of the other individual named in the DMV records, it is not that individual's return information, and thus cannot be withheld from Taxpayer A on the basis that it is the return information of another individual. FOIA exemptions (b)(3) (in conjunction with IRC 6103(e)(7)), (b)(6), and (b)(7)(C) shall be cited in this situation in order to protect the privacy of the third person. As another example, the taxpayer's Examination file contains records of the taxpayer's expenditures for rent and office supplies. The identities and addresses of the property owner and the supplier(s), and the dates and amounts of payments to them that were obtained to determine the taxpayer's correct expenses are return information of the taxpayer. This information merely reflects a business relationship between the taxpayer and the property owner and supplier(s), and is not return information of the property owner or the supplier(s). Information about the business relationship cannot be withheld from the taxpayer as third-party return information (although

other exemptions may apply). Any notation in the file that explicitly refers to the tax matters of the property owner or supplier(s) must be withheld from the taxpayer as third-party return information if the information is from IRS sources (including the caseworker). For a discussion of how the wording of the request may change the response, see IRM 11.3.41.13.8.27, Requests for Third-Party Information From ChoicePoint or Accurant. Also, a third-party's SSN provided by the taxpayer under examination would not be withheld, although if the same SSN were retrieved from IRS sources it would be withheld. If the third-party SSN provided by the taxpayer has been checked against IRS records, any notation of the result must be withheld as third-party return information.

**Note:** See IRM 11.3.2, Disclosures to Persons with a Material Interest, for additional information on releases of tax information based on material interest. This includes joint taxpayer releases, releases to corporate officers and releases to Tax Matters Partners (TMP) in TEFRA related audits outside of IRC 6103(e)(10) regulations.

- b. Rule 6(e) of the Federal Rules of Criminal Procedure exempts grand jury information.
  - c. 31 USC 5319 exempts currency transaction and certain other reports (see IRM 11.3.41.13.8.1, Title 31 Reports - CTRs, CMIRs, FBARs, and SARs).
  - d. 41 USC 4702 exempts certain contract proposals (see IRM 11.3.13.7.2, Contracts/Commercial Information).
  - e. 5 USC 7114 (b)(4)(C) exempts labor management guidance (see the example in IRM 10.5.6.8.6, Disclosure Under 5 USC 7114).
  - f. IRC 6105 exempts tax convention information (treaties with other countries).
  - g. 18 USC 701 prohibits copying Federal agency identification media (see IRM 11.3.41.13.8.29, Requests for Pocket Commissions).
- (3) Generally, procedural rules are inappropriate as a basis for the (b)(3) exemption, except for those rules prescribed by law and having the effect of law such as Rules 6(e) and 16 of the Federal Rules of Criminal Procedure.

**Caution:** Do not cite IRC 7213 , IRC 7213A , IRC 7431 , or the Privacy Act of 1974, as supporting statutes to the (b)(3) exemption.

- (4) When a statute other than IRC 6103 is used to support the (b)(3) exemption, include a brief explanation of how the statute applies in the case history notes.

11.3.13.5.2.5  
(08-14-2013)  
**Exemption (b)(4)**

- (1) This exemption protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential.
- (2) The exemption is intended to protect the interests of both the government and submitters of information. Its existence encourages submitters to voluntarily furnish useful commercial and financial information to the government and correspondingly provides the government with an assurance that such information will be reliable and complete.
- (3) The exemption also protects submitters who are required to furnish commercial and financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.

- (4) Requests for competitive bids for government contracts may fall in this category.
- (5) This exemption relates to information submitted by individuals, corporations or partnerships. It does not apply to records generated by the government.
- (6) 26 CFR 601.702 establishes certain notification and processing procedures for requests to which exemption (b)(4) might apply. Reference this citation as needed. For further information, see IRM 11.3.13.7.2, Contracts/Commercial Information.

## 11.3.13.5.2.6

(04-19-2017)

**Exemption (b)(5)**

- (1) This exemption applies to inter-agency or intra-agency memorandums, letters or emails that would not be available by law to a party other than an agency in litigation with the IRS. Courts have interpreted this language to exempt those documents, and only those documents, that are normally privileged in the civil discovery context.

**Note:** Counsel must be contacted for release determination on any emails to/from Counsel that are found in responsive records.

- (2) There are three primary privileges incorporated into exemption (b)(5):
  - Deliberative process privilege
  - Attorney work product privilege
  - Attorney-client privilege
- (3) Once determination has been made to apply exemption (b)(5), the case notes and the response letter must state which privilege, or privileges, the withheld information falls under. The case notes must also support the use of exemption (b)(5) and whether the information was considered for a discretionary disclosure determination.
- (4) The Service's assertion of these privileges in response to FOIA requests and any related discretionary determinations must be consistent with the application of these same privileges in the context of discovery.
- (5) Deliberative process is the most commonly invoked privilege under exemption (b)(5). There are two fundamental requirements, both of which must be met, in order for the deliberative process privilege to apply.
  - a. The communication must be pre-decisional; that is, it precedes the adoption of an agency policy or other final decision, and
  - b. The communication must be deliberative; that is, play a direct part in the process of making recommendations or expressing opinions on legal or policy matters.

**Note:** Communications which precede a determination not to issue a decision, policy statement, or published guidance, or with respect to which no final decision, policy statement, or published guidance has been issued, may be withheld under the deliberative process privilege if they meet these two requirements. Internal discussion and recommendations regarding FOIA withholding determinations, ordinarily will also be withheld as deliberative process material.



**Note:** Documents which post-date a decision, but which merely recite deliberations that pre-date the decision, may be withheld if they otherwise meet the requirements of exemption (b)(5).

**Note:** The deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

- (6) The burden is on the agency to show the records meet both requirements. Records that reflect existing agency policy or reflect an interpretation of law already adopted by the agency should be disclosed because they are not pre-decisional, but discuss established policies and decisions.
- (7) Generally, factual portions of internal agency records which may fall within the deliberative process privilege are not exempt from disclosure. However, if the facts are inextricably intertwined with deliberative matter, or selectively culled as part of the author's deliberations on the facts, they may be exempt.

**Example:** Revenue Agent Form 4665, Report Transmittal, or "T-letters" transmitting information to Appeals are generally not exempt in their entirety, but must be reviewed to consider whether all, or part, of the record may be exempt.

- (8) Disclosure personnel will withhold documents pertaining to published guidance (i.e. regulations, revenue rulings, revenue procedures, notices, and announcements), and those generated during the preparation of any statements of agency policy, or the preparation of interpretations adopted by the agency (i.e., Appeals Settlement Guidelines, Coordinated Issue Papers, IRM, etc.), when such documents are exempt from disclosure pursuant to discretionary discovery privileges or FOIA exemptions. The basis for this determination is twofold:
  - a. To protect against public confusion that might result from the disclosure of various internal positions that do not reflect the grounds for the adoption of the guidance or policy that was published (or the decision not to publish at all).
  - b. To protect against exposing the decision-making processes of the Internal Revenue Service in a way that would discourage candid discussion and undermine the Service's ability to perform its critical tax administration functions.
- (9) Work product privilege protects records prepared by an attorney or other Service employee during litigation or in reasonable contemplation of litigation. Generally, it does not cover records written by attorneys in the ordinary course of business (i.e., routine review of statutory notices of deficiency or summonses); it only covers those records which, under the particular facts and circumstances, were created primarily because of ongoing, or reasonably expected, litigation. A discussion with the Counsel attorney is required prior to release of any work product. Generally, discretionary FOIA exemptions for documents pertaining to these matters may be waived only by the Associate Area Counsel in consultation with the affected Service client at the supervisory level. For detailed instructions regarding who is authorized to make these determinations, see Chief Counsel Directives Manual (CCDM) 30.11.1.6.

**Note:** This privilege applies regardless of the court in which the litigation has been (or would be) filed.

- (10) Documents pertaining to litigation include not only documents prepared by Counsel attorneys, but also documents maintained in the administrative files of the Service to which the litigation pertains. Litigants have sometimes used the FOIA as a discovery tool. Therefore, coordinate FOIA responses carefully with the Counsel employee responsible for the litigation. Good coordination will help to ensure that material which is privileged in discovery is also appropriately withheld pursuant to FOIA exemption (b)(5), and that other material which could impair the government's case is reviewed for withholding pursuant to applicable FOIA exemptions. Counsel employees will provide disclosure and withholding recommendations in accordance with CCDM 30.11.1.

**Note:** The FOIA and Discovery are two separate processes. FOIA requests for records that involve a Tax Court case must be processed in coordination with Counsel.

- (11) Attorney-client privilege protects confidential communications between an attorney and a client relating to a legal matter for which the client has sought professional advice. This includes communication from the client to the attorney and from the attorney to the client based on confidential information conveyed to the attorney by the client. The attorney-client privilege is not limited to communications pertaining to litigation or possible litigation. A discussion with the Counsel attorney is required prior to releasing any attorney-client communication. Discretionary FOIA exemptions for documents pertaining to these matters may be waived only by the Associate Area Counsel in consultation with the affected Service client at the supervisory level. See CCDM 30.11.1.

