



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

11.3.35

APRIL 14, 2025

EFFECTIVE DATE

(04-14-2025)

PURPOSE

- (1) This transmits revised IRM 11.3.35, Disclosure of Official Information, Requests and Demands for Testimony and Production of Documents.

MATERIAL CHANGES

- (1) IRM 11.3.35.1(3), Program Scope and Objectives, Policy Owner: updated to reflect correct owner of policy surrounding demands for testimony and production of documents.
- (2) IRM 11.3.35.1(4), Program Scope and Objectives, Program Owner: updated to reflect correct program owner of demands for testimony and production of documents.
- (3) IRM 11.3.35.1(5), Program Scope and Objectives, Primary Stakeholders: added (5) to reflect key stakeholders participating in demands for testimony and production of documents.
- (4) IRM 11.3.35.1.5, added Program Controls.
- (5) IRM 11.3.35.1.7, added Related Resources.
- (6) Exhibit 11.3.35-1, Example Testimony Report, fixed exhibit to make it 508 compliant.
- (7) 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 IRM supersedes IRM 11.3.35, Disclosure of Official Information, Requests and Demands for Testimony and Production of Documents, dated April 30, 2018.

AUDIENCE

All Operating Divisions and Functions.

RELATED RESOURCES

- (1) The Disclosure and Privacy Knowledge Base can be found at:
Disclosure and Privacy Knowledge Base.

Celia Y. Doggette
Director, Governmental Liaison, Disclosure and Safeguards
(GLDS)

11.3.35

Requests and Demands for Testimony and Production of Documents

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11.3.35.1
(04-14-2025)
Program Scope and Objectives

- (1) **Purpose:** These procedures provide instructions for IRS officers and employees (including former officers and employees), as well as IRS contractors (including former contractors), when responding to requests and demands for testimony and production of IRS records or information in judicial or administrative proceedings.
- (2) **Audience:** These procedures apply to all IRS employees, and contractors in connection with official duties related to an audit, collection activity, or civil or criminal tax investigation, when responding to requests and demands for testimony and production of IRS records or information in judicial or administrative proceedings.
- (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, and contractors that respond to requests and demands for testimony and production of IRS records or information in judicial or administrative proceedings

11.3.35.1.1
(04-30-2018)
Background

- (1) Internal Revenue Service employees and contractors often receive a request or demand for testimony and production of IRS records in judicial or administrative proceedings. Before responding to any request or demand for testimony or records IRS employees and contractors must obtain approval by an IRS official delegated to authorize the testimony or production of records.

11.3.35.1.2
(04-30-2018)
Authority

- (1) Treasury Regulations 301.9000-1 through 301.9000-7 require IRS officers and employees, as well as contractors, to obtain prior approval before they may produce IRS records or information or testify in judicial or administrative proceedings in response to a demand (subpoena, notice of deposition, court order, etc.).
- (2) Delegation Order 11-2 (see IRM 1.2.2.12.2) sets forth the IRS officials who may authorize testimony or disclosure of IRS records or information in response to certain requests and demands for such information.
- (3) The scope of the authorization will be restricted in accordance with applicable disclosure laws (e.g., IRC 6103, IRC 6104, IRC 6105, IRC 6110, IRC 4424, and the Privacy Act).

11.3.35.1.3
(04-30-2018)
Roles and Responsibilities

- (1) This IRM is used by all IRS and Chief Counsel employees, as well as contractors, to help comply with the procedures pertaining to requests and demands for testimony and production of IRS records or information in judicial or administrative proceedings.
- (2) All employees and contractors have responsibility for ensuring IRS records (hard copy and electronic) are appropriately managed, retained, and archived in accordance with IRMs 1.15, Records and Information Management series for records retention and disposition requirements before documents can be destroyed. Refer to Document 12990, IRS Records Control Schedules (RCS)

for the National Archives and Records Administration (NARA) approved IRS records disposition to prevent unauthorized/unlawful destruction of records. Refer to Document 12829, General Records Schedules, for the NARA issued disposal authorizations for temporary administrative records common to all Federal agencies.

11.3.35.1.4
(04-14-2025)

Program Controls

- (1) Business Units are responsible for establishing and documenting the program controls developed to oversee their program as well as ensuring employee compliance with all applicable elements of this IRM.

11.3.35.1.5
(04-30-2018)

Terms/Definitions/ Acronyms

- (1) **IRS records or information** mean any material (including copies thereof) contained in the files (including paper, electronic, or other media files) of the IRS, any information relating to material contained in the files of the IRS, or any information acquired by a current or former IRS officer, employee, or contractor, while an IRS officer, employee, or contractor as a part of the performance of official duties or because of that IRS officer's, employee's, or contractor's official status with respect to the administration of the internal revenue laws or any other laws administered by or concerning the IRS.

Note: When a discovery request or demand for production of documents received by the IRS includes any documents received from or created by the IRS in response to a Joint Committee on Taxation inquiry arising from its general oversight authority, the Joint Committee will be notified of the request or demand. Any response to the discovery request or demand will be coordinated with the Joint Committee. Field Disclosure employees who receive requests or demands for testimony or document production are to contact the Associate Director, Disclosure through appropriate channels who will coordinate with the Joint Committee. Counsel personnel who receive requests or demands for testimony or document production are to contact the Office of Associate Chief Counsel who will coordinate with the Joint Committee.

- (2) In this section, "IRS records or information" will be referred to as "IRS information."
- (3) IRS information includes, but is not limited to, returns and return information as defined in IRC 6103(b)(1) and (2), tax convention information as defined in IRC 6105, information gathered during Bank Secrecy Act (BSA) and money laundering investigations, and personnel records and other information pertaining to IRS officers and employees. IRS information also includes information received, generated, or collected by an IRS contractor pursuant to the contractor's contract or agreement with the IRS.

Note: Witnessing a traffic accident while on official business would not constitute IRS information and would not require an authorization to testify about the accident. However, the identity and address of the taxpayer involved in the official business would be return information protected by IRC 6103 and, if requested, would be IRS information requiring authorization.

- (4) Information or documents obtained by an employee under the direction and control of the U.S. Attorney's Office in a grand jury investigation is generally not considered IRS information subject to Treasury Regulations 301.9000-1 through 301.9000-7.

Note: See IRM 11.3.35.9 for procedures concerning subpoenas for grand jury information.

- (5) The term “IRS information” includes records or information obtained during the administrative stage of a criminal investigation (prior to the initiation of the grand jury), obtained from IRS files (such as transcripts or tax returns), or subsequently obtained by the IRS for use in a civil investigation.
- (6) Testimony in a tax grand jury investigation regarding returns obtained pursuant to IRC 6103(h)(2) constitutes testimony about IRS information.
- (7) A **request** is any request for testimony by an IRS officer, employee, or contractor for production of IRS information, oral or written, by any person, which is not a demand.
- (8) A **demand** is any subpoena or other order from any court (including a military court), administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition, and includes:
 - Subpoena
 - Summons
 - Notice of deposition (either upon oral examination or written questions)
 - Request for admissions
 - Request for production of documents or things
 - Written interrogatories to parties
 - Other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority

Note: “Other authority” includes a grand jury and Congressional committees or subcommittees.

- (9) An **IRS matter** is any matter before any court, administrative agency or other authority in which the United States, the Commissioner, the IRS, or any officer or employee acting in an official capacity, or any IRS officer, or employee (including an officer or employee of the IRS Office of Chief Counsel) in his or her individual capacity, if the United States Department of Justice or the IRS has agreed to represent or provide representation to the IRS officer or employee, is a party and that is directly related to official business of the IRS or to any law administered by or concerning the IRS. This includes, but is not limited to, judicial and administrative proceedings described in IRC 6103(h)(4) and IRC 6103(l)(4).
- (10) **IRS officers** and **employees** mean any officer and/or employee of the United States appointed by, employed by, or subject to the directions, instructions, or orders of the Commissioner or IRS Chief Counsel, and includes former officers and employees.
- (11) An **IRS contractor** means any person, including the person’s current and former employees, maintaining IRS information pursuant to a contract or agreement with the IRS. This includes former contractors.

