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## **Disclosure, FOIA and The Privacy Act**

By Susan L. Paul and Bill Brockner



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### Overview

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#### Balancing the concepts of privacy and disclosure

The Service relies heavily upon taxpayers' voluntary compliance to operate one of the most successful tax systems in the world. We collect, maintain and use more personal information than any other government agency. Taxpayers may not continue to provide their personal information if they are not confident that it is well protected. This article will clarify and explain privacy and disclosure as it applies to the Service and particularly the Exempt Organizations Division.

The law protects our **privacy**. Both IRC 6103 and the Privacy Act protect taxpayers from unwarranted invasions of privacy. IRC 6103 keeps return and return information confidential. The Privacy Act protects the confidentiality of individuals' records. The law also provides for **disclosure** and sets forth circumstances where Congress determined that the need for disclosure outweighed the need for privacy.

This article will provide a brief overview of IRC 6103, and then address IRC 6104 and 6110; The Freedom of Information Act and E-FOIA. IRC 6104 opens certain tax-exempt organization documents to the public and to State charity officials. IRC 6110 opens the text of certain written determinations to the public. The Freedom of Information Act allows the public to request federal agency records, subject to certain exemptions. The article also provides an overview of The Privacy Act. A subject matter directory follows the article.

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## What is Disclosure?

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### IRC 6103 – protects returns and return information

IRC 6103(a) states that **returns and return information** shall be confidential and that, except as specifically authorized by the Internal Revenue Code, no officer or employee of the United States shall disclose **returns or return information**. *Church of Scientology v. Internal Revenue Service*, 484 U.S. 9 (1987).

One court, in discussing IRC 6103, stated:

We must be ever mindful that when Congress enacts a statute designed to limit the government intrusion into the private affairs of its citizens, the statutory provisions must be followed scrupulously.

*United States of America v. Bachelor.*, 611 F.2d 443, 12 (3<sup>rd</sup> Cir. 1979)

The term “officers and employees of the United States” includes present and former employees.

IRC 6103(b)(8) defines a disclosure as “...the making known to any person in any manner whatever a return or return information.” First, we will define return and return information. Next, we will discuss the two kinds of disclosure: unauthorized and authorized.

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### Definition of “return”

IRC 6103(b)(1) defines the term “return” as any filed tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the Internal Revenue Code. “Return” further includes amendments and supplements such as supporting schedules, attachments, or lists which support or are part of the filed return.

Forms that constitute IRC 6103 protected return or return information when they are filed by tax-exempt organizations, and non-exempt trusts include, but are not limited to:

- Forms 990 series and Form 1120-POL,
  - Forms 1041 and 5227,
  - Employment tax returns,
  - Periodic reports and notices such as Forms 8871 and 8872, and
  - Forms 1065 and 1099.
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## What is Disclosure?, Continued

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### Definition of “return information”

IRC 6103(b)(2) defines the comprehensive term “return information”. Return information is information which discloses:

- A taxpayer’s identity,
- The nature, source, or amount of a taxpayer’s income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments,
- Whether a taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or,
- Any other data, received by, recorded by, prepared by, furnished to, or collected by the Service with respect to a return or with respect to a determination of the existence, or possible existence, or liability of any person under the Internal Revenue Code for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
- Material not disclosable under IRC 6110,
- Advance pricing agreements, IRC 7121 closing agreements and similar agreements along with the related background information.

“Return information” does not include data in a form that is not and cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

**Caution!** IRC 6103 even protects return information where identifiers (e.g., name, TIN, zip code) have been deleted. In *Church of Scientology*, the court noted that the statute is more than an identity test.

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### Unauthorized disclosure – inadvertent

An unauthorized disclosure is one that is not specifically authorized by the IRC. An unauthorized disclosure may be inadvertent or intentional. Some common examples of inadvertent disclosures are:

- Failing to change pattern correspondence
- Sending a FAX to the wrong number
- Giving information to the wrong person
- Sending mismatched correspondence
- Making an inappropriate disclosure after failing to confirm the identity of a caller
- Making an inappropriate disclosure after accepting invalid or incomplete powers of attorney

A Service employee can find more information about this type of disclosure at the IRS Government Liaison and Disclosure website.