**Note:** This privilege also applies to communication among Counsel attorneys regarding the legal advice sought or provided.

**Note:** This privilege also applies when IRS Counsel seeks legal advice from the Department of Justice (including the Offices of the United States Attorneys).

- (12) Once it is determined that there is a sound factual and legal basis for asserting the exemption, a decision must be made about whether the IRS should exercise its discretion not to claim the exemption. Make the decision to disclose information in response to a FOIA request only after a full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosing.
- (13) Sometimes, Chief Counsel Advice or other written determinations are located in field compliance files. Since these documents are exclusively governed by IRC 6110, process copies of these documents in accordance with that statutory schema and not the FOIA. IRC 6110 requires the IRS to publish Chief Counsel Advice in addition to other written determinations (i.e., letter rulings, technical advice, and determination letters). If a FOIA request seeks an exam file, and a section 6110 written determination is included in the file, see IRM 11.3.13.7.1(8). Additional information for handling requests for section 6110 written determinations can also be found at IRC 6110, IRM 37.1.1, Disclosure, Written Determinations Under Section 6110, CCDM 33.1.3, Releasing Legal Advice to the Public, and CCDM 37.1.1, Written Determinations Under Section 6110.



11.3.13.5.2.7

(08-14-2013)

**Exemption (b)(6)**

- (1) This exemption pertains to the protection of personal privacy and requires a balancing of privacy and public interests. If there is a protectable privacy interest threatened by disclosure of the records, this exemption requires a balancing between the individual's right of privacy against the public's right to be informed. The public interest in this balance is whether the information will shed light on government operations (the core purpose of FOIA).
- (2) This exemption protects personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The phrase "similar files" as used in the (b)(6) exemption has been given a broad interpretation. The Supreme Court stated that Congress intended exemption (b)(6) to cover detailed information on an individual which can be identified as applying to that individual, regardless of the type of file in which the information is maintained, rather than just a narrow class of files. This may include reports of reviews made of an office if the narrative portion of the review focuses on a named official or uniquely titled official whose operation is being evaluated.
- (3) To accomplish the balancing of public interest and privacy interest, use the following formula:
  - a. If no privacy interest exists - release the information
  - b. If any protectable privacy interest exists - check for public interest
  - c. If there is no public interest (or public interest is not the kind of interest that sheds light on how the government operates) - withhold the information
  - d. If there is both privacy and **qualifying** public interest - balance the two interests with a leaning toward releasing the information
- (4) Examples of items that are protected by this exemption are the real names of employees using pseudonyms, disciplinary action files, EEO complaint files, and employees' ratings of record.
- (5) Exemption (b)(6) does not preclude the release of:
  - Purely statistical information
  - Staffing patterns
  - Graphs of units closed, or
  - Overtime expenditures
- (6) When information pertains to federal government employees, but the information is essentially business in nature rather than personal, the (b)(6) exemption is not applicable.

**Example:** A request about an IRS employee's business travel (i.e., locations, costs) should not be withheld under exemption (b)(6).

- (7) The *DOJ Guide to the FOIA and Privacy Act Overview* contain an in-depth discussion about how to apply this exemption.

11.3.13.5.2.8

(04-19-2017)

**Exemption (b)(7)**

- (1) Exemption (b)(7) exempts from disclosure records or information compiled for law enforcement purposes, but only to the extent that the production of such records:
  - a. could reasonably be expected to interfere with enforcement proceedings,

- b. would deprive a person of a right to a fair trial or an impartial adjudication,
- c. could reasonably be expected to constitute an unwarranted invasion of personal privacy,
- d. could reasonably be expected to disclose the identity of a confidential source, including state, local, or foreign agency or authority, or any private institution, which furnished information on a confidential basis. In the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, any information furnished by the confidential source is also exempt,
- e. would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
- f. could reasonably be expected to endanger the life or physical safety of any individual.

- (2) This exemption allows, but does not require, the withholding of records or information compiled for law enforcement purposes. **It does not permit a blanket denial of records.** When information is withheld, in full or in part under this exemption, case notes must explain the foreseeable harm releasing such records would cause. Consider whether partial disclosure of information is possible whenever a determination that a full disclosure of a requested record is not possible. Records may be edited or withheld only if the production of such records would cause one of the six specifically enumerated harms described above. The exemptions under (b)(7) apply to records generated out of civil and criminal judicial and administrative enforcement proceedings, and also apply to information that discusses investigations, such as instructions to staff and other employee guidelines.

**Note:** The first (threshold) requirement that must be met when applying any of the (b)(7) exemptions is to determine that the document or record in question was compiled for law enforcement purposes. If the record was not compiled for law enforcement purposes, the (b)(7) exemptions do not apply.

**Example:** An agency's general monitoring of its own employees to ensure that the procedures in effect are compliant with the agency's statutory mandate and regulations does not satisfy the threshold requirement.

**Note:** Case notes must support the use of exemption (b)(7) and Disclosure personnel must be able to determine the harm to the government's interest and articulate how release would or could interfere with enforcement proceedings.

11.3.13.5.2.8.1  
(10-05-2021)

#### Exemption (b)(7)(A)

- (1) Exemption (b)(7)(A) exempts from disclosure, records or information compiled for law enforcement purposes. Information contained in records compiled for a law enforcement purpose is not exempt unless disclosure would harm a protected interest. Thus, records may be withheld if disclosure could reasonably be expected to interfere with enforcement proceedings. This will apply to any ongoing enforcements or where there is a concrete prospect of future enforcement proceedings. This exemption may apply to open or closed investigatory files, along with non-investigatory files if the files were compiled

for law enforcement purposes. The supporting documentation of the expected harm to interfere with enforcement proceedings must be explained in the inventory management system case notes.

- (2) Records may be withheld if disclosure of information unknown to requesters might impede the investigation or harm the government's case in that particular or a related proceeding. A determination may be made to exempt a category of records in a specific case, without the necessity of completing a document-by-document review if the category of records meets the requirements for exemption described in (1) above. It is expected that withholding a category of records rather than doing a document-by-document review would be an infrequent approach based on very specific and compelling circumstances relating to individual enforcement matters. The following procedures and documentation are required to make a determination to exempt a category of records.
- (3) If disclosing the records to the requester will harm an ongoing investigation, and making copies for Disclosure personnel would also impair the investigation because it would significantly interrupt the efficient conduct of the investigation, the function with control over the records must make a written attestation and provide it to Disclosure personnel. Disclosure personnel will include the attestation in the FOIA case file. The attestation must contain:
  - a. Employee name, title, and phone number
  - b. Approximate volume of records (number of file cabinet drawers, boxes, pages etc.)
  - c. Location of records
  - d. Other contact name, title, telephone number (i.e. Supervisor or Administrative personnel who would be able to locate the records)
  - e. Statement that disclosure of the records could reasonably be expected to interfere with enforcement proceedings and that copies of all records to be withheld from the requester are being provided at this time to the Disclosure employee or will be provided to the Disclosure employee if the requester files an administrative appeal or judicial complaint pertaining to the FOIA determination
  - f. Assurance that the FOIA search request has been noted in the investigative file, and
  - g. The signature of an IRS or Chief Counsel supervisor who has the authority to withhold return information under IRC 6103(e)(7) as found in Delegation Order 11-2 (see IRM 1.2.2.12.2).
- (4) The assigned Disclosure employee will advise the requester that responsive records in an approximate volume are being withheld pursuant to FOIA exemption (b)(7)(A) and/or (b)(3) in conjunction with IRC 6103(e)(7) .
- (5) The function making the determination that disclosure could harm the government's case may provide a complete copy of the records being withheld to the Disclosure employee or must state in the documentation described above that a complete copy of the withheld documents will be kept available and will be provided if the requester files an administrative appeal or judicial complaint in the FOIA matter. IRS must be able to identify any documents withheld. Therefore, if the function does not provide copies of the withheld records to the Disclosure employee, it is imperative that the function clearly identify within its file which documents were withheld in response to the FOIA request, and that this identification be maintained for the life of the file. None of the withheld documents may be destroyed sooner than called for in the Records Control

Schedule controlling FOIA records, and case documents received or developed subsequent to the FOIA request must be distinguishable from documents withheld.

- (6) The function with control of an open and ongoing case must carefully weigh the administrative burden of providing the copies with its response to the search request against the burden of maintaining the segregation within its file between the withheld documents and newer material added as the case continues. An issue to consider is the possibility that the requester will make additional requests for the file, which will require the function to separately identify the documents responsive to each FOIA request.
- (7) The Supreme Court has stated that the exemption may also apply when release of requested information would give the requester earlier and greater access to the government's case than he/she would otherwise have.
- (8) This exemption is commonly applied to open Criminal Investigation, Examination, Collection, Appeals, and Counsel files. Disclosure personnel, after coordinating with appropriate functional personnel, must be able to determine the harm to the government's interest and articulate how release would interfere with enforcement proceedings. Document the file adequately to reflect the determination.
- (9) Occasionally, exemption (b)(7)(A) may be applied to records in a closed case, where disclosure could reasonably be expected to interfere with other open or future expected cases.

