

# Disclosure Litigation BULLETIN

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**This bulletin is for informational purposes; it is not a directive.**

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Bulletin 99-4

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## RELEASE OF DOCUMENTS PURSUANT TO RRA

On July 22, 1999, pursuant to the transition rules of IRS Restructuring and Reform Act (RRA) of 1998, section 3509(d)(2)(A), the Service released Litigation Guideline Memoranda, Tax Litigation Bulletins, Criminal Tax Bulletins and General Litigation Bulletins issued between January 1, 1986 and the effective date of section 3509 (October 22, 1998). While most of the documents were released in full, certain information was redacted from some of the documents pursuant to various exemptions authorized under I.R.C. § 6110 and the Freedom of Information Act. The RRA amended I.R.C. § 6110 to provide for a new category of “written determinations” entitled Chief Counsel Advice - documents written by national office components of the Office of Chief Counsel and issued to field and service center employees of the Service or to regional and district counsel employees that convey a legal interpretation or Counsel position or policy with respect to a revenue provision. The RRA specifically included the various documents listed above within the new category of Chief Counsel Advice and provided for a transition period during which the Service would release certain prior Chief Counsel Advice memoranda dating back to 1986. The next release date under the transition rules is January 22, 2000, when the Service is scheduled to release Field Service Advice and technical assistance to the field issued between January 1, 1994 and October 22, 1998.

## CASE DEVELOPMENTS

### Tax Analysts v. IRS, No. 98-2345 (TPJ) (D.D.C. August 6, 1999)

In this FOIA suit, plaintiff sought a copy of the closing agreement entered into between the Service and the Christian Broadcasting Network (CBN). The district court granted the government’s motion for a judgment on the pleadings, ruling that the case was controlled by a decision in another recent case in which Tax Analysts sought access to six closing agreements between the Service and several tax exempt organizations, including the Church of Scientology. Tax Analysts v. IRS, 99-1 USTC ¶ 50,345 (D.D.C. March 16, 1999) (see DL Bulletin 99-3). The court in the CBN case held that the closing agreement was “return information” under I.R.C. § 6103 and was distinct from an application for tax exempt status that had been approved by the Service, which would be open to public inspection under I.R.C. § 6104.

Joseph A. May v. IRS, et al., No.98-4042-CV-C-5 (W.D.Mo., August 6, 1999)

The district court granted the government's motion for summary judgment in this FOIA lawsuit. The court found that declarations executed by the disclosure officer and special agent were sufficient in demonstrating that the IRS searched for records responsive to plaintiff's request where such documents might reasonably be located. The court rejected plaintiff's argument that the IRS should have produced Collection Division files in response to his request, agreeing with the government's argument that plaintiff requested only litigation files relating to collection (for which the Service had searched), and not administrative collection files.

Based on the declarations submitted by the Service as well as its in camera review of the documents at issue, the court upheld the various FOIA exemptions asserted by the government. In particular, the court held that the Service properly withheld from plaintiff pursuant to FOIA exemption (b)(7)(C), identifying information of third party contacts and witnesses in the criminal investigation of the plaintiff, statements, tax returns, and medical expenses of third party witnesses, correspondence with and/or regarding third party witnesses, documents referencing the tax treatment of patient/witnesses' medical expenses, and the social security numbers of special agents who worked the criminal investigation of plaintiff. The court found that release of this information "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under exemption (b)(7)(C), noting that the courts have afforded broad privacy rights to witnesses and investigators, and have recognized intrusions on personal privacy where information would disclose identities of persons who cooperated in an investigation. In balancing the privacy interests vs. the public interest in the information, the court reasoned that the public interest in disclosure was "minute."

The court also upheld the withholding, pursuant to the attorney work product privilege embodied in FOIA exemption (b)(5), of a criminal referral letter from District Counsel to the Department of Justice and a prosecutorial memorandum prepared by an Assistant United States Attorney. The court found that the referral letter clearly indicated it was being prepared for purposes of pursuing litigation against plaintiff, and set forth the factual basis for possible prosecution and an analysis of the applicable law. Likewise, the court found that the prosecutorial memorandum summarized the evidence gathered, as well as containing recommendations of possible courses of action regarding the criminal prosecution of the plaintiff.