[http://www.hq.irs.gov/disclosure/awareness\\_tools.htm](http://www.hq.irs.gov/disclosure/awareness_tools.htm)

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## What is Disclosure?, Continued

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### Unauthorized disclosure – UNAX

Except as specifically authorized by the IRC, you may not disclose return or return information to anyone, even yourself. It is unlawful for an IRS employee to browse returns or return information, also known as unauthorized access or UNAX, that the employee does not need for official duties, regardless of whether they disclose the information to somebody else. See IRC 7213A for more information about definitions and penalties.

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### Consequences of unauthorized disclosure

If you make an unauthorized disclosure or inspection of “returns or return information”, the consequences can be serious.

- IRC 7431 states that if any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information in violation of IRC 6103, then the taxpayer may bring a civil action for damages against the United States.
  - The government may be held liable for an amount equal to the sum of the greater of \$1,000 for each act, or the sum of the actual damages plus, in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages plus the costs of the action. Additionally, courts may award reasonable attorneys fees if the defendant is the United States and the plaintiff is the prevailing party.
  - There is no cause of action if the inspection or disclosure is the result of an officer’s or employee’s good faith but erroneous interpretation of IRC 6103, or if the taxpayer requests the disclosure.
  - IRC 7213 and 7213A contain provisions for criminal charges against the officer or employee for unauthorized disclosures and unauthorized inspections, respectively.
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### Unauthorized disclosure – a good faith defense

Even when an employee makes an inadvertent or intentional unauthorized disclosure, the government may be able to show that the employee made the disclosure based upon a ‘good faith’, but erroneous interpretation of IRC 6103 or at the taxpayer’s request.

The courts consider whether the unauthorized disclosure violates a clearly established statutory right of which a reasonable person would have known. So, in order to be able to rely on the good faith defense, the employee must consider whether the disclosure was authorized by IRC 6103 and proceed only if they hold a reasonable belief that it was. If an employee follows the statutory language, any regulations, the Internal Revenue Manual and/or other agency procedures, their disclosure will generally qualify as a good faith interpretation of IRC 6103. *Barrett v. United States*, 51 F.3d 475 (5<sup>th</sup> Cir. 1995); *Schachter v. United States*, 77 F. 3d 490 (9<sup>th</sup> Cir. 1996)

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## What is Disclosure?, *Continued*

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### Authorized disclosures

IRC 6103 (c) through (o) describes authorized disclosures. IRM 11.3, *Disclosure of Official Information* contains procedures for disclosing returns and return information in various circumstances. This article will discuss a few common examples. You should direct your questions about disclosure matters to the local disclosure office. Service officers and employees may regularly make many kinds of authorized disclosures in the course of their duties.

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### Authorized disclosure – Example 1 – for tax administration purposes

IRC 6103(h)(1) authorizes the disclosure of tax information to employees of the Department of the Treasury whose official duties require the disclosure for tax administration purposes.

In essence, this section authorizes access to tax information when the employee has a “need to know” to perform a tax administration function.

The key term “tax administration” is defined in IRC 6103(b)(4):

(A) To mean –

- (i) The administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and
- (ii) The development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) Includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

The threefold definition of tax administration covering execution, policy-making and enforcement encompasses nearly every function of the IRS. As a result, the definition expands to allow disclosure to the various Treasury officials who oversee the operations of the IRS, work with the IRS in developing tax policy, and assist the IRS in enforcing the Internal Revenue Code.

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## **What is Disclosure?, *Continued***

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**Authorized disclosure – Example 2 – disclosure by consent - overview**

A taxpayer may designate a third party to receive his or her tax information. IRC 6103(c). According to the regulations, this type of designation must generally be in writing. However, if the designee is providing assistance to the taxpayer in resolving a tax matter, the regulations permit an oral consent. This section has recently been amended. Prior to 1996, IRC 6103(c) contained a requirement that consents to disclose tax information to a third party designated by the taxpayer had to be in writing. In 1996, Congress amended this section by deleting the word “written” from the language. Section 1207, *Taxpayer Bill of Rights II*, P. L. No. 104-168, 110 Stat. 1452 (1996). As of January 2001, temporary regulations permit oral consents when the designee is assisting the taxpayer to resolve a tax matter. The temporary regulations also clarify several issues, such as who can execute a consent and who can be a permissible designee. Reg. 301.6103(c)-1T.

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## What is Disclosure?, *Continued*

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**Authorized disclosure – Example 2 – disclosure by consent – General Purpose Consent**

The temporary regulations contain the requirements for the consents that allow the IRS to disclose tax information to a third party designated by a taxpayer.