**Example:** The amount of money actually spent in a sting operation may be withheld to prevent public knowledge of the agency's resource limitations. This is distinct from exemption (b)(7)(E) because this is actual funds, not guidelines, procedures or techniques.

11.3.13.5.2.8.2  
(08-14-2013)

**Exemption (b)(7)(B)**

- (1) Exemption (b)(7)(B) protects against prejudicial pretrial publicity. This exemption provides for withholding if disclosure of the records would deprive a person of a right to a fair trial or impartial adjudication. This is primarily a protection against prejudicial publicity in civil or criminal trials. This is rarely used by IRS.

11.3.13.5.2.8.3  
(04-19-2017)

**Exemption (b)(7)(C)**

- (1) Exemption (b)(7)(C) protects personal information found in law enforcement records. This exemption protects from disclosure records or information compiled for law enforcement purposes the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.
- (2) This exemption differs from exemption (b)(6) in that it requires a different standard for evaluating the invasion of personal privacy. It requires only a reasonable expectation of an invasion of personal privacy rather than a clearly unwarranted invasion of personal privacy. It also differs from exemption (b)(6) in that it requires the records or information being withheld to have been compiled for law enforcement purposes.

**Example:** A FOIA request for only an IDRS transcript does not constitute information compiled for law enforcement purposes but simply information compiled to respond to the FOIA request. (Exemption (b)(6) should be considered in this instance to protect any personal privacy.) However, copies of IDRS transcripts within a tax administration file that were

compiled by the Compliance employee as part of their administrative proceeding would be considered compiled for law enforcement purposes. (Both exemption (b)(6) and (b)(7)(C) should be considered in this instance to protect any personal privacy.)

- (3) Prior to invoking this exemption, you must identify and evaluate the personal privacy interests implicated in the requested records. The Supreme Court held that whether disclosure is warranted within the meaning of the (b)(7)(C) turns upon the nature of the requested information and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties. Disclosure personnel must balance competing personal privacy and public interests.
- (4) This exemption only protects the personal privacy of individuals. Entities have no personal privacy. If the privacy or confidential information of a non-individual entity is at issue, Disclosure personnel must consider whether another FOIA exemption will properly apply to withhold the information.
- (5) This exemption is commonly used to protect the identity of lower level Compliance employees at the Federal, state, or local level, names and other identifying information of taxpayers or other targets under investigation, and any witnesses or confidential sources interviewed. See IRM 11.3.41.13.8.22, Employee Privacy Matters, for more information.

#### 11.3.13.5.2.8.4

(08-14-2013)

#### **Exemption (b)(7)(D)**

- (1) Exemption (b)(7)(D) protects the identity of confidential sources and, in criminal cases, the information the confidential source provided. This exempts from disclosure the name and any material which could reasonably be expected to disclose the identity of a confidential source. In criminal investigations, any information furnished by a confidential source, whether or not it identifies the source, is exempt.
- (2) The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement record, civil or criminal. The term confidential source refers not only to paid informants but to any person who provides information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. The factual basis for confidentiality, if not clear from the face of the records, will be documented in the case file.
- (3) A source can be confidential with respect to some items of information provided, even if other information is furnished on an open basis.
- (4) Sources have been interpreted to include local, state, and foreign law enforcement agencies that provide information to an agency in confidence. This was codified by the 1986 amendments to the FOIA. It does not include Federal agency personnel.
- (5) The second part of the provision applies to the information provided by the confidential source. Generally speaking, with respect to civil matters, such information may not be treated as exempt on the basis of exemption (b)(7)(D), except to the extent that its disclosure would reveal the identity of the confidential source. However, with respect to criminal investigations and lawful national security intelligence investigations, any information provided by a confidential source is, by that fact alone, exempt.

- (6) Use of this exemption by itself provides an indication that a confidential source exists. Use this exemption only where Disclosure personnel have confirmed, through consultation with the affected function(s), that the requester knows a confidential source exists and asserting the exemption is not likely to indirectly reveal the identity of the source. Where assertion of the exemption is believed to be inappropriate, exemption (b)(3) in conjunction with IRC 6103(e)(7) , (b)(7)(A), and (b)(7)(C) may be asserted.

11.3.13.5.2.8.5  
(10-05-2021)

**Exemption (b)(7)(E)**

- (1) Exemption (b)(7)(E) exempts from disclosure certain enforcement procedures. This exemption applies to records that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of law.
- (2) This exemption may only be used to protect investigative techniques or guidelines not generally known to the public.

**Note:** Where a technique is generally known, but the criteria for its use or the details of its use in a specific case are not publicly known, exemption (b)(7)(E) may apply to protect the information. For example, wiretapping is a technique generally known to the public. However, the criteria for IRS use of this technique are not generally known, and can be withheld using this exemption. Further, because the mere fact of use of the technique in a specific situation may reveal the criteria for use, fact of usage may (under certain circumstances) be withheld. This must be discussed with the agent(s) handling the investigation.

**Caution:** Information marked “OUO”, “CUI”, or a similar classification is not automatically exempted under (b)(7)(E). The information must still be reviewed, and an appropriate harm standard provided, in order to redact the information.

- (3) This exemption has been applied to protect DIF, DAS and UIDIF scores, tolerances, and investigative criteria, which are also protected by FOIA exemption (b)(3) in conjunction with IRC 6103(b)(2). See IRM 11.3.41.13.8.9, DIF, DAS, and UIDIF Score, SERFE Indicator. Settlement criteria or records that discuss hazards of litigation can also be withheld pursuant to FOIA exemption (b)(7)(E).
- (4) After the passage of time, tolerances, investigative and prosecutorial criteria, and settlement guidelines may become known to the public or revised. Consider such factors before invoking the exemption. The determination must be made in consultation with the affected function(s), and documented in the case file.

11.3.13.5.2.8.6  
(08-14-2013)

**Exemption (b)(7)(F)**

- (1) Exemption (b)(7)(F) applies to the life and safety of individuals. It exempts information the disclosure of which could reasonably be expected to endanger the life or physical safety of any individual.

**Example:** This exemption might apply to information that would reveal the identity or existence of undercover agents (local, state, or federal) working on such matters as narcotics, organized crime, terrorism, or espionage.



- (2) The exemption is not limited to law enforcement personnel. The 1986 amendments to the FOIA broadened the scope of the exemption to encompass danger to any person. This exemption may also be appropriate to protect the identity or location of witnesses if the requester is already known or believed to be violent.

11.3.13.5.2.9  
(08-14-2013)  
**Exemption (b)(8)**

- (1) Exemption (b)(8) applies to reports related to the regulation of financial institutions. This exempts from disclosure matters contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. It is rarely used by the IRS.

11.3.13.5.2.10  
(08-14-2013)  
**Exemption (b)(9)**

- (1) Exemption (b)(9) applies to geological and geophysical information and data, including maps concerning wells. It is rarely used by the IRS.

11.3.13.5.3  
(08-14-2013)  
**Record Exclusions**

- (1) The Freedom of Information Act includes three special exclusions for protecting certain law enforcement records under subsection (c) of the FOIA.
- (2) These exclusions expressly authorize Federal law enforcement agencies to treat certain law enforcement records as not subject to the requirements of the FOIA. These provisions apply only to especially sensitive records in specific limited circumstances.
- (3) Disclosure personnel **must** thoroughly familiarize themselves with the exclusion guidelines found in the *DOJ Guide to the Freedom of Information Act*.
- (4) Disclosure personnel must coordinate the assertion of these exclusions using established communication protocols with the FOIA Senior Policy Analyst who will coordinate as necessary with Branch 6 or 7 of the Office of the Associate Chief Counsel, Procedure and Administration.

11.3.13.5.3.1  
(08-14-2013)  
**Exclusion (c)(1)**

- (1) The (c)(1) exclusion provides that, under certain conditions, when a request involves access to records described in subsection (b)(7)(A), the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of the FOIA.
- (2) The exclusion may only be applied when the following conditions exist:
  - a. The investigation or proceeding involves a possible violation of criminal law.
  - b. There is reason to believe that the subject of the investigation or proceeding is not aware of its pendency.
  - c. Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.
- (3) Where the excluded records are just part of other records subject to the request, the request will be handled as a routine request with the other responsive records processed as if they were the only responsive records.
- (4) Where the only records responsive to a request fall within the exclusion, advise the requester that no responsive records exist.



- (5) The letter to the requester must not mention the (c)(1) exclusion or include the excluded documents in any statement of the quantity of documents located or withheld.
- (6) The case history notes must thoroughly document the basis for the exclusion and identify the excluded documents and the functional employee with knowledge of the situation. If possible, the excluded documents shall be kept with the FOIA case file, clearly identified as (c)(1) excluded documents.
- (7) After issuing an initial response that involves the (c)(1) exclusion, if the taxpayer learns of the investigation and a FOIA appeal or lawsuit is pending, it is no longer appropriate to claim the exclusion; however, other FOIA exemptions may apply.