- (12) Any former employee, officer, or contractor who receives a request or demand to testify concerning returns and return information, or other IRS information should contact the field IRS Disclosure Office for advice.

- a. This would not apply to a request or demand issued to a former IRS officer or employee for expert opinion or testimony where the testimony involves general knowledge (such as information contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while the former IRS officer, employee, or contractor was employed or under contract with the IRS. These situations require no testimony authorization.

Note: See IRM 11.3.35.2 for procedures concerning testimony authorizations.

- (13) To the extent a former officer, employee, or contractor is requested or demanded to give testimony or produce documents, which are considered to be returns or return information, the former officer, employee, or contractor is still governed by the provisions of IRC 6103.

- a. The limitations imposed by IRC 6103(a) still apply to information of which the individual had knowledge because of his or her relationship with the IRS.

Note: The former officer, employee, or contractor would be subject to the penalty provisions of IRC 7213 and IRC 7431 for unauthorized disclosures of returns and return information.

- b. Information subject to the Privacy Act would still enjoy Privacy Act protection.
- c. Classified information gained while employed would also be statutorily protected from release by the former officer, employee, or contractor.

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

Acronym	Definition
AUSA	Assistant United States Attorney
BSA	Bank Secrecy Act
CAP	Code, Authority and Procedure
CFR	Code of Federal Regulations
CI	Criminal Investigation
DOJ	Department of Justice
FOIA	Freedom of Information Act
FRC	Federal Records Center
FTCA	Federal Tort Claims Act
GLDS	Governmental Liaison, Disclosure and Safeguards
GRS	General Records Schedule

Acronym	Definition
GSS	GLDS Support Services
ID Theft	Identity Theft
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
NARA	National Archives and Records Administration
NFC	National Finance Center
OPF	Official Personnel Files
OPM	Office of Personnel Management
PGLD	Privacy, Governmental Liaison and Disclosure
PPO	Policy and Program Operations, Disclosure
RCS	Records Control Schedule
SETR	Single Entry Time Reporting
TAPS	Totally Automated Personnel System
USC	United States Code
WO	Whistleblower Office

11.3.35.1.6
(04-14-2025)
Related Resources

- (1) Sources of guidance when responding to requests and demands for testimony and production of IRS records or information in judicial or administrative proceedings may also be found at these related resources:
 - Treasury Regulations *26 CFR 301.9000-1* through *26 CFR 301.9000-7*
 - *Delegation Order 11-2*

11.3.35.2
(12-28-2015)
Requests Authorized by Field Officials

- (1) In Delegation Order 11-2 (found in IRM 1.2.2.12.2) at Exhibit 1.2.2-3, there are tables for testimony authorization that specify the judicial or administrative proceedings that do or do not require testimony authorizations. Each table gives examples of the types of proceedings and lists the responsible officials for both preparing and either authorizing or denying the testimony.
- (2) In addition, Delegation Order 11-2 includes Table 8 that provides a list of the privileges to withhold documents or testimony. This table specifies who has the authority to either assert or waive these privileges.
- (3) In general, use the authorities in the tables of Delegation Order 11-2 to determine whether to permit officers or employees of the IRS working in the

same geographical area as the authorizing official indicated in the appropriate table to testify or produce IRS information when a request or demand for such records or information is received.

Note: See IRM 11.3.35.3 for exceptions.

- (4) Table 1 of Delegation Order 11-2 covers authorization for Tax Court proceedings.
- (5) IRS officials charged with preparing or authorizing testimony approvals or denials should coordinate with appropriate counsel before acting. In some cases, this will involve coordination through HQ Chief Counsel.

Note: Field Disclosure employees are reminded to coordinate contact with HQ Chief Counsel through their local Area Counsel.

11.3.35.3
(04-30-2018)
**Requests Requiring
Special Processing**

- (1) The following requests or demands for testimony or production of IRS information must be authorized by the Area Manager , East or West.
 - a. Requests made to IRS employees assigned to a Headquarters office, including employees of the Office of Chief Counsel assigned to Headquarters.
 - b. Requests that may require a disclosure to a competent authority under a tax treaty pursuant to IRC 6103(k)(4), or information received by the IRS under a tax treaty, regardless of whether the information was previously disclosed pursuant to the treaty.

Note: Authorization will be provided in these cases only after the approval of the Deputy Commissioner, International, (LB&I) is secured.

 - c. Requests made to IRS employees assigned to the Martinsburg, Tennessee, and Detroit Computing Centers.
 - d. Employees appearing voluntarily or upon request before a state legislative body.
 - e. Employees in Puerto Rico, Guam, the Virgin Islands, or other U.S. possessions or protectorates.
- (2) The following requests or demands for testimony or production of IRS information must be authorized by the Commissioner, the appropriate Deputy Commissioner, or other delegated official in accordance with Delegation Order 11-2 (see IRM 1.2.2.12.2, IRM 1.2.2-3):
 - Requests made by a Congressional committee. These requests will immediately be brought to the attention of the Office of Legislative Affairs.
 - Requests involving disclosure to the President or certain other persons under IRC 6103(g)
 - Requests involving disclosure to correct a misstatement of fact under IRC 6103(k)(3)
- (3) These authorizations must also be cleared through the Associate Chief Counsel (Procedure and Administration).

11.3.35.4
(04-30-2018)
**Procedures in IRS
Matter Cases**

- (1) An **IRS matter** is defined in IRM 11.3.35.1.5(9).
- (2) “IRS matter” is not defined in IRC 6103. However, these matters include, but are not limited to:
 - Criminal tax cases
 - Refund litigation cases
 - Summons enforcement cases
 - Wrongful levies
 - Foreclosure of Federal tax liens
 - Bankruptcies
 - Actions affecting personnel rights of employees or former employees of the IRS
 - Federal tort claims litigation
 - Freedom of Information and Privacy Act litigation
- (3) All subpoenas received by IRS officers and employees, as well as contractors, related to an IRS matter **must** be forwarded immediately to the employee’s local Disclosure Office, who will refer it to the appropriate Chief Counsel or General Legal Services (GLS) area office.
- (4) No authorization is needed when testimony or production of records is requested by Government counsel representing the IRS in an IRS matter. See IRM Exhibit 1.2.2-3 , Delegation Order 11-2 Authorization Tables 1-8, for additional information.
- (5) Where testimony requesting IRS information is sought in an IRS matter by a party to the litigation other than the government (i.e., the defense in a criminal tax case, a petitioner in a U.S. Tax Court case, the plaintiff in a Federal Tort Claims Act case, or the plaintiff in a refund litigation case), an authorization or denial is required. The Office of Chief Counsel is responsible for preparing the proposed authorization and submitting it for approval. See IRM 1.2.2-3, Delegation Order 11-2 Authorization Tables 1-8, for additional information.
- (6) A testimony authorization is no longer required to respond solely in writing, under the direction of the attorney or other government representative, to requests and demands in IRS matters, including, but not limited to, admissions, document production, and written interrogatories to parties.
- (7) Table 1 of Delegation Order 11-2 (see IRM Exhibit 1.2.2-3) delegates to Chief Counsel the authority to determine whether to permit testimony and production of records in response to a Tax Court subpoena.
- (8) Chief Counsel has re-delegated authority to determine whether to permit testimony and production of records in response to a Tax Court subpoena to Area Counsel, except for Headquarters matters, where the Associate Chief Counsel has re-delegated authority.
- (9) No authorization is needed if the IRS officer, employee, or contractor is requested to testify or produce documents in such a proceeding on behalf of the Commissioner.
- (10) No testimony authorization is needed to respond to a request or demand issued to a former IRS officer, employee, or contractor for expert opinion or testimony if the testimony sought involves general knowledge (such as infor-

mation contained in published procedures of the IRS or the IRS Office of Chief Counsel) gained while the former IRS officer, employee, or contractor was employed or under contract with the IRS.