A general purpose consent must contain specific information. Before we make any disclosure, the taxpayer must execute a consent which,

- (1) is signed, dated and contains the taxpayer's name, address or SSN/EIN or any combination thereof,
- (2) identifies the person to whom the disclosure is to be made,
- (3) specifies the specific tax year or years involved, and
- (4) describes the tax information to be disclosed.

Either spouse may make a consent for the Service to disclose information relating to a jointly filed return.

The regulations require that the consent be contained in a separate written document that pertains solely to the authorized disclosure. When a taxpayer agrees to consent to the disclosure of his or her tax information as a part of a larger agreement, the consent to disclose must appear separately on a page. This requirement reinforces the principle that when the taxpayer signs the consent, the taxpayer is fully aware of the implications of the document they signed. It defines a separate written document as one side of an 8 ½" by 11" or larger sheet of paper (which can be included as part of a larger document) or text appearing on a single computer screen. It also considers an electronic transmission to be a written document.

The regulations contain time restrictions. The Service must receive the consent within 60 days of the date the taxpayer executes the document. In addition, this type of consent cannot authorize disclosure on an open-ended basis. It must state a finite number of tax years for which information can be disclosed.

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## What is Disclosure?, *Continued*

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**Authorized disclosure – Example 2 – disclosure by consent – When a taxpayer requests assistance**

The regulations contain special instructions for consents to disclose tax information when a taxpayer requests assistance from others, such as a Member of Congress or a relative. A taxpayer will execute this type of consent when he or she asks a third party for information or assistance relating to the taxpayer's return, a transaction or other contact between the taxpayer and the IRS.

The regulations contain a specific set of requirements for this type of situation. Before you make a disclosure to the assisting third party, the taxpayer must execute a consent which,

- (1) Is signed, dated, and contains the taxpayer's name, address or SSN/EIN or any combination thereof,
- (2) Allows the Service to clearly identify to whom the disclosure is to be made, and
- (3) Contains sufficient facts to enable the Service to determine the nature and extent of the information or assistance requested and the information to be disclosed in order to respond correctly to the taxpayer's request.

The taxpayer may give an oral consent under this provision. But before you rely on an oral consent to make a disclosure, you must verify the identity of the taxpayer and the designee and confirm the date and nature of the assistance or information requested. When you rely on an oral consent, you should record the fact of and the date of the consent and the information that will be disclosed.

In all cases, the taxpayer should make the consent as specific as possible, especially when describing the tax information that will be disclosed. The Service should disclose only the information for which the taxpayer has clearly waived confidentiality.

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## What is Disclosure?, *Continued*

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**Authorized disclosure – Example 2 – disclosure by consent – general considerations.**

An employee should consult the regulations to decide whether a consent received from a taxpayer to authorize a requested disclosure is sufficient. The Service generally regards Form 8821, *Tax Information Authorization*, to be a valid and sufficient consent if it is properly completed, dated and signed by the taxpayer. In the case of a conference with multiple taxpayers, you should obtain a properly executed consent form from each taxpayer that participates in the conference.

If someone other than the taxpayer or the taxpayer's duly authorized representative will be in attendance during a conference with the taxpayer, you should obtain a proper consent for that person as well. In this case, you may obtain an oral consent from the taxpayer to permit disclosures to the people in attendance at the conference or meeting. However, the attendees must be there to help resolve a tax matter, for example, employees of an organization may be familiar with certain facts relevant to the issue under discussion.

Note: A disclosure consent under IRC 6103(c) does not authorize practice before the Service. You must obtain a power of attorney for a person who engages in practice before the Service. In addition, a taxpayer's attorney does not have the authority to execute a disclosure consent on behalf of the taxpayer, unless the power of attorney makes specific authorization to do so.

Anytime after a consent has been properly executed, the taxpayer has the right to revoke it. The Service will rely on the properly executed consent to continue to disclose the tax information as specified in the consent until it receives a written revocation of the consent.

Last, you may not make a disclosure, even if it is specifically authorized by a properly executed consent, if the Service makes a determination that such disclosure would seriously impair Federal tax administration.

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## What is Disclosure?, *Continued*

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### Authorized disclosure – Example 3 – investigative disclosures to third parties

IRC 6103(k)(6), and Reg. 301.6103(k)(6)-1 authorize IRS employees to disclose return information to third parties, including third party contacts within the meaning of IRC 7602(c), under certain conditions. An employee may, in connection with their official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information.