11.3.13.5.3.2  
(08-14-2013)  
**Exclusion (c)(2)**

- (1) The (c)(2) exclusion provides that a law enforcement agency may treat requests for informant records maintained under an informant's name or personal identifier as not subject to the FOIA unless the informant's status as an informant has been officially confirmed.
- (2) This does not preclude the IRS from responding to such requests by denying third-party investigative records without searching for or confirming or denying the existence of such records consistent with statutory or regulatory requirements.

11.3.13.5.3.3  
(08-14-2013)  
**Exclusion (c)(3)**

- (1) The (c)(3) exclusion pertains only to classified law enforcement records concerning foreign intelligence or counterintelligence or international terrorism generated by the FBI.

11.3.13.5.4  
(07-16-2020)  
**Glomar**

- (1) Executive Order 12-958, as amended, incorporates the use of a "Glomar" by a federal agency in response to a request for records. The "Glomar" response provides that: "An agency may refuse to confirm or deny the existence or non-existence of requested records whenever the very fact of their existence or non-existence is itself classified under this order."
- (2) A FOIA exemption must apply to information that is being considered for withholding under a Glomar response. A Glomar response can only be used if any responsive records, or evidence that records exist, fall under one of the nine FOIA exemptions. The exemption(s) and support for the use of those exemptions must be documented in the inventory management system case notes. The basis for applying a Glomar response must also be documented in the inventory management system case notes.

**Example:** A FOIA request is received from a third party asking for copies of tax administration files for a taxpayer and the third party does not have proper authorization. These tax administration files would fall under FOIA exemption (b)(3) used in conjunction with 26 U.S.C. 6103 and IRS can neither confirm or deny the existence of any tax records to the third party.

- (3) A Glomar response is not appropriate when the FOIA request is imperfect.
- (4) In employing "Glomarization", agencies must be careful to use it only to the extent that is warranted by the terms of the FOIA request at hand. For a request that involves more than just a law enforcement file, the agency should

take a “bifurcated” approach to it, distinguishing between the sensitive law enforcement part of the request and any part that is not so sensitive as to require “Glomarization”.

- (5) Appeal rights are provided to the requester when a Glomar response is used.

11.3.13.5.5  
(10-05-2021)  
**Outside of Scope**

- (1) “Outside the scope” is not a legal FOIA exemption found in section 552(b) of the Freedom of Information Act and should rarely be used when processing a FOIA request. The term outside of scope refers to responsive records that have been provided or obtained that are outside the scope of the FOIA request.
- (2) Outside the scope of the FOIA request is the term used to refer to records, or portions of records, that are not responsive to the request. This situation should rarely apply because caseworkers should only be retrieving or receiving documents that are responsive to the request. Once records are received, information can only be withheld by citing an appropriate FOIA exemption.

**Note:** Documents such as the Form 2275-A, Records Request, Charge and Recharge (Disclosure), that the caseworker used to request files are not considered responsive and should be removed from responsive records before sending a final response to the requester. Do not include them as responsive documents to the request. Non-responsive records such as Form 2275-A should be scanned and placed in the inventory management system, using appropriate procedures to import documents for that specific system, but should be maintained separately from responsive records. These types of documents should remain in the inventory management system to support actions taken on the case.

- (3) If records are received from record holders that are not responsive to the request, delete them from the scanned file on a page by page or file by file basis. Failure to do so may misrepresent the total number of responsive pages reviewed and makes the number of pages withheld by a valid FOIA exemption incorrect. That opens the door for a legal challenge of the withholding and complicates any litigation as the records were withheld outside of a bona-fide FOIA exemption.
- (4) A legitimate and rare outside the scope situation only applies when there are records that are “created” or came into the possession or control of the record holder after the date of the FOIA. However, out of scope does not apply to entries on transcripts or case history entries that were made after the date of the FOIA as the case history entry is not creating a record, it only reflects actions taken after the date of the FOIA. The record in its entirety is responsive because it was within the possession and control of the function prior to the date of the FOIA. See 26 CFR 601.702(c)(8)(ii). Even if the record was created after the date of the FOIA, release should be considered based upon the concept of openness and transparency or based on the time it takes to locate and retrieve responsive records. See IRM 11.3.13.4.2, Adequacy of Search.

11.3.13.5.6  
(07-16-2020)  
**Redacting Records**

- (1) During the review and editing process, Disclosure personnel are responsible for balancing their two roles as enforcer of access statutes and guardian of protected data. Sometimes those roles may appear to work against each other. Case file documentation must reflect both roles and explain the reasoning behind the final determination to withhold or release information.
- (2) As discussed in IRM 11.3.13.5.1(4) through (7), Approach to Exemptions, some exemptions are discretionary by statute and some are clearly non-discretionary. Clear case file documentation of the reasoning behind the application of the discretionary and non-discretionary exemptions is crucial because the requester may appeal the final determination. The use of an index to document these determinations is encouraged.

**Note:** For more information regarding the usefulness of indexing, see IRM 11.3.13.6.1, Indexing.

- (3) Any reasonably segregative portion of a record must be released after redaction of the portions that are exempt. The redaction must be obvious to the requester and, if feasible, the applicable exemption cited at the point of redaction. In most instances and if applicable to a specific inventory management system, the inventory management system will automatically place the exemption at the place of the redaction. The FOIA also requires an explanation in the response letter for any items withheld. See IRM 11.3.13.6, Response and Closing.

**Note:** A reasonably segregative portion is any portion of a requested record which is not exempt from disclosure and which, after redaction of the exempt material, still conveys meaningful information that is not misleading.

- (4) When editing portions of a record being released, reasonable effort must be made to clearly indicate to the requester the extent of the editing. Editing and its extent must also be apparent in electronic records.
- (5) The volume of information deleted on the released record must be indicated at the place in the record where the deletion was made. The inventory management system will clearly indicate the position and extent of any editing if properly used by Disclosure staff.
- (6) Requesters must be able to identify the exemptions that apply to the information being withheld.

**Note:** Annotate the exemption at the point of redaction. If this is impossible, annotate the exemption in the margin of the record being partially released. If this is not reasonable, the applicable exemption may be stated in the letter, with references to the pages where material was redacted pursuant to the exemption. The response letter will describe the nature of the information being withheld and the exemption(s) being claimed.

11.3.13.5.7  
(10-05-2021)  
**Legibility of Copies**

- (1) Copies of records made in connection with FOIA matters must be as legible as possible.
- (2) The burden of proof in defending withholding rests with the Government. Therefore, copies of documents which may ultimately be submitted to a court for **in camera** inspection must be legible.

11.3.13.6  
(10-05-2021)  
**Response and Closing**

- (1) The final response letter issued to the requester is the final action to complete a FOIA request. Interim responses must be issued to the requester throughout case processing, as applicable. See IRM 11.3.13.6.3, Interim Response Letters, for information on interim responses. The Disclosure caseworker must ensure the correct address is used on any correspondence issued to the requester.
- (2) The response letter must contain specific items of information such as the request receipt date and must explain any exemptions applied for records denied in full or in part.
- (3) Generally, when the response includes records that have been edited in any fashion, the letter must cite the reason and the associated exemptions applied. The edited records must generally reflect the exemption applied at the point of redaction.

**Note:** For further discussion of editing requirements, see IRM 11.3.13.5.6, Redacting Records.

- (4) All agency response letters with an adverse determination must include Notice 393 appeal rights notification, the FOIA Public Liaison contact information, and Office of Government Information Services (OGIS) contact information.
- (5) Case files and history notes must contain sufficient information to permit reviewers to determine precisely what was and/or was not released, and the underlying reasons. In many cases, the response letter itself may be adequate to determine the extent of records released. However, the history notes must be detailed enough to allow managers and other reviewers to understand all relevant activities, actions, and/or research used to make a determination.
- (6) The electronic file must contain copies of the signed and dated response letter, edited and/or withheld records, any index that may have been prepared, and any other records that are necessary to document the processing of the request.

**Note:** Complete copies of what was released in addition to items edited or not released may be necessary to support any administrative appeal or litigation. If the records reviewed are too voluminous to maintain as an electronic file copy because the records were not scanned into the inventory management system, the Disclosure caseworker must retain records retrieved from files or the Federal Records Center (FRC) for 180 days from the date of the response before returning them. If the records are from an existing open administrative file controlled by a function, Disclosure personnel need not hold the file, but must be able to retrieve the file if necessary in the event of an appeal or litigation. Disclosure personnel must be able to reconstruct the records which were released in the event of an appeal or litigation, and identify any records created after processing the FOIA request.

- (7) A Disclosure Manager or their designee must review all cases releasing redacted records. Case files must document when a case is forwarded to the Disclosure Manager or their designee for review and signature.
- (8) The FOIA Improvement Act of 2016, signed on June 30, 2016 states that whenever an agency sends a response to a FOIA request, the agency must make known to the person making such a request their right to seek assistance from the FOIA Public Liaison.

**Note:** Agency responses include extension, interim and final response letters. FOIA Public Liaison contact information must be included in all of these types of response letters. See IRM 11.3.13.6.2, Extension Letters, and IRM 11.3.13.6.3, Interim Response Letters, for additional information on extension and interim response letters.