- (11) No testimony authorization is needed if a more specific procedure established by the Commissioner governs the disclosure of IRS information. These procedures include, but are not limited to:
- Treasury Regulation 601.702(d)
 - Freedom of Information Act requests pursuant to 5 USC 552
 - Disclosures to state tax agencies pursuant to IRC 6103(d), and
 - Disclosures to the Department of Justice pursuant to an ex parte order pursuant to IRC 6103(i)(1)

11.3.35.5
(12-28-2015)
**Procedures in Non-IRS
Matters**

- (1) Field Disclosure employees are responsible for preparing any necessary authorizations or non-authorizations for signature by GLDS Area Managers in all non-IRS matters, except for those involving BSA information outlined in Delegation Order 11-2, Table 6 (see IRM Exhibit 1.2.2-3).

Note: When IRS records were previously provided pursuant to an Ex Parte court order under IRC 6103(i)(1), often Disclosure receives a telephone call from the US Attorney's Office requesting the testimony of an expert witness to introduce these documents in open court. This occurs when the IRS has no involvement in the non-tax case. The AUSA in this case would not have a specific employee to whom to issue the subpoena. Disclosure employees will follow the procedures outlined in the Court Witness for Ex Parte document located on the Disclosure SharePoint site, to secure an expert witness.

- (2) The Disclosure caseworker is responsible for preparing authorizations for the signature of the Associate Director, Disclosure or Director, GLDS, and for the Commissioner and the appropriate Deputy Commissioner. See Delegation Order 11-2, found in IRM Exhibit 1.2.2-3 .
- (3) Prior to submission to the appropriate official for signature, all authorizations must be reviewed by Chief Counsel.

11.3.35.6
(04-30-2018)
**Testimony
Authorizations in
Identity Theft Cases**

- (1) The Law Enforcement Assistance Program (LEAP) helps state and local law enforcement lawfully obtain tax return data vital to their local efforts in investigating and prosecuting specific cases of identity theft, under an IRC 6103(c) consent, processed by Criminal Investigation Division. Disclosure caseworkers may receive a subpoena for testimony based on information disclosed under this program.
- (2) Disclosure employees will process the Testimony Authorization request. In addition to normal procedures for processing these subpoenas, Disclosure caseworkers must also contact the CI ID Theft Coordinator for the specified state to:
- a. Verify the case is part of the IRS ID Theft program
 - b. Confirm that the Federal Tax Information was provided to state or local law enforcement and what type of information was provided

Note: A list of the CI ID Theft Coordinators is found on the Disclosure Share Point site.

- (3) Prepare the Testimony Authorization Memo using the approved pattern letter:
 - a. Authorization should include that testimony is confined to the state case only, and is authorized only for the information provided pursuant to the ID theft consent previously submitted to CI.
 - b. Consents are not required to be submitted with the request or demand for testimony, as the state or local law enforcement office already was provided the appropriate tax information per the ID Theft consent submitted to CI.
 - c. No disclosure of any related CI or other IRS activity will be authorized.
 - d. Local Counsel approval is not necessary.

11.3.35.7
(04-30-2018)
**Responsibilities of IRS
Personnel**

- (1) All employees are required to **immediately** forward all requests or demands for testimony or production of IRS information to the Disclosure Office along with pertinent facts and background. These requests or demands are normally in the form of a subpoena.
- (2) Disclosure personnel may act as liaison to Office of Chief Counsel on requests or demands in United States Tax Court cases, requests or demands in IRS congressional matters, and requests or demands in personnel, labor relations, government contract, Bivens-type actions, and Federal Tort Claims Act (FTCA) matters, or matters related to informant claims and requests. Once the request or demand is forwarded to IRS Counsel, the Counsel attorney assigned to the case will work with the subpoenaed employee directly.
- (3) Suits involving the federal government will contain references in their titles to the United States, the Department of the Treasury, the Internal Revenue Service, or other federal agency as either the plaintiff or the defendant. Disclosure personnel will immediately forward the request or demand to the Office of Chief Counsel.
- (4) In **IRS related matters**, Disclosure personnel will **immediately**, upon receipt, forward a subpoena, court order or other request or demand from a party other than the government to the appropriate Chief Counsel office.

Note: To locate the appropriate office, caseworkers should contact their local area Counsel or search the IRS Office of *Chief Counsel Telephone Directory* for the local Area Counsel.

Example: A current or former IRS office, employee, or contractor who receives a request or demand, on behalf of an appellant, grievant, complainant, or representative, for IRS information in personnel, labor relations, government contract, Bivens, FTCA matters, or matters related to informant claims, shall promptly notify the IRS Associate Chief Counsel (General Legal Services (GLS)) attorney assigned to the case. If no IRS Associate Chief Counsel (GLS) attorney is assigned to the case, the IRS officer, employee, or contractor shall notify the IRS Associate Chief Counsel (GLS) attorney assigned to servicing his or her geographic area. That IRS Associate Chief Counsel (GLS) attorney will promptly notify the authorizing official. The IRS officer, employee, or contractor who received the request or demand will await instructions from the authorizing official.

- (5) When forwarding the request or demand to the appropriate Area Counsel for processing, provide the Code, Authority and Procedures (CAP) justification applicable to the referral.
- (6) While the preparation of a testimony authorization in response to a subpoena in an IRS matter is the responsibility of IRS Chief Counsel, Disclosure personnel may, depending on local policy, assist in briefing the employee on the disclosure ramifications of the testimony.
 - a. The need for immediate notification cannot be overemphasized. By failing to take proper steps in the processing of demands for testimony or production of IRS information, employees may subject themselves and the IRS to sanctions such as contempt of court citations.
 - b. The request or demand and pertinent facts may be transmitted by EEfax or e-mail, if an electronic copy of the request or demand is available, when there is insufficient time for formal transmittal and mailing.
- (7) Employees whose testimony is requested/subpoenaed and Disclosure personnel are responsible for gathering and reporting the necessary facts on which a proper authorization may be based.

Note: Before a testimony authorization is prepared, a subpoena is required outlining the necessary facts. These facts include the name of the employee whose testimony is requested, the date, time and place the testimony is needed, by whom the testimony is being requested, and exactly what is to be testified to. See Title 26 Code of Federal Regulations (CFR) 301.9000-5.

- (8) Gathering the necessary facts will include contacting all IRS functions that are or may be affected by the requested testimony to determine if there are open or pending cases. If there are such matters, Disclosure personnel should secure a clearance or written recommendation from the affected functions as to whether disclosure will seriously impair tax administration, and if so, how.
- (9) Pertinent information must be obtained from any IRS functions that may be affected by the requested testimony. Exhibit 11.3.35-1 contains an example of the type of information needed. This exhibit template may be used or any other approved written format containing substantially the same information as the exhibit template.
- (10) Jurisdiction over documents and employees for purposes of authorizing an expedite request for testimony and production of records will continue to be vested in the approving official of the office where the respective employees are located.

Note: It may be necessary to obtain more than one authorization (i.e., an authorization for the employee(s) and an authorization for the documents).

- (11) Disclosure personnel, with the assistance of functional employees in the affected offices, may be responsible for coordinating the following actions in connection with the processing of testimony cases:
 - a. Locating and assembling requested/demanded documents.
 - b. Screening records requested/demanded and segregating or disassociating documents that are not authorized to be disclosed.
 - c. Arranging for inspection or transmittal of records.