The employee must be sure to disclose only to the extent that such disclosure is necessary to obtain information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. **You may not disclose actual tax returns or copies of actual tax returns for investigative purposes.** You may only disclose information relative to an investigative purpose. Check the Internal Revenue Code and the regulations because this statute is quite restrictive. IRM 11.3, *Disclosure of Official Information* contains guidance on third party contacts.

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### Authorized disclosure – Example 3 – third party contact issues - definitions

In addition to IRC 6103, a disclosure to a third party may raise issues under the third party contact rules of IRC 7602(c). A **third party contact** is one where a communication is made which,

- Is initiated by an IRS employee;
- Is made to a person other than the taxpayer;
- Is made with respect to the determination or collection of the tax liability of the taxpayer;
- Discloses the identity of the taxpayer being investigated; and
- Discloses the association of the IRS employee with the IRS.

**Official duties** are those that relate to,

- An examination;
  - A collection activity;
  - A civil or criminal investigation;
  - An enforcement activity or similar activity.
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## What is Disclosure?, *Continued*

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**Authorized disclosure – Example 3 – third party contact – notice**

The law does not require an employee to obtain special permission or authorization to make a third party contact. However, a Service employee must give the taxpayer reasonable notice in advance that such contacts may be made. Proposed Reg. 301.7602-2(a). Also, the IRS must provide a record of contacts if the taxpayer requests it. Proposed Reg. 301.7602-2(e)(2). TE/GE uses Letter 3164 K, *Third Party Contact Letter* to notify a ruling requestor or applicant that we may contact third parties. In addition, the IRS uses Notices 1219B and 1219A, *Notice of Potential Third Party Contact* to give notice to the taxpayer that we can make contact with third parties when we attempt to collect unpaid taxes and obtain nonfiled tax returns. An IRS employee can use Form 12175, *Third Party Contact Report Form* to make a record of each third party contact.

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**More authorized disclosures**

In addition to IRC 6103, there are other sections of the Internal Revenue Code which provide for the disclosure of tax information in certain circumstances. For example, IRC 6104 requires disclosure to the public of certain tax-exempt organization application materials and returns. IRC 6104(a)(1)(A), and (b). See also IRC 6104(d), which requires disclosures by exempt organizations. The IRC also authorizes the disclosure of certain exempt organization information to state officials. IRC 6104(c). Another provision of the Internal Revenue Code provides for the disclosure of redacted copies of written determinations. IRC 6110.

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**Disclosure – internal guidance**

For more information and guidance about disclosure of tax-exempt organization information, go to the IRM, at the IRS website, [The Digital Daily](#), at [www.irs.gov](http://www.irs.gov). Find the section titled “Site Map”, click on it and look for the section titled “Tax Professionals” and click on the subtitle “Internal Revenue Manual”. You can find The Communications and Liaison Division’s disclosure section in IRM 11.3.9, *Disclosure of Official Information*. You can find the Exempt Organization Division’s disclosure section in IRM 7.8.2, Chapter 49, *Publicity of Exempt Organization Information* (02/1999).

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## IRC 6104(a) and (b), The Service Discloses

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**The Service makes disclosures**

This section addresses the disclosures the Service makes in accordance with IRC 6104. We will discuss what documents pertaining to tax-exempt organizations we may disclose to the public or state charity officials. We will also discuss what documents and information we may not disclose and some of the ways the Service makes disclosures of tax-exempt organization information.

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**IRC 6104(a)(1)(A) disclosed documents - applications**

The Service is authorized to disclose tax-exempt organizations' applications to the public. When the Service makes a determination that an organization is exempt from taxation as an organization described in IRC 501(c) or (d), or is a political organization exempt from taxation under IRC 527, it makes the organization's application for recognition of exemption or notice of status along with any supporting documents open to public inspection. IRC 6104(a)(1)(A).

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**IRC 6104(a)(1)(A) - continued**

The Service will disclose any letter or document which relates to an application that is open to public inspection, including:

1. Favorable rulings and determination letters issued in response to applications for tax exemption,
2. Technical advice memoranda issued with respect to an approved, or subsequently approved, application for tax exemption, and
3. Letters issued in response to an application for tax exemption that propose a finding that the organization is not entitled to be exempt from tax, if the organization is subsequently determined, on the basis of the application, to be exempt from tax.