11.3.13.6.1  
(04-19-2017)  
**Indexing**

- (1) Indexing is a technique for creating a detailed list of the records that were reviewed in response to a FOIA request.
- (2) The index is useful in making the final FOIA determination whenever a case involves an extensive number of records, some of which may be granted and others denied in whole or in part. Indexing is especially helpful if the records denied are subject to several exemptions.
- (3) Disclosure personnel must consider preparing an index whenever the case is sufficiently complex to warrant one.

**Example:** Consider preparing an index when more than one type of file is responsive, numerous pages are withheld in full or in part and/or many exemptions apply.

- (4) In some cases, Disclosure personnel may determine that a partial index or a handwritten draft is adequate for an initial determination.

**Note:** A partial or preliminary index may require further amplification if the case advances to the administrative appeal level or results in litigation.

- (5) You must first number the pages when preparing an index. Generally, an index will:
  - a. identify the records by type, date, recipient (by title), and originator (by title),
  - b. indicate the nature of the record and, if part of an investigatory file, indicate how the record relates to the investigation,
  - c. identify the FOIA exemptions asserted,
  - d. provide justification for the assertion and specify the anticipated harm from release of the record, unless assertion of the exemption is mandatory,
  - e. indicate those items withheld because the exemption is mandatory and cite any applicable disclosure statutes, and
  - f. indicate discretionary releases of information where an exemption could have applied, but a determination was made to disclose the information.
- (6) Blocks of substantially identical records may be described generally rather than in individual detail.
- (7) An index is not a required element in the response to the requester and is not generally provided.

**Note:** Some requests ask for an index or listing of all documents withheld in full or in part and may specify a "Vaughn Index." Requesters are not entitled to such an index or listing. Disclosure personnel need not create one and are not required to provide to the requester any list created to assist in processing the request.

**Exception:** In some cases, the Disclosure Manager may decide that providing all or part of the index as an attachment may simplify the response or avoid an unnecessary appeal.

**Caution:** Ensure that details included in an index provided to the requester do not compromise the records or the information denied.

- (8) With the advice and assistance of the Disclosure Manager or member of their staff, employees of the function conducting the search and making recommendations about release of the records may prepare an index.

11.3.13.6.2  
(10-05-2021)  
**Extension Letters**

- (1) The FOIA (at 5 USC 552(a)(6)(B)(i)) provides for an additional 10 business days to respond if Disclosure personnel notify the requester in writing that IRS needs more time to:
- search for and collect the requested records from other locations separate from the responding office (i.e. Federal Records Center),
  - search for, collect, and review a large volume of records which are, or may be, responsive to the request,
  - consult with another agency or Treasury bureau which has a substantial interest in one or more of the responsive records, or
  - consult with business submitters to determine the extent of proprietary information.
- (2) In the request for voluntary extension of time to respond, you must provide the requester an opportunity to:
- limit the scope of the request, and
  - arrange an alternative time frame for processing the request.
- (3) The letter requesting the initial voluntary extension of time is required even if the requester agreed to allow additional time to respond during personal or telephone contact. It is important to notify the requester in writing that he/she has a right to file for judicial review to obtain a response. Additionally, notify the requester that the court may find that the agency's failure to comply with the statutory response date is justified if the requester refuses to consider limiting the scope or to accept a reasonable alternate time frame for response.
- (4) There is no right to an administrative appeal for failure to meet the statutory 20 business day or additional 10 business day time limits for response.

**Note:** See 26 CFR 601.702 and IRM 11.3.13.6.7, Administrative Appeals.

- (5) Contact information for the Office of Government Information Services (OGIS) and the FOIA Public Liaison must be included in the extension letter. See IRM 11.3.13.6.5 and IRM 11.3.13.6.6 for additional information on the FOIA Public Liaison and procedures.

11.3.13.6.3  
(10-05-2021)  
**Interim Response Letters**

- (1) An interim response letter should be issued to requesters when it is appropriate. The Department of Justice Office of Information Policy issued guidance on making interim responses during the processing of Freedom of Information Act requests. An interim response letter should be provided when some records are available rather than waiting until all records are located and processed.



**Note:** Consider including extension letter language in the interim response letter, if applicable.

- (2) Any exceptions to not engage in rolling or interim productions, when records are clearly available, must be reflected and supported in case documentation.
- (3) Contact information for the Office of Government Information Services (OGIS) and the FOIA Public Liaison must be included in the interim letter. See IRM 11.3.13.6.5, FOIA Public Liaison, and IRM 11.3.13.6.6, Office of Government Information Services (OGIS), for additional information on the FOIA Public Liaison and procedures.

11.3.13.6.4  
(10-05-2021)  
**Expedited Response**

- (1) The Freedom of Information Act provides for expedited processing if the requester asks in writing and demonstrates a compelling need for the information.
- (2) A compelling need may exist when:
  - a. failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual
  - b. the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity; or

**Note:** See 26 CFR 601.702(c)(6) for details about who qualifies as an individual primarily engaged in disseminating information and what situations may meet the compelling need requirement.

- c. failure to obtain the records quickly could cause a loss of substantial due process rights.
- (3) A request for expedited processing must include a detailed explanation of the circumstances creating the compelling need. The explanation must be sufficient to enable Disclosure personnel to determine whether the asserted need meets the statutory or regulatory requirements. The requester must certify that the statement of compelling need is true and correct to the best of their knowledge and belief. A requester may ask for expedited processing at the time of the initial request for records or at any later time.

**Note:** A request that does not contain a compelling need or certification of the need is not an “invalid” request for expedited processing. If the request for expedited processing does not have a compelling need or certification as required, the request for expedited processing may be denied and the requester must be provided the required notification with appeal rights.

- (4) A notice of the determination to grant or deny expedited processing must be provided within **10 calendar days** after receipt of the request. The letter must be signed by the Disclosure Manager or designee. If the request for expedited processing is denied, provide a Notice 393 with notification of the denial. Contact information for the Office of Government Information Services (OGIS) and the FOIA Public Liaison must also be included in all responses denying a request for expedite processing. See IRM 11.3.13.6.5, FOIA Public Liaison, and IRM 11.3.13.6.6, Office of Government Services(OGIS), for additional information on the FOIA Public Liaison and procedures.



**Note:** Improper FOIA requests are not considered constructively “received”. The 10 calendar day timeframe does not start until IRS receives a valid FOIA request.

- (5) If a caseworker will close a case before the 10 calendar day requirement, the determination to grant or deny expedited processing is moot and no determination to grant or deny the expedited processing is required to be made. Pattern language should be used to advise requesters that the request for expedited processing was not considered..

**Note:** If a caseworker is unsure if a case will close before the 10 calendar day requirement, the request should be treated as if it will go beyond the 10 calendar days and a grant or denial response should be sent to the requester.

11.3.13.6.5  
(04-19-2017)  
**FOIA Public Liaison**

- (1) The Executive Order issued in December 2005, the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016 require the IRS to designate FOIA Public Liaisons to serve as supervisory officials to whom a FOIA requester can raise issues about the service the FOIA requester received.
- (2) To comply with the Executive Order, the IRS designated the Disclosure Managers as the FOIA Public Liaisons for their respective offices.
- (3) In their role as FOIA Public Liaison, Disclosure Managers are responsible for reducing delays in processing, knowing the status of requests in their offices, and assisting in the resolution of disputes raised by FOIA requesters for cases completed by their staffs. Disclosure staff must notify the Disclosure Manager promptly of any inquiries or disputes raised by requesters.
- (4) The FOIA Improvement Act of 2016, signed on June 30, 2016 states that whenever an agency sends a response to a FOIA request, the agency must make known to the person making such a request their right to seek assistance from the FOIA Public Liaison.

**Note:** Agency responses include extension, interim and final response letters. FOIA Public Liaison contact information must be included in all of these types of response letters.

11.3.13.6.6  
(04-19-2017)  
**Office of Government  
Information Services  
(OGIS)**

- (1) The Office of Government Information Services (OGIS) is the Federal Freedom of Information Act (FOIA) Ombudsman. OGIS was created within the National Archives and Records Administration when the OPEN Government Act of 2007 amended the FOIA 5 USC 552. OGIS reviews agency compliance with FOIA, provides mediation services to resolve FOIA disputes, and identifies policies and procedures for improving FOIA compliance.
- (2) Typically requesters submit their dispute to OGIS, and OGIS contacts the FOIA Senior Policy Analyst. Any OGIS inquiries received in the field must be referred to the FOIA Senior Policy Analyst.
- (3) The FOIA Improvement Act of 2016 signed on June 30, 2016 states that whenever an agency sends an adverse determination response to a FOIA request, the agency must make known to the person making such a request the following:

- a. The right of such person to appeal to the head of an agency within a period that is no less than 90 days after the date of such adverse determination, and
  - b. The right of such person to seek dispute resolution services from the FOIA Public Liaison, and
  - c. The right of such person to seek dispute resolution services from the Office of Government Information Services (OGIS).
- (4) All agency response letters with an adverse determination must include the Notice 393 appeal rights notification, the FOIA Public Liaison contact information, and OGIS contact information.