- d. Arranging for Chief Counsel to assist or an attorney of the Department of Justice (including U.S. Attorneys) to represent the requested/subpoenaed employee.
- e. Use Disclosure's Special Search Procedures to obtain tax records in response to all court mandated requests and demands for documents, including subpoenas. When requesting these documents, Disclosure will fully complete the modified Form 2275-A, Records Request, Charge and Recharge (for Disclosure Only), to include all necessary information. The caseworker will fax Form 2275-A to the appropriate Campus Special Search Unit or Federal Records Center (FRC) for processing. If a reply is not received within three days, Disclosure Managers will initiate follow-up contact with the appropriate official.

Note: If appropriate, refer the requester to routine agency procedures (Form 4506 and/or Form 4506-T) to request a copy of a tax return or transcripts. The caseworker must contact the requester to alert them of the routine agency procedure and ask them to withdraw the subpoena.

- (12) Disclosure personnel may seek technical assistance from the Disclosure Policy and Program Operations (PPO) staff, when necessary.
- (13) Disclosure personnel will document all actions taken in the electronic inventory management system throughout the testimony and production of records process.
- (14) The closed case files will include the following:
 - a. A history note confirming that the appropriate accounting for the disclosure was completed, if applicable. See IRM 11.3.37, Recordkeeping and Accounting for Disclosures.

Note: A copy of the appropriate form or narrative of accounting memorandum is not required to be included in the inventory management system case file.

 - b. Comprehensive documentation in the electronic inventory management system, notating all considerations and actions taken on a request including, but not limited to, disclosure and privacy aspects considered, communications made, conclusions made and agreements reached.
 - c. Copies of the original request or demand and the testimony authorization, as well as any written functional clearance or disclosure recommendation secured.
- (15) All subpoenas or other court orders or demands for confidential informant or Whistleblower Office (WO) information should be coordinated with the Office of Chief Counsel Attorney for the Whistleblower Office before any actions are taken or response is made.

11.3.35.8
(04-30-2018)
**Processing Requests for
Privacy Act Protected
Records**

- (1) Requests and demands for testimony and/or production of Privacy Act protected records require proper authorization. Only release the records if there is a signed Privacy Act consent or a listed court order routine use in the Privacy Act System of Records Notice.

- (2) Requests and demands for testimony and/or production of personnel and payroll records in private litigation or administrative proceedings will be coordinated by the assigned Disclosure caseworker with the Office of Personnel Management (OPM), National Archives and Records Administration (NARA), and/or Memphis Payroll Center, as necessary.
- (3) The assigned Disclosure caseworker will ensure that the information is received in sufficient time to comply with the date and periods specified in the request, subpoena, etc.
- (4) OPM regulations for Personnel records are outlined in Title 5 Code of Federal Regulations (CFR) 297.402. IRS adopted the OPM regulations for all IRS personnel records as well as all other IRS records subject to the Privacy Act.
- (5) The OPM regulations requires that subpoenas for personnel records of Federal civilian employees must be signed by a judge or magistrate of a court of competent jurisdiction over the case being heard by the court in order to meet the court order routine use exception in the Privacy Act (5 USC 552a(b)(ii)).

Note: Subpoenas that do not meet the court order routine use exception in the Privacy Act are not necessarily invalid. They are valid under the state or local court's laws and procedures. This type of subpoena may be an invalid **method** of requesting **federal** tax records. It is here that an alternative method can be suggested. See IRM 11.3.35.11(10).

- (6) Valid subpoenas for documents under OPM's jurisdiction (Official Personnel Files (OPFs) of **retired, deceased, or separated** employees, **without** the written authorization from the subject employee attached, (but which meet the Privacy Act routine use court order exception,) are handled by the OPM Office of General Counsel. After calling the OPM Counsel to advise the subpoena is being referred to them, caseworkers should forward it to the following address:

The Office of General Counsel
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Telephone Number: (202) 606-1700

- (7) Subpoenas for documents under OPM's jurisdiction **of retired, deceased, or separated** employees, **with** a written authorization from the subject employee attached, should be forwarded to the following address:

National Personnel Records Center, Annex
1411 Boulder Boulevard
Valmeyer, IL 62295

Fax #: 618-935-3014

- (8) Valid subpoenas for personnel records of **active** Federal civilian employees are handled by NARA. After advising the requester of the referral, caseworkers should forward the subpoena to the following address:

Director
National Personnel Records Center, NARA
(Civilian Personnel Records)
1411 Boulder Boulevard
Valmeyer, IL 62295-2603

- (9) When documents are disclosed in response to such a court order, they are accounted for on Form 5482 as a Privacy Act (b)(11) disclosure. See IRM 10.5.6.7 Privacy Act Accounting of Disclosures.
- (10) Before rejecting a subpoena for IRS employee time and attendance, payroll or personnel records signed by an attorney or clerk of the court, Disclosure personnel should contact the requester who caused the subpoena to be issued and advise them of the OPM and Privacy Act requirements. (See (4) and (5) above).
- (11) IRS employees have the capability of securing their own time and attendance records through *TAPS/SETR*. If the employee does not have access to *SETR*, the employee's manager will be able to help them.
- (12) IRS employees have the capability of securing their own Earnings and Leave Statements and Forms W-2 from the Employee Personal Page of the *National Finance Center (NFC)* web site.
- (13) If the subpoena is for records of a former IRS employee, and there is no valid Privacy Act consent, Disclosure personnel should offer the requester an option of withdrawing the subpoena and/or obtaining written permission from the subject of the time and attendance, payroll or personnel record in order to meet the confidentiality requirements of the Privacy Act.
- (14) Caseworkers should advise the third party requester in the closing letter to send their requests for personnel records with authorization from the former employee to the address listed in IRM 11.3.35.8(7). The caseworker must contact the requester to advise them of the procedure and ask the requester to withdraw the subpoena. If the requester will not withdraw the subpoena the caseworker should contact Counsel to determine if the subpoena needs to be quashed.

Note: Disclosure employees may also refer requesters to the *NARA* web site in their response letters for more information.

- (15) Caseworkers should advise the third party requester in the closing letter to send their requests for time and attendance or payroll records with authorization from the employee to the following address:

Internal Revenue Service
Ogden Payroll Branch
Mail Stop 1508
P.O. Box 9774
Ogden, UT 84409

- (16) No accounting is required for the disclosure of time and attendance, payroll or personnel records if authorized in writing by the employee or former employee.

- (17) Disclosure personnel should be aware that there might be a routine use (other than subpoenas) that might apply.

Example: The routine use in Privacy Act System of Records 36.003 that provides for the disclosure of information about a possible violation of law to an agency with the responsibility for prosecuting such a violation would cover the disclosure of payroll data in a state prosecution of an employee involving fraud. If the disclosure is made subject to a routine use, the accounting on Form 5482 would reflect a (b)(3) disclosure. See IRM 10.5.6.7 , Privacy Act Accounting of Disclosures.

- (18) The authority to disclose personnel records pursuant to the written permission of the employee lies with OPM and NARA. Disclosure personnel should remain available to give advice concerning disclosure of personnel records, if requested. IRM 11.3.13, Freedom of Information Act, and IRM 10.5.6.8, Personnel Records, both contain information relating to certain personnel information that is available to the public.
- (19) Disclosure personnel should ensure that the accounting and notification requirements regarding disclosure of personnel records made under compulsory legal process are adhered to as described in IRM 11.3.37, Recordkeeping and Accounting for Disclosures.