Reg. 301.6104(a)-1(b)

We may also provide a statement that:

1. Describes the subsection and paragraph under which an organization qualifies for exemption from taxation, and
2. States whether an organization is currently recognized as a tax-exempt organization.

Reg. 301.6104(a)-1(f)

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## **IRC 6104(a) and (b), The Service Discloses, Continued**

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**IRC 6104(b)  
returns and  
reports**

The Service makes certain returns and reports filed by tax-exempt organizations available to the public. IRC 6104(b). We disclose the following documents:

1. Annual returns required in IRC 6033 that are filed by exempt organizations described in IRC 501(a), and
2. Returns filed by trusts described in IRC 4947(a)(2) or that claim charitable deductions under IRC 642(c) as required in IRC 6034.

In addition, the Service discloses reports and returns filed by political organizations:

1. Notices filed by certain political organizations as required in IRC 527(i)(1)(A),
2. Reports filed by certain political organizations as required in IRC 527(j)(2)
3. Returns filed by certain political organizations as required in IRC 6012(a)(6) and IRC 6033(g).

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## IRC 6104(a) and (b), The Service Discloses, Continued

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### Exceptions to IRC 6104(a)(1)(A)

The law contains several exceptions to these disclosure mandates. It protects certain material that a tax-exempt organization submits during the application process, including confidential business information and national defense information. It also protects information about a tax-exempt organization's contributors that is contained in its annual returns.

**Confidential Business Information.** If we receive a request from an organization to withhold certain business information from its application materials or related supporting papers, and we make a determination that public disclosure of the information would adversely affect the organization, we will withhold it. The type of business information we withhold includes any trade secret, patent, process, style of work or apparatus of the tax-exempt organization. IRC 6104(a)(1)(D). Anyone can find the procedures for filing a request to withhold confidential business information in the Regulations. Reg. 301.6104(a)-5(a)(1).

**National Defense Material.** We may not disclose any information a tax-exempt organization submits when we determine that disclosure would adversely affect national defense. IRC 6104(a)(1)Reg. 301.6104(a)-5(a)(2)

Work with your disclosure officer to make a proper determination as to what information may be disclosed and what must be withheld. IRM 11.3.9.1(6).

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### Exceptions to IRC 6104(b)

We may not disclose any information, which may identify a tax-exempt organization's contributors. Specifically, we do not disclose a contributor's name and address. In addition, if any other information may possibly identify a contributor, we do not disclose it. For example, the amount of a contribution may appear to be disclosable, but if it can reasonably be expected to identify a certain contributor, do not disclose it. Reg. 301.6104(b)-1(b)(2).

**Note:** This exception to the rule of nondisclosure does not apply in the case of private foundations and IRC 527 organizations. The list of contributors attached to their returns is disclosable.

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## IRC 6104(a) and (b), The Service Discloses, Continued

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**How Does the Service Disclose – the Internal Revenue Bulletins and the Cumulative Bulletin**

The Service discloses tax-exempt organization documents and information in many ways. First, it makes announcements in the Internal Revenue Bulletins and the Cumulative Bulletin

Under Notice 92-28, 1992-C.B. 515, the Service provides notice in the Internal Revenue Bulletin of the exemption rulings issued by the Exempt Organizations Technical Division. The Internal Revenue Service publishes the Internal Revenue Bulletin weekly. These bulletins are reorganized every six months by Code section and published in the Cumulative Bulletin.

Any member of the public can obtain copies of Internal Revenue Bulletins by writing to:

Superintendent of Documents  
U.S. Government Printing Office  
Washington, D.C. 20402-9325

or calling 202-512-1800.

Anyone can also locate and download the most recent Internal Revenue Bulletins on the IRS website, The Digital Daily, at [http://www.irs.gov/bus\\_info/bullet.html](http://www.irs.gov/bus_info/bullet.html)

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## IRC 6104(a) and (b), The Service Discloses, Continued


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### The Service discloses – Pub 78

The Service publishes Publication 78, *Cumulative List of Organizations*, which is a list of organizations that are eligible to receive tax-deductible contributions. This pub also lists the percentage of the contribution that is deductible. It also will only list an organization by its legal name. Any member of the public can find searchable and downloadable versions of Pub 78 on The Digital Daily, the IRS website, at <http://www.irs.gov/exempt/display/0,,i1%3D3%26genericId%3D6873,00.html>

Anyone can also get a subscription for Publication 78 by writing to the:

Superintendent of Documents  
Government Printing Office  
Washington, D.C. 20402.