11.3.13.6.7  
(10-05-2021)

#### Administrative Appeals

- (1) In accordance with 26 CFR 601.702(c)(10)(i), a requester may appeal administratively any initial determination under the FOIA that notifies the requester:
- a. of a denial of records, in full or in part,
  - b. of an adverse determination of the requester's fee category,
  - c. of an adverse determination of the requester's fee waiver or fee reduction request,
  - d. that no responsive records exist, or
- Note:** See IRM 1.2.2.12.4, Delegation Order 11-4, Responses to Administrative Appeals Filed Pursuant to the Freedom of Information Act (5 USC 552), for employees delegated to receive, and respond to, IRS FOIA appeals.
- e. a denial of a request for expedited processing and the appeal must be postmarked within 10 days of the date of the notification that expedite processing was denied..
- (2) The FOIA Improvement Act of 2016 signed on June 30, 2016, states that whenever an agency sends an adverse determination response to a FOIA request, the agency must make known to the person making such a request the following:
- a. The right of such person to appeal to the head of an agency within a period that is no less than 90 days after the date of such adverse determination, and
- Note:** The FOIA Regulations referenced in (1) of this section state that the appeal must be postmarked within 35 days after the date of the applicable FOIA adverse determination letter. The FOIA Improvement Act of 2016 extended the right of such person to appeal within 90 days after the date of an adverse determination. Any adverse determination letters for FOIA requests received after June 30, 2016, must allow 90 days for an appeal.
- b. The right of such person to seek dispute resolution services from the FOIA Public Liaison, and
  - c. The right of such person to seek dispute resolution services from the Office of Government Information Services (OGIS).
- (3) All agency response letters with an adverse determination must include the Notice 393 appeal rights notification, the FOIA Public Liaison contact information, and OGIS contact information.

- (4) The IRS Independent Office of Appeals is responsible for processing administrative appeals under the FOIA.
- (5) Appeals personnel will no longer process or monitor FOIA appeals resulting from constructive denials of records (i.e., lack of timely response). If the Appeals Office receives such an appeal, it will advise the requester that there are no administrative appeal rights and the only recourse is to seek judicial review in court or wait for the initial determination.

**Note:** When the Appeals Office requests it, Disclosure personnel will provide either a written or verbal anticipated response date.

- (6) A requester may administratively appeal the adequacy of the FOIA search. Requesters who believe that there may be more responsive records than those addressed in the FOIA response may communicate their concern regarding the search to the FOIA caseworker. If the concern is not promptly resolved by the caseworker and local Disclosure Manager, then the requester may exercise administrative appeal rights.

**Note:** Requesters need not contact the caseworker before filing an administrative appeal of the adequacy of a FOIA search.

- (7) Appeals has access to the inventory management system and should not need records, response letters, or other information that have been imaged and are in the system. If a paper file exists for a request not imaged into the inventory management system, Disclosure personnel will provide Appeals with the paper file, as needed.
- (8) If informal or partial indexes are part of the file, Appeals processing personnel may request that Disclosure personnel develop improved indexes in order to facilitate resolution of an appeal. When requested, Disclosure personnel will cooperate fully with Appeals personnel.

11.3.13.6.8  
(08-14-2013)  
**Declarations**

- (1) If the requester files litigation pursuant to the FOIA, attorneys from the Office of the Associate Chief Counsel (Procedure and Administration) who defend the agency in FOIA lawsuits prepare declarations for the signature of Disclosure personnel and employees in other functions who assisted in conducting searches for responsive records or who recommended withholding information to establish case processing and the scope of the search.
- (2) Counsel also prepares declarations for the signature of the Revenue Agent, Revenue Officer, or Special Agent who is most familiar with the underlying investigation, or the supervisor of those individuals to establish the factual basis for any law enforcement claims.

**Note:** Generally, Counsel will also prepare a declaration for the signature of the appropriate official under DO 11-2 (Rev. 4), found in IRM1.2.2.12.2 , if the request response asserted FOIA subsection (b)(3) in conjunction with IRC 6103(e)(7) .

- (3) Declarations are based on the specific facts and circumstances of the particular case that led logically to the conclusions that relied on those facts.
- (4) Attorneys in Branch 6 or 7 of the Office of the Associate Chief Counsel (Procedure and Administration) may require an index of documents withheld in

full and in part in order to facilitate resolution of the case. Disclosure personnel will prepare, or assist in preparing, such an index, as requested.

- (5) Disclosure personnel will assist the Counsel attorneys assigned to the litigation to:
  - a. gather necessary facts for the declarations,
  - b. provide documentation as exhibits to the declarations, as appropriate, and
  - c. coordinate the execution of the declarations by agency personnel.

11.3.13.7  
(08-14-2013)  
**Special Issues**

- (1) This subsection provides guidance related to some of the more complex or unusual issues encountered when processing FOIA requests.

11.3.13.7.1  
(10-05-2021)  
**Written Determinations  
(Including Private Letter  
Rulings, Technical  
Advice & Chief Counsel  
Advice)**

- (1) The public may access “written determinations” and “background file documents” pursuant to IRC 6110 . These documents are not subject to FOIA. These terms are defined in IRC 6110(b)(1) and (b)(2) respectively. See IRM 37.1.1, Disclosure, Written Determinations Under Section 6110, regarding processing requests pursuant to IRC 6110.
- (2) The background file may also contain records that are not available under IRC 6110 (i.e., internal memoranda, inter-agency memoranda, routing slips, emails, and case control sheets) but are subject to request under the FOIA. The Tax Law Specialist will process FOIA requests for background file records.

**Note:** Disclosure personnel cannot process a third-party FOIA request for background file records if the request identifies the records by a taxpayer name or identifying number. A third party seeking access to written determinations or background files, whether under IRC 6110 or the FOIA, must identify the requested records as described in 26 CFR 301.6110-1 (i.e., by providing the identification, file, or similar number, category, or code section). Proper authorization must be included with a request for third-party written determination documents.

- (3) This section of the IRM provides guidance related to the processing of FOIA requests for records in the underlying file which are not covered by IRC 6110.
- (4) Written determination files are generally stored in the National Office of the Office of Chief Counsel. Written determinations include:
  - Private Letter Rulings (PLR)
  - Technical Advice Memoranda (TAM)
  - Chief Counsel Advice (CCA)
- (5) All PLR’s and TAM’s are taxpayer specific and are protected under IRC 6103. Proper identification/authorization must be included with the request to be valid for processing.
- (6) CCA is written advice or instruction by the National Office of the Office of Chief Counsel to field offices relating to interpretations of revenue provisions whether taxpayer specific or generic. Examples are:
  - Litigation Guideline Memoranda (LGM)
  - Bulletins
  - Legal Advice

**Note:** Not all CCA's are taxpayer specific. Requests for CCA's that are taxpayer specific must include proper identification/authorization to be valid for processing.

- (7) CCA issued on or after January 1, 1986, are available for public inspection through the Freedom of Information Act (FOIA) Library and caseworkers may direct requesters seeking CCA to the FOIA Library.

**Note:** If the requester seeks a copy of a written determination from 1997 or later, and he/she can provide the identification number or Uniform Issue List (UIL) number, field Disclosure personnel may advise the requester how to access the record on the internet website and/or download it themselves and provide it. For further discussion of the determinations involved in data electronically available to the requester, see IRM 11.3.13.4.1, Search Efforts, (3) and (4). If, however, the request seeks an underlying file, discuss with the Disclosure Manager to get assistance from a Tax Law Specialist or transfer that portion of the request to the Tax Law Specialist with Disclosure Manager approval.

11.3.13.7.2  
(10-05-2021)  
**Contracts/Commercial  
Information**

- (1) Contractors (Business Submitters/Vendors) provide information to the IRS that may contain trade secrets and commercial or financial information that is privileged or confidential. The IRS routinely receives FOIA requests for this information and must give the contractor the opportunity to provide a detailed statement of any objections to the release of the contract records.

**Note:** All FOIA requests for contract information must have a valid IRS and/or Treasury contract number listed in the request. If no contract number is listed then the request is imperfect.

- (2) Requesters sometimes seek access to information which, although physically in IRS possession is:
- not an agency record subject to the FOIA; or
  - exempt from access pursuant to 5 USC 552(b)(4) as trade secrets and commercial or financial information obtained from a person and is therefore privileged or confidential.

**Caution:** Take care not to release information described in (2)(b) without considering the commercial or proprietary interests of the originator.

- (3) Examples of information that may involve commercial or proprietary considerations include:
- Studies provided by non-governmental sources
  - Training materials prepared under contract
  - Operating manuals for purchased or leased equipment
  - Transcripts prepared by court stenographers
  - Contracts and related records concerning the purchase of goods or services
  - Computer software (off the shelf or not governmentally produced)

**Note:** The IRS Restructuring and Reform Act of 1998 (RRA 98) provides very specific circumstances under which a summons may be issued for the production and/or analysis of tax-related computer source code and related

materials. Once in the possession of the IRS, the material becomes IRC 6103 information. As such, it warrants the protections afforded by IRC 6103 plus any additional safeguards as found in IRC 7612. Willful unauthorized disclosures of this information will subject the IRS and the employee to criminal penalties under IRC 7213 and IRC 7213A, and/or civil damages under IRC 7431.