O'Connell v. Rubin, et al., No. 4:97-CV-10485 (S.D. Iowa, July 15, 1999)

The district court issued a favorable decision to the government in this lawsuit alleging, in part, Privacy Act violations. The plaintiff, a former special agent who had been reassigned to the position of revenue agent, claimed that Service employees improperly used information from an unfavorable evaluation issued during his special agent training which led to his position reassignment. The court found that the placement in the plaintiff's Employee Performance File (EPF) of notes and an evaluation prepared by plaintiff's advisor during plaintiff's Special Agent Basic Training (SABT) was not in

violation of the Privacy Act. The court reasoned that the notes and evaluation were timely placed in the agency's record systems, and thus, allowed plaintiff time to respond to the contents. The court also could find no violation of the Privacy Act by the advisor's retention of his work product on his personal computer. The court held that the advisor's transmission from his files of the evaluation and notes to plaintiff's branch chief and division chief was not in violation of the Privacy Act because management clearly had "a statutory 'need to know' about an adverse evaluation of plaintiff's fitness as a special agent." Finally, the court rejected plaintiff's claim that the notes and evaluation should be substantively amended, finding that because the documents contained the advisor's personal opinions based on observations of, and interaction with, plaintiff during SABB training, they are not "capable of being verified" as false. Thus, they cannot be considered inaccurate statements subject to the amendment provisions of the Privacy Act. 5 U.S.C. § 552a(d)(2).

Robert Angelo:lacoe v. Internal Revenue Service, No. 98-C-0466 (E.D. Wis., July 23, 1999)

In this combination FOIA/I.R.C. § 7431 case, plaintiff alleged that the Service made an unauthorized disclosure during bankruptcy proceedings and failed to provide documents requested under the FOIA. The court granted the government's motion for summary judgment and dismissed the case.

With respect to the claims of unauthorized disclosure made pursuant to I.R.C. § 7431, plaintiff alleged that the Service had made wrongful disclosures of tax information when it turned over 13 boxes of documents the Service had seized from the plaintiff to the attorney representing the plaintiff in the bankruptcy case. The bankruptcy court had ordered the plaintiff to prepare tax returns for two years before it would approve his bankruptcy plan, and plaintiff had stated that he could not complete those returns until he had obtained the seized records from the Service. In finding no unauthorized disclosure, the district court noted that the disclosure was made to the plaintiff's attorney of record to enable plaintiff to file delinquent tax returns as ordered by the bankruptcy court. Although not explicitly stated in its opinion, the court appeared to hold that, under the circumstances, section 6103(h)(4)(A) authorized this disclosure because it occurred in a judicial proceeding pertaining to tax administration to which the plaintiff-taxpayer was a party.

Bayview Farm, et al. v. IRS, Civ. No. DKC 94-2135 (D. Md., June 17, 1999)

The district court denied an attorney's petition for attorney's fees and expenses under the Equal Access to Justice Act (EAJA) after successful litigation against the Service for unauthorized disclosure of federal tax returns and return information under I.R.C. § 7431 (see DL Bulletin 98-4).

After the court had denied his litigation costs under I.R.C. § 7430, the attorney sought his costs under sections 2412(b) and 2412(d)(1)(A) of the EAJA. Under section 2412(d)(1)(A) an award of attorney's fees may be allowed if the government's litigating

position is not substantially justified. However, the court determined here that an award was not allowable because the statute excepts “cases sounding in tort.” It was held the underlying litigation, i.e., for unauthorized disclosure of tax returns and return information pursuant to I.R.C. § 7431, sounded in tort because I.R.C. § 7431 provides for damages based on the government’s negligence.

Likewise, the court rejected the attorney’s claim under section 2412(b) of the EAJA which provides for awards where the government acts in bad faith. The attorney claimed that the Service engaged in “scorched-earth tactics” during discovery, causing unnecessary legal expenses. The court noted that in the years of this litigation most of the discovery was substantial and conducted without controversy. In any event, the court pointed out that the action was brought by the attorney and that the government was defending itself “with vigor,” as it is entitled like any other defendant.

It should be noted that section 3101 of the RRA of 1998 amended I.R.C. § 7431 so that attorney’s fees may be awarded in an unauthorized disclosure case where the plaintiff has substantially prevailed.

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Your suggestions for inclusion of topics in future Bulletins are invited.