11.3.35.9
(12-28-2015)
**Grand Jury Tax
Investigation Information**

- (1) IRS employees who are involved in an active Grand Jury civil or criminal tax investigation, under the direction and control of the US Attorney's Office, have access to and may already have knowledge of the information and documents obtained by the Grand Jury. Disclosure of this tax Grand Jury information or documents in the court proceeding does not require testimony authorization pursuant to Treasury Regulation 301.9000-3. Rather, authorization in these instances comes from the Department of Justice.
- (2) Disclosure personnel should direct employees receiving subpoenas regarding testimony in a Federal tax grand jury investigation to the Department of Justice official (usually the Assistant U.S. Attorney assigned to the grand jury investigation) to obtain any necessary direction.
- (3) Disclosure personnel should be aware, that testimony regarding tax information obtained during the administrative stage of an investigation (prior to the initiation of the grand jury) may require testimony authorization. Types of information could include examination, collection, criminal investigation or other compliance files. See Treasury Regulation 301.9000-1(a).
- (4) If an employee receives a subpoena from a party to the grand jury investigation other than the Department of Justice requiring testimony about tax information provided pursuant to IRC 6103(h)(2), a testimony authorization is required pursuant to Treasury Regulation 301.9000-3. However, see Treasury Regulation 301.9000-3(b)(2) for exceptions related to admissions, document production, and written interrogatories.
- (5) If a defendant's subpoena covers any IRS information as defined in IRM 11.3.35.1.5(1), and Treasury Regulation 301.9000-3 requires authorization, employees should coordinate with the Assistant U.S. Attorney or other appropriate Department of Justice (DOJ) official on the decision whether or not to permit testimony.

- (6) Even if there is no requirement pursuant to Treasury Regulation 301.9000-3 for a written testimony authorization, an employee may request and receive written approval from the Disclosure Office to appear and give testimony under the guidance of the Assistant U.S. Attorney or other appropriate DOJ official.

11.3.35.10
(12-28-2015)
**Written Statement
Required for Requests
or Demands in Non-IRS
Matters - Treasury
Regulation 301.9000-5**

- (1) A request or demand for IRS information for use in a non-IRS matter shall be accompanied by a written statement made by or on behalf of the party seeking the testimony or disclosure of IRS information, setting forth:
- A brief description of the parties to and subject matter of the proceeding and the issues
 - A summary of the testimony, records or information sought, the relevance to the proceeding, and the estimated volume of IRS records involved
 - The time that will be required to present the testimony (on both direct and cross-examination)
 - Whether any of the IRS records or information is a return or is return information (as defined in IRC 6103(b) or IRC 6105 tax convention information), and the statutory authority for the disclosure of such return or return information.
 - If no consent to disclose pursuant to IRC 6103(c) accompanies the request or demand, the reason why such consent is not necessary
 - Whether a declaration by an IRS officer, employee, or contractor under penalties of perjury pursuant to 28 USC 1746 would suffice in lieu of deposition or trial testimony
 - Whether deposition or trial testimony is necessary in a situation in which IRS records may be authenticated under applicable rules of evidence and procedure
 - Whether IRS records or information are available from other sources
 - A statement that the request or demand allows a reasonable time (generally, at least fifteen business days) for compliance
- (2) **Permissible waiver of statement** - The requirement of a written statement may be waived by the authorizing official for good cause.
- (3) Failure to provide the written statement may result in IRS's opposition to the demand. See Treasury Regulation 301.9000-4(f).

11.3.35.11
(04-30-2018)
**Recommending and
Preparing Testimony
and Production
Authorizations**

- (1) Treasury Regulations 301.9000-1 through 301.9000-7 set forth the procedures under which IRS employees may disclose IRS information in response to a subpoena.
- (2) The regulations establish the Commissioner's right to determine whether the disclosure should be made and how it should be made or limited in accordance with applicable statutes.
- (3) The Disclosure Office and Chief Counsel are responsible for providing the authorizing official (see Delegation Order 11-2, Testimony Tables 1 through 8 (see also IRM 1.2.2-3)) with the pertinent facts necessary to make such determination.
- (4) In submitting recommendations for and preparing testimony and production authorizations, disclosure personnel must take into account:

- a. If testimony or disclosure of IRS information would violate a Federal statute including, but not limited to the following:
 - IRC 6103 or IRC 6105
 - Privacy Act 5 USC 552a
 - Regulations such as 31 CFR Chapter X.
 - Re-Dissemination Guidelines covering reports, and information derived through the Bank Secrecy Act (BSA)
 - Grand Jury Secrecy (Federal Rules of Criminal Procedure 6(e))
 - b. If testimony or disclosure of IRS information would reveal classified national security information, unless properly declassified.
 - c. Whether the disclosure is appropriate or relevant to the case under the rules of procedure governing the case or matter in which the subpoena arose.
 - d. The availability or feasibility of producing the information or testimony sought (i.e., time limits and volume or format of documents).
 - e. Whether testimony or disclosure of IRS information would reveal investigatory records or information compiled for law enforcement purposes that would permit interference with law enforcement proceedings or would disclose investigative techniques and procedures, the effectiveness of which could thereby be impaired.
 - f. Whether disclosure might tend to reveal unrelated third party tax information or the identity of a confidential informant.
- (5) Applicability of the above factors is usually evident from the information gathered in accordance with IRM 11.3.35.6 and IRM 11.3.35.8, and will serve as a basis for including specific limiting language in the proposed testimony and production authorization.
- (6) Any applicable privilege or protection under law may be asserted in response to a request or demand for testimony or disclosure of IRS information, including, but not limited to, the following:
- Attorney-client privilege
 - Attorney work product doctrine
 - Deliberative process (executive) privilege
- (7) The authorization prepared for the appropriate approving official should, to the extent applicable, specifically indicate:
- Names and locations
 - Court appearance date(s)
 - Tax periods
 - Classes of tax or types of returns
 - The extent and limitations on disclosure
 - A description of the testimony and document production sought, and the exact nature of the testimony and document production authorized
- Note:** The Testimony Authorization Memo pattern language incorporates these elements.
- (8) It is imperative that the authorization be approved and the employee notified prior to the time the requested/subpoenaed employee is scheduled to appear in the judicial or administrative proceeding.

Note: In all cases, a written authorization should be executed, forwarded to the employee, and included in the testimony file. However, in time-sensitive situ-

ations, the authorization may be given orally by the authorizing official. This fact will be documented in the electronic inventory management system testimony case file and followed-up with a written authorization to the employee confirming the authorization granted.

- (9) There is a general rule of cooperation among Federal agencies. Therefore, when the government is a party to the litigation, testimony is usually provided. Depending upon local policy, this cooperation may also extend to state or local governments.
- (10) Normally, IRS resources should not be expended in private litigation. The Disclosure Office should offer alternate sources or methods of obtaining the requested data (e.g., routine uses of Privacy Act System of Records, Form 4506, Request for Copy of Tax Return, Form 4506-T, Request for Transcript of Tax Return, IRC 6103(c), or IRC 6103(e)). If any person makes a request or demand for IRS records or information in connection with a non-IRS matter, authorizing officials must take into account the following additional factors when responding to the request or demand:
 - a. Whether the requester is a Federal agency, or a state or local government entity or agency.
 - b. Whether the demand was issued by a Federal or state court, administrative agency or other authority.
 - c. Where the IRS is not a party, whether the IRS has already been involved in some capacity (e.g., making disclosures under a Privacy Act routine use or providing documents/information in a Federal non-tax criminal matter under IRC 6103(i)).
 - d. The potential effect of the case on the administration of internal revenue laws or any other laws administered by or concerning the IRS.
 - e. The importance of the legal issues presented.
 - f. Whether the IRS information is available from other sources.
 - g. The IRS's anticipated commitment of time and anticipated expenditure of funds necessary to comply with the request or demand.
 - h. The number of similar requests and their cumulative effect on the expenditure of IRS resources.
 - i. Whether the request or demand allows a reasonable time for compliance (generally, at least fifteen business days).
 - j. Whether testimony or disclosure is appropriate under the rules of procedure governing the case or matter in which the request or demand arises.
 - k. Whether the request or demand involves expert witness testimony.
 - l. Whether the request or demand is for the testimony of an IRS employee or contractor who has no personal knowledge of relevant facts.
 - m. Whether the request or demand is for the testimony of a presidential appointee or senior executive and whether the testimony of a lower-level official would suffice.
 - n. Whether the procedures of Treasury Regulation 301.9000-5 have been followed.
 - o. Any other relevant factors brought to the attention of the authorizing official.
- (11) Requests for IRS expert testimony in non-tax matters will normally be denied. However, if the IRS has an interest in the issue and the outcome of the litigation,

tion, IRS employees may be authorized to testify. The Disclosure Manager will coordinate determinations of IRS interest with Chief Counsel and the involved function(s).