- (4) Studies, operating manuals, and computer software (when prepared by non-governmental sources) may not be agency records subject to the FOIA and may be the property of the originator.
- (5) Base any determinations on the provisions of the agreement under which the IRS obtained the materials, the presence or absence of copyright or other restrictive markings, and whether the IRS obtained exclusive use of the materials.
  - a. If the IRS has exclusive and unlimited use of the materials, they are agency records.
  - b. If the IRS has only temporary or limited use of the materials, or if the originator exercises continuing control over the materials, they generally are not considered agency records.
- (6) A single record may contain both materials that the IRS prepared and those obtained from other sources. Whether it is possible to segregate the materials will depend on practical considerations and physical constraints.
- (7) Sometimes IRS employees acting on their own initiative and on their own time prepare materials for their own use. Such materials may remain the property of the employee and would not be considered agency records. Base any determination on the terms of the use permitted by the employee. See (5) above.
- (8) The status of transcripts prepared by court stenographers will depend on applicable law and the agreement under which the stenographer serves the court. Generally, court transcripts are agency records in those situations in which the stenographer's rights to exclusive distribution have terminated.
- (9) Contracts and associated records relating to the purchase of goods and services, including evaluative records, are agency records, but they may contain trade secrets and commercial or financial information that is privileged or confidential. Vendors frequently provide the government with more information concerning their products or services than they would make available in ordinary trade.
- (10) Disclose business information provided to the IRS by a business submitter only as allowed by regulation. Carefully follow the provisions of 26 CFR 601.702(g). Generally, they require prompt written notification to submitters of business information that IRS has received a FOIA request for that information and the details of any proposed response. Further, the IRS must give business information submitters the opportunity to provide a detailed statement of any objections to disclosure within 10 business days. Attempt to contact the submitter to ensure their receipt of the inquiry if you receive no response within the allotted time.

**Note:** On September 30, 1997, Part 15 of the Federal Acquisition Regulation (FAR) was revised to stipulate that unit prices of each award be disclosed to unsuccessful bidders during the post award notice and debriefing process.



Additionally, you may release unit prices on request under the FOIA, unless the business submitter provides written documentation that release of the unit prices would be a competitive disadvantage (consider the use of exemption (b)(4) in this situation). Furthermore, the FAR specifically provides that the items, quantity, and any stated unit prices of each award are also publicly available. These FAR provisions are mandatory for contracts solicited after January 1, 1998.

- (11) Certain business information provided to the IRS by a business submitter is subject to statutory prohibition against disclosure, and must be withheld under FOIA exemption (b)(3) citing 41 USC 4702 as the supporting statute. See 26 CFR 601.702(g)(1).
  - a. This statute applies only to contractor proposals (technical, business, management, and cost proposals) submitted in response to a solicitation for competitive bid (Request for Proposal or RFP).
  - b. The statute also provides protection for a proposal submitted by the successful bidder, provided the language in the proposal is not actually incorporated in, nor referred to in, the contract. Base the determination to assert the (b)(3) exemption on whether the language in the proposal is incorporated into the contract.
- (12) Give considerable weight to a business submitter's objections to disclosure unless they clearly conflict with legal precedent or obviously lack merit.

11.3.13.7.3  
(10-05-2021)  
**Personnel Records**

- (1) The Office of Personnel Management (OPM), as the custodian of the Official Personnel Folder (OPF) and Employee Performance Folder (EPF) and the authority through which other Federal agencies may appoint employees, has issued rules and regulations governing the disclosure of OPF and EPF records. These rules and regulations are found in Part 294 of the Federal Personnel Manual (FPM) (5 CFR 294).
- (2) The OPM also has FOIA responsibilities for personnel records maintained by agencies. These responsibilities are detailed in each of the sections describing the various records. Responses to FOIA requests seeking OPF or EPF information will be consistent with OPM regulations at 5 CFR 293 and 5 CFR 297. See IRM 10.5.6.8, Personnel Records, for additional information regarding OPFs/EPFs and their contents.

11.3.13.7.3.1  
(10-05-2021)  
**Public Information Listing**

- (1) The Office of Personnel Management (OPM) has designated six items of information, pertaining to federal employees, which are generally available to the public. Based on the OPM guidelines, Federal agencies must maintain a Public Information Listing (PIL) of all their employees which contains the OPM designated items. A copy of the PIL can be provided under the FOIA. Refer to the Personnel Records job aid found in the Record Retrieval Resources(RRR) on the Disclosure SharePoint site.
- (2) The Public Information Listing (PIL) consists of the following six items of information as specified in 5 CFR 293.311:
  - a. Name,
  - b. Present and past position titles and occupational series,
  - c. Present and past grades,



- d. Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials). These may be separately stated, if so requested,
  - e. Present and past duty stations (the official duty station does not include any flexiplace address or even the existence of a flexiplace work option); and,
  - f. Position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) which, if released, would not interfere with law enforcement programs or severely inhibit agency effectiveness.
- (3) OPM has authorized the withholding of the public information items of employees in sensitive positions. Consequently, you must ensure that other records such as office telephone directories do not include information on employees in these positions when released to the public. Criminal Investigation provides statistical data to the public on staffing numbers, locations of posts of duty, and salary ranges on an area basis. OPM has designated the following positions as sensitive:

GS/IR Series	Title
0007	Correctional Officer
0082	United States Marshal
0083	Police Officer
0084	Nuclear Materials Courier
0132	Intelligence
0134	Intelligence Clerk/Aide
0401	General National Resources and Biological Science
0436	Plant Protection and Quarantine
0512	Internal Revenue Agent
0840	Nuclear Engineering
0930	Hearing and Appeals Officer
1169	Internal Revenue Officer
1171	Property Appraisal and Liquidation Specialist
1801	General Inspection, Investigation, Enforcement and Compliance
1802	Compliance Inspection and Support
1805	Investigative Analyst
1810	General Investigating

GS/IR Series	Title
1811	Special Agent (SA) Criminal Investigation
1812	Game Law Enforcement
1816	Immigration Inspection
1854	Alcohol, Tobacco, and Firearms Inspection
1881	Customs and Border Protection Interdiction
1884	Customs Patrol Officer
1890	Customs Inspection
1895	Customs and Border Protection
1896	Border Patrol Enforcement

- (4) IRS policy also authorizes the withholding of the public information items of employees in cyber security designated positions. Cybersecurity designated positions are not identified by a specific GS/IR series or position title. Refer to the Personnel Records job aid found in the Record Retrieval Resources on the Disclosure SharePoint site for additional information regarding cyber security designated positions.

11.3.13.7.4  
(04-19-2017)  
**News Media Requests**

- (1) Disclosure personnel may receive requests from individuals stating they are affiliated with news media and seeking a fee waiver or reduction on that basis. The requester must establish their standing as a member of the media prior to a decision to grant a waiver or reduce fees.
- (2) Historically, representatives of the news media include persons on the staff of established news media outlets, such as, but not limited to, radio or television stations, wire services, or periodicals of general circulation. The OPEN Government Act of 2007, amending section (a)(4)(A)(ii) of the FOIA, defines representatives of the media to include “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” The term “news” as defined by the Act means “information that is about current events or that would be of current interest to the public.” The Act also addresses the evolution of news delivery methods and allows for consideration of alternative media as news media entities.
- (3) The Courts have addressed this area and have defined “news media” as follows:
- a. A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

**Note:** Requesters stating information will be posted to an online source for public interest may not qualify as a member of the media. Contact must be made to obtain clarification and additional informa-

tion on how the material will be disseminated in order to categorize the requester under the news media category.

- b. Information is commonly gathered by means of FOIA requests, papers declassified by the Government, interviews with, and private records of, present and former government officials, official statements, publications, and press releases, testimony before Congress, newspaper and periodical accounts of recent events, and reports by congressional committees and the Government Accountability Office.
  - c. From documents gathered, the requester or entity exercises a significant degree of editorial discretion in deciding what records to use and how to organize them, creates a record, report, or publication, and distributes the resulting work to the public.
- (4) Freelance journalists may be regarded as working for the news media, even though not actually employed by the media, if they can demonstrate a solid basis for expecting publication, such as a publication contract or by demonstrating a record of past publication.
  - (5) Representatives of narrowly focused publications such as house journals, trade journals, or organizational newsletters, which are not designed for ordinary circulation to the general public, are generally not considered news media for this purpose.

**Note:** A request from NTEU will not usually qualify as a media request. NTEU's focus and constituency are the IRS bargaining unit employees, not the general public.

- (6) Information vendors, data brokers, and other second-hand disseminators of documents, such as private libraries, private repositories, or those who act as information vendors or as agents of others who want access to government documents, do not qualify as news media for fee waiver purposes.
- (7) Generally, all fees may be waived or reduced when disclosing information is likely to contribute significantly to public understanding of the operations or activities of the government and when it is not primarily in the commercial interests of the requester. See IRM 11.3.5.6.2, Searches.

**Note:** A requester seeking a fee waiver based on being a representative of the news media must generally explain in the waiver request both an intention and a reasonably expected ability to disseminate the information to the public.