**Caution!** Not all eligible organizations are listed in Publication 78. It does not list organizations that are not required to apply to the IRS for recognition of exempt status and organizations that are not required to or do not file a return for two years. Publication 78 also does not separately list subordinate organizations of central organizations such as posts, legions, or chapters. It only lists the central or parent organization  will also only list an organization by its legal name.

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### The Service discloses – Customer Account Services

Exempt Organizations Customer Account Services (CAS) stands ready to answer technical and procedural questions about charities and other non-profit organizations for any member of the public. Anyone may call them at 1-800-829-5500 (for TTY/TDD help, call 1-800-829-4059). The call center is open 8:00am to 6:30pm Eastern Standard Time. If someone asks whether an organization is listed in Publication 78, the Service will send a reply within 10 days. The public may also write to CAS at:

Internal Revenue Service  
TE/GE Division, Customer Service  
P.O. Box 2508  
Cincinnati, OH 45201

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## IRC 6104(a) and (b), The Service Discloses, Continued

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**The Service discloses – the Business Master File**

The Service also discloses tax-exempt organization data contained in its database, the Business Master File (BMF), to any member of the public. Go to the IRS website, The Digital Daily, at [www.irs.gov](http://www.irs.gov), find the section titled “Charities & Non-Profits”, click on it, and go to “Tax Stats” to see the many different downloads available. The website also contains instructions for downloading and using the data available there.

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**The Service discloses – individual requests**

The Service will respond to individual requests from any member of the public for inspection of or copies of applications with the supporting documents and/or annual returns submitted by tax-exempt organizations. Generally, a person can request these documents by filing Form 4506-A, *Request for Public Inspection or Copy of Exempt or Political Organization IRS Form*. Anyone can use this form to request to inspect or obtain copies of Form 1023, or Form 1024, Forms 990, 990-EZ, or 990-PF, or Form 1120-POL, Forms 8871 and 8872. The public can find Form 4506-A and its instructions on the IRS website, The Digital Daily at [www.irs.gov](http://www.irs.gov). Go to the section titled “Site Map”, then go to the section titled “Forms and Publications”.

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## IRC 6104(a) and (b), The Service Discloses, Continued

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### The Service discloses - CDs

We recently announced that we now offer to anyone making a written request, CDs, for a fee, that contain the scanned images of Forms 990, 990-EZ and 990-PF filed by tax-exempt organizations described in IRC 501(c)(3), for the years 2000, 2001 and 2002. We also offer CDs, for a fee, that contain the scanned images of Form 990-PF for calendar years 1999, 2000, 2001 and 2002. We provide CDs by the state (quarterly) and/or on a monthly basis.

A requestor must send a written request for the CDs to the following address:

Internal Revenue Service  
P.O. Box 9941  
Stop 6716  
Ogden, UT 84409

Fax: (801) 620-7896

The request must contain the following information:

- Organization name
- Requestor name
- Requestor's mailing address
- Requestor's telephone number and extension
- Requestor's fax number
- UPS number
- Description of the order

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### Proposed Legislation

In the summer of 2002, Congress was considering the proposed *Charity Aid, Recovery and Empowerment (CARE) Act of 2002*, which contained a requirement that the IRS notify the public that the Forms 990, 990-EZ and 990-PF are publicly available. The CARE Act was still under consideration by Congress when this article was submitted for publication. Stay tuned for further developments.

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## IRC 6104(c) – The Service Makes Notification and Disclosure to State Officials

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### Current law

When Federal and State charity regulators work together, we can often realize measurable efficiencies. State charity officials safeguard charitable assets, monitor charitable solicitations, register fundraisers and investigate consumer complaints about charities. While we have differing responsibilities, we share oversight of the charitable sector.

For decades, Federal and State tax officials have participated in an information exchange program. IRC 6103(d). However, another Code section specifically allows the Service to make certain notifications and disclosures to State agencies that regulate charitable organizations. IRC 6104(c). Under this Code section, the IRS automatically notifies the Attorney General and the principal tax officer of each State when it has taken certain final adverse actions against tax-exempt organizations. Reg. 301.6104(c)-1(a)(1). We make automatic notification when:

1. An organization is refused recognition as an organization described in IRC 501(c)(3);
2. An organization has been operated in such a manner that it will not, or will no longer be recognized as meeting the requirements for exemption under 501(c)(3); or when
3. A deficiency of tax is assessed under IRC 507 or chapter 41 or 42.