- (12) However, when a determination is made that it is not in the IRS's interest to provide testimony, appropriate actions should be taken by the field Disclosure staff (request that the order be withdrawn, offer alternate information, etc.) or by Area Counsel to work through DOJ to have the subpoena quashed. Written notification should be supplied to the employee. See IRM 11.3.35.12(5).
- (13) Use the appropriate pattern memorandum for all cases in which Disclosure employees are preparing a testimony authorization.

11.3.35.12
(12-28-2015)
**Testimony
Considerations**

- (1) The key to handling testimony cases is confirming their validity under Treasury Regulations 301.9000-1 through -7, and obtaining **timely** and **accurate** information.

Note: This point cannot be overemphasized.

- (2) Disclosure personnel should speak to the attorney or requester responsible for serving the request or subpoena. This call should be used to:

- Verify receipt of the subpoena
- Determine additional background and scope of the subpoena (See IRM 11.3.35.11)
- Verify the time frame for the appearance/production of records and
- Explain any disclosure complications

Example: Some IRC 6103 disclosures may require written authorization. See IRM 11.3.3 , Disclosure to Designees and Practitioners.

Example: An ex parte court order or other written request under IRC 6103(i) is necessary prior to testimony pursuant to IRC 6103(i)(4). See IRM 11.3.28 , Disclosure to Federal Agencies for Administration of Non-Tax Criminal Laws.

Example: A subpoena for personnel records requires close analysis by Disclosure personnel in order to determine whether a routine use disclosure or the Privacy Act (b)(11) court order exception applies.

Note: This call must be documented in the electronic inventory management system Case History Notes.

- (3) To the extent possible, Disclosure personnel must attempt to avoid unnecessary appearances by IRS employees in judicial and administrative proceedings.
- (4) If there are disclosure complications, Disclosure personnel should request that the issuing party withdraw the request/subpoena. Although a written statement of withdrawal is desirable, an oral statement by the requester to the effect that the IRS need not appear in response to his/her request/subpoena is generally sufficient to close out the case. A note to this effect should be included in the

electronic inventory management system case history notes. Disclosure personnel should send a letter confirming withdrawal to the requester.

- (5) If the authorization to testify is denied, and the requester refuses to withdraw the request/subpoena, the authorizing official must give the employee written confirmation of the denial. A copy may be provided to the court when he/she respectfully declines to testify for lack of authorization as required by Treasury Regulation 301.9000-3.

Note: See IRM 11.3.35.13(3).

- (6) If there is insufficient time to gather and analyze the facts, prepare a report, and obtain an authorization, Disclosure personnel should contact the requester and inform him/her to this effect (or request that Area Counsel do so). The requester should be informed that the employee would appear if he/she insists, but that the employee will explain to the court or other authority that the request/subpoena was served at the last minute and that Treasury Regulation 301.9000-3 does not permit testimony or production of IRS information without the proper authorization. When confronted with this situation, the requester may seek a postponement, withdraw the subpoena, or still require the employee to appear.
- (7) The use of certified documents is another way where appearance of an IRS employee at trial may be minimized. With managerial approval, offer the requester certified documents, if disclosure is permitted, in lieu of appearance and testimony by an employee. The certified copies of returns and return information are admissible into evidence in accordance with IRC 6103(p)(2)(C) and IRC 7514.

Note: See IRM 11.3.6, Seals and Certifications.

- (8) Certified documents are particularly useful when tax returns are desired. If time allows, Disclosure personnel should:
- Suggest that the requester withdraw a subpoena for returns and
 - Send a Form 4506, Request for Copy of Tax Return, to the appropriate Campus, checking the box on the form to request a certified copy for court purposes

Note: Only, ink stamp certifications are provided.

- (9) When information is provided pursuant to a subpoena, a note to this effect should be included in the electronic inventory management system case history notes. Disclosure personnel should explain in the response letter to the requester the basis for releasing the requested information pursuant to the subpoena.

Note: Responding to a request or demand for documents protected under the confidentiality statutes requires a testimony authorization even though the release is done with the owner's consent (e.g. IRC 6103(c) consent for tax records). However, **no** authorization is needed if it is made clear to the requester that the release is made pursuant only to the consent and that the IRS considers the demand/request withdrawn.

- (10) Additionally, if a request/subpoena is served on more than one IRS employee, depending on the circumstances, the requester should be contacted to see if just one employee, or at least fewer employees, may appear.

Note: If multiple requests/subpoenas from the same requester for the same documents are received and assigned to multiple Disclosure Offices, then the Disclosure Managers should discuss grouping the subpoenas and processing them in one office for consistency of response.

- (11) If it is clear that an IRS employee will have to appear in court, depending on the circumstances of the case, contact the requester to see if he/she will agree to let the employee appear on a few hours' notice or at a specific time, rather than requiring appearance from the beginning of the proceeding.
- (12) Returns and taxpayer return information initially provided under an IRC 6103(i) order require a finding under IRC 6103(i)(4)(A)(i), or an order under IRC 6103(i)(4)(A)(ii) in order to be disclosed in a proceeding. This finding by the court is separate from the original Ex Parte Court Order and should be issued in writing by the judge. See IRM 11.3.28 for additional information.
- (13) Some important guidelines to note when processing a testimony request resulting from an Ex Parte Court Order are:
- Return information other than returns and taxpayer return information, initially provided under an IRC 6103(i) request, may be disclosed in a proceeding pursuant to IRC 6103(i)(4)(B) without a finding or an order.
 - An IRS employee may testify about records already disclosed under IRC 6103(i) records and their meaning but may not make additional disclosures in testimony.
 - A written testimony authorization may be required, depending on whether testimony is in conjunction with an IRS case and who is requesting the testimony. The employee's testimony is limited to the disclosures already made under the IRC 6103(i) order. The testimony is limited to that which has already been disclosed. However, see Treasury Regulation 301.6103(c)-1 for disclosure consents made in open court.
 - Caution dictates that if a non-written authorization is needed, written advice about the limitations of the permitted testimony should be provided to the employee in the same format as a testimony authorization. If there is no assigned Chief Counsel attorney, the Disclosure Office should prepare the written advice.

11.3.35.13
(12-28-2015)
Disclosure Caveats

- (1) Unless directed otherwise in the authorization instructions, employees may not testify regarding:
- Information that may tend to identify a confidential informant
 - Unrelated third party tax information
 - Wagering tax information as defined in IRC 4424
 - Tax treaty (convention) information
 - Secret grand jury information

Note: If problems develop, contact Disclosure and Counsel for assistance, prior to any testimony.

- (2) An IRS employee faced with a court order to testify or produce documents prior to receiving testimony and/or production authorization should respectfully

decline to testify. The employee should explain to the court that Treasury Regulation 301.9000-3 does not permit him/her to testify or produce IRS information unless authorized to testify or produce IRS information and that he/she is awaiting authorization. To the extent necessary, Disclosure or Chief Counsel personnel or Government counsel (usually an Assistant U.S. Attorney) may accompany the employee to explain the situation.