#### 11.3.13.8 (04-19-2017) FOIA Reporting

- (1) The FOIA requires each federal agency to submit an Annual Report to the Attorney General, each fiscal year. This report contains detailed statistics on the numbers of requests received and processed by each agency, the time taken to respond, the outcome of each request, as well as many other statistics regarding the administration of the FOIA at each agency.
- (2) The Department of Justice also requires each federal agency to submit a Chief FOIA Officers report, each fiscal year. This report contains a detailed description of the steps taken by the agency to improve FOIA compliance and transparency. The IRS Chief FOIA Officers report is available in the *IRS FOIA Library*.

11.3.13.8.1  
(04-19-2017)  
**Annual FOIA Report**

- (1) FOIA, in 5 USC 552(e)(1), requires all federal agencies to file the Annual FOIA Report each year, on or before February 1, with the Department of Justice. This report details the agency's administration of the FOIA for the prior fiscal year.
- (2) The Annual FOIA Report must be made electronically available to the public on the internet. The IRS annual report is available beginning with fiscal year 1998 in the *IRS FOIA Library*.

11.3.13.8.1.1  
(04-19-2017)  
**Report Submission**

- (1) The report captures statistical data concerning FOIA and Privacy Act requests, administrative appeals, and litigation cases processed by the IRS, and follows the Department of Justice Guidelines.
- (2) The report is prepared by the Office of Disclosure using data from the inventory management system as of September 30. It reflects the cumulative activity for the fiscal year using national totals for cases logged. Upon completion, the IRS report is transmitted to the Department of Treasury who further submits the information to the Department of Justice.

11.3.13.8.1.2  
(07-16-2020)  
**Data Capture**

- (1) The Disclosure inventory management system provides the statistical information required for the report.
- (2) Case data entered on the inventory management system is the basis for the report. Data is captured as cases are received and closed. Disclosure personnel must provide complete and accurate information when processing and closing cases.
- (3) Log all incoming requests in a timely manner and document all required case actions to ensure accurate data for the report.
- (4) All FOIA (and PA) requests require an entry capturing how the case was closed (i.e. grant, full or partial denial, etc.). If withholding records, cite the statutory FOIA exemptions and note the supporting statute(s) when asserting the (b)(3) exemption.

**Note:** The caseworker must import a blank page into the inventory management system, if applicable for a system's functionality, when FOIA exemptions are being cited to deny documents, in part or in full, when responsive documents are not secured or when voluminous responsive documents are reviewed and processed outside of the inventory management system. Case notes must also support the basis for processing responsive documents outside of the inventory management system. All responsive records must be located within the inventory management system according to the functionality of that system. Apply any applicable exemptions to the blank page to capture what exemptions are being cited.

- (5) Input fees billed and payments received as they are processed to ensure timely and accurate reporting.
- (6) It is critical that all data reported to Congress annually be captured in the inventory management system. The report includes but is not limited to:
  - the number of initial request cases received, processed, and outstanding at the end of the year
  - all exemptions cited, and all statutes relied upon

- statistical data concerning the time it takes to process requests for access and appeals
- a list of the ten oldest requests that are pending at the end of the fiscal year

11.3.13.8.1.3  
(04-19-2017)

**Cost Data**

- (1) To comply with statutory reporting requirements, Disclosure Managers will ensure that all time devoted to FOIA requests by both Disclosure and non-Disclosure personnel is captured and reported by function on each case worked. All offices shall prescribe appropriate reporting procedures to capture FOIA case related time for functional and Disclosure personnel.
- (2) Do not attempt to capture clerical employee time on FOIA cases. For the purposes of this report, time applied for any activities completed by clerical personnel would not be captured, but all time completed by a technical employee would be captured.
- (3) FOIA costs are computed from the hours applied by Disclosure and by employees in other functions. The total hours applied are used to compute the number of staff years. Costs are then calculated using the IRS standard cost factor per staff year, which includes salary, benefits, equipment, rent, supplies, and other costs.

**Note:** The FOIA SETR time code 800-85330 must be used by all IRS employees to document the time spent in researching, processing and releasing documents. See the Deputy Commissioner for Operations Support and Deputy Commissioner for Services and Enforcement memo dated March 31, 2016.

11.3.13.8.1.4  
(04-19-2017)

**Citing Supporting Statutes**

- (1) The annual report requires a description of every statute relied upon to withhold records and whether courts have upheld the use of the statute. The inventory management system provides a list of the commonly used statutes, when allowed by that system.

**Note:** See IRM 11.3.13.5.2.4(2), Exemption (b)(3), for a list of the most common supporting statutes.

- (2) The inventory management system limits caseworkers to a list of supporting statutes, when allowed by that system, used previously in IRS FOIA processing. Contact the FOIA Senior Policy Analyst if you propose invoking a statute not on the list. Never use the Privacy Act as a supporting statute for the FOIA (b)(3) exemption.

11.3.13.8.2  
(04-19-2017)

**Chief FOIA Officer's (CFO) Report**

- (1) The Attorney General's 2009 FOIA Guidelines require the Chief FOIA Officer for each federal agency to submit a report to the Attorney General containing a detailed description of the steps taken by the agency to improve FOIA compliance and transparency. This report contains details of FOIA administration at each agency, as well as steps taken to implement the Attorney General's 2009 FOIA Guidelines during each reporting year.

11.3.13.8.2.1  
(04-19-2017)

**Report Submission**

- (1) This report captures data concerning the agency's compliance with the FOIA, including steps taken to:
  - a. apply the presumption of openness

- b. ensure that Treasury, and IRS, has an efficient and effective system in place for responding to FOIA requests
- c. increase pro-active disclosures
- d. utilize technology
- e. improve timeliness in responding to requests and reducing backlog
- f. capture the use of FOIA law enforcement exclusions, and
- g. spotlight overall success of the FOIA program

- (2) The report is prepared by the Office of Disclosure using data from the inventory management system as well as information provided from business units within the agency that support the FOIA program. Upon completion, the IRS report is transmitted to the Department of Treasury who further submits the information to the Department of Justice.

11.3.13.9  
(08-14-2013)  
**Annual TIGTA Review**

- (1) The IRS Restructuring and Reform Act (RRA) of 1998 established a requirement for TIGTA to conduct periodic audits of a statistically valid sample of the total number of denials (full and partial) of requests pursuant to the FOIA and IRC 6103. The overall objective of the audit is to determine whether the IRS improperly withheld information based on 5 USC 552(b)(7) or IRC 6103.
- (2) The data used for the sample is accumulated from the inventory management system database for all offices. To ensure timely and accurate reporting to TIGTA, offices must maintain the information concurrently with the processing of the cases.
- (3) Management must emphasize the importance of maintaining accurate data.

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**Exhibit 11.3.13-1 (04-19-2017)**  
**FOIA/PA Delegation Order**

Delegation Order for release determinations of FOIA and Privacy Act requested records.

This Delegation Order delegates authority for initial determinations with respect to requests for records pursuant to 5 USC 552, Freedom of Information Act (FOIA), and 5 USC 552a, Privacy Act (PA), from the Director, Governmental Liaison, Disclosure and Safeguards to disclosure managers and staff as appropriate. Re-delegations require a separate written authorization

<b>Authority</b>	<b>Subject Matter</b>	<b>Delegated to:</b>	<b>Re-delegation</b>	<b>Comments</b>
5 USC 552 Freedom of Information Act	Determinations of full grants (including determinations where records are non-existent), and imperfect requests or where records are not released	Disclosure Managers, Tax Law Specialists, Senior Disclosure Specialists, Disclosure Specialists	May not be re-delegated below Disclosure Assistant (or equivalent) for 5 USC 552(a)(1) or (a)(2) requests	Determinations involving tax returns/return information as defined in IRC 6103(b) must be approved by an officer with the proper IRC 6103 authority per Delegation Order 11-2.
	Determinations of partial or full denials	Disclosure Managers, Tax Law Specialists, Senior Disclosure Specialists, Disclosure Specialists	May not be re-delegated	Determinations involving tax information as defined in IRC 6103(b) must be approved by an officer with the proper IRC 6103 delegated authority per Delegation Order 11-2.

**Exhibit 11.3.13-1 (Cont. 1) (04-19-2017)**  
**FOIA/PA Delegation Order**

<b>Authority</b>	<b>Subject Matter</b>	<b>Delegated to:</b>	<b>Re-delegation</b>	<b>Comments</b>
5 USC 552a Privacy Act	Determinations of requests for access to any IRS or Chief Counsel record or amendment of records	Disclosure Managers, Tax Law Specialists, Senior Disclosure Specialists	May not be re-delegated	Determinations involving tax information as defined in IRC 6103(b) must be approved by an officer with the proper IRC 6103 delegated authority. IRC 7852(e) prohibits amendment of tax records. Determinations for amendment of a Chief Counsel record must be referred to the Assistant Chief Counsel (Procedure and Administration)
	Determinations of partial or full denials	Disclosure Managers, Tax Law Specialists, Senior Disclosure Specialists	May not be re-delegated	Determinations involving tax information as defined in IRC 6103(b) must be approved by an officer with the proper IRC 6103 delegated authority.