After they receive notification of the final adverse action, State attorneys general and State tax officials can make a request to inspect the material related to the adverse action. Reg. 301.6104(c)-1(b)(3) and 301.6104(c)-1(c). For a list of information that will not be made available, see Reg. 301.6104(c)-1(b)(3)(ii).

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### Other State officials may apply

State officers, other than the State attorney general and the State tax official, may request automatic notification (and rights to inspect the related material) of these final adverse actions if they follow certain application procedures. Generally, they must present a letter from the Attorney General of their state which sets forth the functions and the authority of the State officer under State law, and which contains sufficient facts for the IRS to make a determination that they are an official entitled to receive the information. Reg. 301.6104(c)-1(a)(2) contains specific application directions.

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## IRC 6104(c), The Service Makes Notification and Disclosure to State Officials, Continued

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### The Service works hard to share resources with State charity officials

A few years ago, we designated a Rulings and Agreements person as a State charity liaison and instituted an ongoing program to enhance cooperative efforts and share resources with State charity officials. Since then, we initiated and implemented many successful new projects and plan many more. Here are some examples:

- **Expedited response to requests.** The Service installed procedures so that we can make an expedited response when a state charity official requests copies of tax-exempt organizations' disclosable applications and annual returns. For example, after September 11, 2001, the Service made a speedy response to the New York Attorney General's request for copies of all of the applications submitted by charities that were created to respond to the tragedy.
- **Readily available resource.** State charity officials have frequently contacted our liaison to:
  - Speak to a tax law specialist,
  - Ask general questions about IRS policies and operations,
  - Ask for help finding data or information,
  - Share information about trends, or
  - Offer suggestions for new joint opportunities.
- **Joint training opportunities.** In July, 2001, State charity officials and Exempt Organizations employees jointly produced and participated in the Car Donation Interactive Video Training (IVT) program. State charity officials regularly attend our IVT programs.
- **Joint publications.** We are working with State charity officials to jointly publish materials. For example, on December 3, 2001, we issued a joint press release about car donations.
- **CDs of annual returns.** The Service makes CDs of annual returns that tax-exempt organizations file with the Service available to State charity officials at no cost.

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## **IRC 6104(c), The Service Makes Notification and Disclosure to State Officials, Continued**

**Proposed  
CARE  
Legislation**

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Under the proposed *Charity Aid, Recovery, and Empowerment (CARE) Act of 2002*, which was being considered by Congress at the time these materials were submitted for publication, the Service would be authorized to disclose additional information about tax-exempt organizations to State charity officials. The CARE Act was still under consideration by Congress at the time this article was submitted for publication. Stay tuned for further developments.

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## IRC 6104(d) – Tax-Exempt Organizations Disclose

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### Overview of IRC 6104(d) Disclosures by tax-exempt organizations

IRC 6104(d) addresses the disclosures that tax-exempt organizations must make. We will discuss:

- The documents that a tax-exempt organization must disclose in response to a request for information;
  - The manner of disclosing these documents;
  - The manner of providing copies and conditions that may be placed on in-person or written requests for copies of the documents; and the amount, form, and time of payment of any fees a tax-exempt organization may charge for the copies;
  - How an organization can make its application for tax exemption and annual information returns “widely available”;
  - The penalties for failure to comply with disclosure requirements; and
  - The standards that apply in determining whether a tax-exempt organization is the subject of a harassment campaign and the procedures for obtaining relief.
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### IRC 6104(d) disclosed documents

The Internal Revenue Code and the regulations describe the documents that all tax-exempt organizations, including tax-exempt IRC 527 political organizations, must disclose. Reg. 301.6104(d)-1(b)(3) and (4) and IRC 6104(d)(1)(A)(i),(ii),and (iii). Generally, tax-exempt organizations must disclose applications for recognition of exemption and annual information returns. Tax-exempt IRC 527 political organizations must disclose more:

- The notice of status, Form 8871, *Political Organization Notice of Section 527 Status*. See IRC 527(i),
- The periodic report, Form 8872, *Political Organization Report of Contributions and Expenditures*. See IRC 527(j), and
- Their annual returns, Form 1120 POL, *U.S. Income Tax Return for Certain Political Organizations* and Form 990, *Return of Organization Exempt From Income Tax*. See IRC 6012(a)(6) and 6033(g), respectively. IRS Fact Sheet, FS-2002-11, issued May 11, 2002.