- (3) If an IRS employee is faced with a court order to testify or produce documents with respect to information that is not authorized to be disclosed by the testimony and production authorization, the employee should respectfully decline to testify or produce documents with respect to those matters. If returns and return information are involved, the employee should explain to the court that disclosure could subject him/her to civil and criminal sanctions. Disclosure or Chief Counsel personnel, or Government counsel (usually an Assistant U.S. Attorney) may accompany the employee to explain the situation to the court.
- (4) In non-tax cases, the fact that a person presents a subpoena or other request or demand indicating he/she is the attorney for a taxpayer, is not sufficient to establish that person as the authorized representative of a taxpayer for purposes of disclosing confidential tax information. IRC 6103(c) and (e) require that a taxpayer consent in writing or in open court on the record to the disclosure of his/her confidential tax information. In tax cases, disclosure may be made where the requirements of IRC 6103(h)(4) are met.
- (5) Prior to taking the stand as a government witness or a witness for the opposing party in a non-tax civil or criminal proceeding, the subpoenaed employee should apprise Government counsel of the limits of the testimony authorization. The employee may provide Government counsel, as well as the judge or magistrate and the defense, with a copy of the written advice or authorization.
- (6) Should Government counsel ignore IRS instructions and request testimony which clearly is beyond the scope of the authorization (e.g., testimony concerning third parties or confidential informants) or raise no objection when such testimony is requested by the opposing counsel, the employee should inform the court of any statutory restrictions on disclosure and of the testimony instructions issued by the IRS. The employee should be careful to not directly or indirectly disclose tax information (e.g., fact of filing) when making this explanation. If the line of questioning is pursued, the employee should request the court's permission to consult with IRS officials before responding. If the court refuses to grant permission and insists that the employee testify, the employee should respectfully decline to testify because statutory authority and/or IRS approval is lacking.
- (7) Where the legality of the disclosure is questionable, such as when non-Government counsel moves for disclosure based on a constitutional premise as in Brady v. Maryland 373 U.S. 83 (1963) (See IRM 11.3.35.14), the employee should be guided by Government counsel in providing testimony. In either situation, the IRS will support its employees in any "good faith" decision on their part about the propriety of their actions in protecting the confidentiality of IRS information.

11.3.35.14
(04-30-2018)

Brady v. Maryland and the Jencks Act

- (8) Any IRS officer, employee, or contractor who discloses IRS information without authorization under Treasury Regulation 301-9000-3, may be subject to administrative discipline, up to and including dismissal, applicable contractual sanctions and civil or criminal penalties, including prosecution under 5 USC 552(a) or IRC 7213.
- (1) In all criminal cases, the Government is under a constitutional obligation to disclose, upon the defendant's request, evidence material either to guilt or punishment (exculpatory evidence), Brady v. Maryland, 373 U.S. 83 (1963). This includes evidence that may be used to impeach or discredit a Government witness. **Giglio v. United States**, 405 U.S. 150 (1972). It also encompasses Henthorn material (information about the credibility and/ or integrity of a Government employee who will be called as a witness).
 - (2) The Brady rule does not however, require the Government to seek exculpatory material that is not already in its possession. The Brady decision does not require that the Government perform the defense's task of locating all exculpatory material; rather, the rule of the case is that if such material exists in the Government's files used for purposes of prosecuting the offense, the Government is prohibited from hiding such material from the defense.
 - (3) If the IRS is not one of the investigating agencies in a prosecution, there are no Brady obligations and Government employees may not disclose information in response to a Brady based order. Chief Counsel must be consulted regarding Brady based orders in cases where IRS is not one of the investigating agencies.
 - (4) When the IRS discloses returns and/or return information in response to a **Brady** based order (it can be written or oral but the sufficiency of an oral request must be coordinated with Chief Counsel), the IRS will seek a court order that limits the use of such information by the defendant to the particular proceedings. U.S. v. Moriarity, 69-1 USTC paragraph 9212 (Ed. Wisc. 1969), sets out the guidelines for this order.
 - (5) In such cases, the IRS will request that the judge inspect the returns and/or return information "in camera" (a legal term that means "in private" or "in chambers") to determine whether disclosure to the defendant is constitutionally mandated.
 - (6) Special care must be taken when the information requested relates to a confidential informant. See IRM 11.3.35.7(15).
 - a. The production of any information that may identify, directly or indirectly, a confidential informant depends on the facts and circumstances in each case.
 - b. Consideration must be given to such factors as the informant's relationship to the case, whether his/her life may be threatened by the disclosure, and the potential impact of non-disclosure on the Government's case.
 - c. It is the policy of the IRS to protect the confidentiality of informants and any decision to release such information to the judge or in court is a matter of extreme sensitivity.
 - d. If necessary, an IRS designee may testify about the contents of the returns and/or return information disclosed.

Note: Usually, the designee will not be permitted to testify or produce documents that may reveal third party information not subject to the order or which would tend to identify, directly or indirectly, a confidential informant.

- (7) The Jencks Act (18 USC 3500) relates only to pre-trial statements of Government witnesses in Federal criminal cases. Any such statements given to the Government relating to the subject matter of the witness' testimony must be provided to the defense.
- (8) Disclosures of returns and return information under **Jencks** must be in a tax proceeding as provided in IRC 6103(h)(4)(D).

11.3.35.15
(04-30-2018)
**Briefing the Employee
Who Will Testify**

- (1) Disclosure personnel must advise the requested/subpoenaed employee of the authorization and the permissible scope of testimony and production of IRS information before the employee is scheduled to appear.

Note: Exhibit 11.3.35-2 provides a briefing guide/handout which may be used.

- (2) The following items are examples of matters that might be addressed:
 - a. The specifics of the testimony and production authorization; the particular records, tax entities and tax records that the employee may disclose.
 - b. The need to segregate documents and not testify about matters not authorized for disclosure.
 - c. The need to confine testimony to the limits of the authorization. Additional information (and personal opinions, unless authorized) should not be volunteered.
 - d. During testimony, the need for employees to make sure that they understand a question and give the accompanying counsel time to raise any objections they might have before responding. If the employee does not understand a question or does not know the answer, he/she should say so.
 - e. The employee's right to say that he or she cannot properly answer a question when a "yes or no" answer is requested without an explanation, if the "yes or no" answer could be misleading.
- (3) Disclosure personnel must ensure all disclosures are accounted for and all notification requirements are complied with, if necessary, before closing out the testimony file.

11.3.35.16
(12-28-2015)
**Accounting
Requirements**

- (1) Use Form 5482 to meet the accounting requirements of the Privacy Act of 1974, at 5 USC 552a(c) when applicable (i.e., personnel and payroll records).

Note: See IRM 10.5.6.7 , Privacy Act Accounting of Disclosures.

- (2) Use Form 5466-B to meet the accounting requirements of IRC 6103(p)(3) when applicable.

Note: See IRM 11.3.37, Recordkeeping and Accounting for Disclosures.

11.3.35.17
(04-30-2018)

**Notifying Individuals
That Their Records Were
Made Available to a
Person Under
Compulsory Legal
Process**

- (1) The Privacy Act of 1974, at 5 USC 552a(e)(8), requires that each agency make reasonable efforts to serve notice on an individual when any record on that individual is made available to any person under a compulsory legal process when the process becomes a matter of public record.
- (2) “Compulsory legal process” is:
 - a. An order of a court of record, including an ex parte order pursuant to IRC 6103(i)(1), or
 - b. A summons or a subpoena (whether for testimony or records, or both) issued by a judge or magistrate of a court of competent jurisdiction over the case being heard.
- (3) The Compulsory Legal Process does not include interrogatories and motions for discovery unless in accordance with a court order enforcing such discovery.
- (4) Except for (5), (6) and (7) below, appropriate Disclosure and Chief Counsel personnel in the office releasing documents or giving testimony about an individual pursuant to a compulsory legal process will ensure that a notice is issued to the individual indicating that information concerning him/her was made available pursuant to compulsory legal process. The notice should contain a summary of the information provided and should be provided within 5 working days of any record being made public.

Note: The following notification language should be provided to the individual in writing:

“This is your legal notice that your XXX tax return (or return information) was provided to [name of third party], under a compulsory legal process.”

- (5) Whenever the individual whose information was made available under compulsory legal process is present in the judicial or administrative proceeding when that information is disclosed, the notice requirement set out in (4) may be considered satisfied and no additional notification is required. The case file will be noted that the individual was present at the time of disclosure.

Example: The individual is a party, witness, or observer in the proceeding.

- (6) If disclosure is in response to a grand jury subpoena or an ex parte order pursuant to IRC 6103(i)(1), notice should not be given until the subpoena or order becomes a matter of public record. If the subpoena or order does not indicate whether it is a matter of public record, it may be necessary to request the issuing authority to advise the IRS when the matter becomes public so that the required notice may be issued.

Note: Ex Parte Court Orders pursuant to IRC 6103(i)(1), (i)(3)(C) and (i)(7) relate directly to federal tax records. To the extent the order is also seeking personnel or payroll records in conjunction with tax records, the Privacy Act, 5 USC 552a, indicates the Act’s regulations on verification of identity and access to records (5 CFR part 297) are to be followed. See article titled Trend Watch: Ex Parte for FOIA on the Disclosure Share Point site, for information on the Privacy Act exceptions (b)(7) and (b)(11). This guidance applies to FOIA case files and other Privacy Act protected records.

- (7) Notification is not necessary where the compulsory legal process (whether or not a matter of public record) calls for information contained in a system of records which has been exempted from the requirements of 5 USC 552a(e)(8) pursuant to 5 USC 552a(j)(2).

Example: A Criminal Investigation case file contained within Privacy Act System of Records 46.002, which is exempt under Section (j)(2) of the Privacy Act.

- (8) Mailing the notice to the individuals last known address constitutes a reasonable effort to serve the notice.
- (9) A copy of the notice shall be placed in the case file.

11.3.35.18
(12-28-2015)
Witness Fees

- (1) In a non-IRS matter, witness fees received with a subpoena, court order or other written request requiring testimony by an IRS employee or official should be turned over immediately to the Disclosure Office along with the subpoena and other court related material.
- (2) The GLDS Support Services(GSS) will return any witness fees received with a subpoena back to the submitter. If Disclosure authorizes the subpoenaed employee to provide testimony, Disclosure will work with the employee to collect any applicable witness fees and forward them to the appropriate office. See *Jury and Witness Fees* , for additional information on where to send the payment.
- (3) Payment of witness fees is required prior to the appearance and testimony of an IRS employee when these fees are mandated under Federal or state laws. Where testimony is to be permitted and witness fees have not been paid, the Disclosure Office should contact the requester to secure payment.
- (4) The Chief Finance Officer (CFO) requires deposit of all payments, including witness fees, on the date received, Once applicable payment is collected it will be forwarded to the appropriate office and coded with the proper accounting codes per IRM 6.630.1

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Exhibit 11.3.35-1 (04-30-2018)

Example Testimony Report

Exhibit 11.3.35-1 Example Testimony Report

Received by:

Jane Walnut, Disclosure Manager

Date: 9/13/14

1. **Name of Contact:** Bill Maple, Special Agent
2. **Function:** CI
3. **Phone number:** 888-500-0000
4. **Title of Case:** United States v. John X. Elm., et al
5. **Type of Case:** Criminal (Federal Narcotics Violations)
6. **Docket Number:** CR-XX00-00
7. **Court Location:** U.S. District Court, Northern District of [State/City/State]
8. **Date & Time Testimony/Production Required:** 10:00 a.m., Mon., 9/17/14
9. **Subpoenaed/Requested Employee**
 - 9a. **Name:** William Maple
 - 9b. **Title:** IRS Criminal Investigation Special Agent
 - 9c. **Post of Duty:** [City/Address/other]
10. **Subpoena/ Request served**
 - 10a. **On behalf of:** The United States
 - 10b. **By:** Jack Q. Oak, Assistant U.S. Attorney, City, State
11. **Subpoena/ Request calls for:** Introduction of 2011 - 2013 tax records of John Elm, Mary Elm, and Harry Pine and explanation of return processing and lack of records, as necessary.
12. **Is subpoenaed/requested information available?** (If yes, explain in item 19.) All requested tax records pertaining to John Elm and Mary Elm are available.
13. **Any confidential information or sensitivity?** (If yes, explain in item 19.) There was an informant in the criminal tax investigation on tax year 2008 on the Elms; however, it is not anticipated that testimony will jeopardize the identity of the informant since the tax information obtained under IRC 6103(i)(1) is not related to that investigation. No LEM or other sensitive material is present.
14. **Any open Civil or Criminal Case?** (If yes, explain in item 19.) There is a closed criminal tax case on the Elms for tax year 2008 (case was closed without referral for prosecution).
15. **Would disclosure seriously impair Federal tax administration?** (If yes, explain in item 19.) No.
16. **Recommendation of Approving Official:** Permit testimony to the 2011 - 2013 tax information related to John Elm, Mary Elm and Harry Pine, and general return processing, only.

Exhibit 11.3.35-1 (Cont. 1) (04-30-2018)**Example Testimony Report**

17. **Recommended Scope of Authorization:** Copies of returns produced pursuant to IRC 6103(i)(1) assuming approval under IRC § 6103(i)(4) (see item 19).

Testimony and related records regarding narcotics raid and seizure of narcotics (see item 19) authorized only to extent that they are a matter of public record. Any other tax information is protected from disclosure by IRC 6103(a).

No information regarding identity of confidential informant is to be disclosed. No other tax returns or return information can be disclosed without waiver.

18. **Rationale for recommended Authorization:**

19. **Additional pertinent information and continuations of earlier items:**

Item 12 cont. 2011-2013 returns for Harry Pine are at FRC and may not be available by date of testimony.

Item 14 cont. During the narcotics raid, Agent Maple seized books and records pertaining to another individual that proved to not be involved in the narcotics case or other wrong doing.

Exhibit 11.3.35-2 (04-30-2018)**Testimony Considerations**

1. When an employee is required to testify and possibly disclose confidential information or any other job related information, the following items must be kept in mind:
 - a. Specific authorization to testify or produce records is required in non-IRS matters (or in IRS matters where the request comes from a party other than the Government).

Reminder: This authorization is **not** necessary when testifying on behalf of the Government in an IRS matter.

- b. A representative from the Disclosure Staff or Chief Counsel will obtain the authorization and brief the employee about the appearance.
 - c. If necessary, employees can be accompanied by someone from Chief Counsel or the Office of the U.S. Attorney.
 - d. The authorization will state the limits of testimony. Disclosure of confidential information is subject to the provisions of IRC 6103, the Privacy Act and legal privileges.

Reminder: The provisions contained in this section, **not** the text in the subpoena or demand, will determine what confidential information may be provided in testimony.

Caution: Any testimony or production of records that include information related to a confidential informant or other exempt issues must be coordinated with Disclosure and Counsel prior to any testimony being authorized or given. (See IRM 11.3.35.13(1).)

2. During testimony, follow the guidelines below:
 - a. First and foremost, always tell the truth.
 - b. Before answering a question, make sure you fully understand it.
 - c. If you don't know the answer to a question, just say you don't know.
 - d. If you can answer a question with a "yes" or "no" answer, you should do so.
 - e. Some attorneys try to force a "yes" or "no" answer by a witness when further explanation is necessary. In such situations, state that the answer requires an explanation and the Court will ordinarily permit you to do so.
 - f. Do not speculate with phrases like, "I think," "I believe," and "probably," when in fact you don't know. Again, if you don't know, just say you don't know.
3. Employees are entitled to reimbursement for any travel expenses associated with an appearance, but any fees received from the requesting party must be turned over to the IRS. See *Jury and Witness Fees* ,, for additional information.
4. Employees will be asked to write a brief summary of their testimony or state why they were not required to testify.
5. Any questions concerning a subpoena to testify, or to be deposed, should be directed to the field Disclosure Office.
6. Do not volunteer any information concerning pending litigation to non-IRS Counsel without prior approval.