Tax-exempt organizations must also respond to a request for parts of their disclosable annual information returns and application for recognition of exemption. The requestor must specifically identify the requested part or schedule. Reg. 301.6104(d)-1(d)(2)(ii)(B).

Tax-exempt organizations are also required to make their amended returns available for public inspection and copying beginning on the date the returns are filed. Reg. 6104(d)-1.

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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### Applications for recognition of exemption

The phrase “application for recognition of exemption” encompasses many different types of documents. Reg. 301.6104(d)-3(b)(3)(i) It describes:

- Form 1023, *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*;
- Form 1024, *Application for Recognition of Exemption Under Section 501(a)*;
- All documents and statements the Service requires an applicant to file with the form;
- Any statement or other supporting document submitted by an organization in support of its application (for example, a legal brief supporting an application, or a response to questions from the Service during the application process); and
- Any letter or other document issued by the Service concerning the exemption application (such as a favorable determination letter or a list of questions from the Service about the application).

Some organizations, such as IRC 501(d) apostolic or religious organizations, do not use an IRS form such as Form 1023 or 1024 to file for recognition of exemption. Their applications would include the:

- Application letter, articles of incorporation, declaration of trust, or other similar instrument that sets forth the permitted powers or activities of the organization;
- Bylaws or other regulatory code;
- Statements describing the character of the organization, the purpose for which it was organized, and its actual activities;
- Latest financial statements showing assets, liabilities, receipts and disbursements;
- Statements showing the sources of its income and receipts and their disposition; and
- Other statements or documents the Service required it to file with the application or that it submitted in support of its application letter.

Reg. 301.6104(d)-3(b)(3)(ii)(A)-(F).

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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**Applications  
excepted from  
disclosure**

A tax-exempt organization is not required to disclose the following application materials:

- An exemption application for tax exemption filed by an organization that has not yet been recognized;
  - Any application for tax exemption the organization did not have on hand as of July 15, 1987; Reg. 301.6104(d)-3(b)(3)(iii)(A)-(C)
  - Any material not open to public inspection under IRC 6104 and 6110 and material not open to public inspection because of certain circumstances such as a harassment campaign. Reg. 301.6104(a)-1(i) and Reg. 301.6104(d)-3
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**Disclosable  
annual returns**

Generally, a disclosable annual return is an exact copy of any return a tax-exempt organization files with the Service in accordance with IRC 6033. Many different types of returns are disclosable annual returns. Some examples are:

- Form 990, *Return of Organization Exempt From Income Tax*
- Form 990-PF, *Return of Private Foundation*
- Form 990-EZ, *Short Form Return of Organization Exempt from Income Tax*
- Form 990-BL, *Information and Initial Excise Tax Return for Black Lung Trusts and Certain Related Persons*
- Form 1120 POL, *U.S. Income Tax Return for Certain Political Organizations*
- Form 1065, *U.S. Partnership Return of Income*, filed by recognized IRC 501(d) organizations.

The word “Return” generally includes all schedules, attachments and supporting documents filed with the return, and any amended returns.

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**Schedule B is  
partially  
disclosable**

Tax-exempt organizations report information about contributors and the contributions they receive during the year on Schedule B. The names, addresses and any other information that can identify a contributor is not disclosable. Reg. 301.6104(b)-1(b)(1) and (2).

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**Annual returns  
excepted from  
disclosure.**

The following returns are not disclosable:

- Form 990-T, *Exempt Organization Business Income Tax Return*
  - Schedule A of Form 990-BL, *Information and Initial Excise Tax Return for Black Lung Trusts and Certain Related Persons*
  - Schedule K-1 of Form 1065, *U.S. Partnership Return of Income*, filed by recognized IRC 501(d) organizations.
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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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**Disclose for a limited time only**

Tax-exempt organizations are required to keep an annual return available for public inspection and copying for three years after date the return is required to be filed or is actually filed, whichever is later. IRC 6104(d)(2)

If an organization files an amended return, however, the amended return must be made available for a period of 3 years beginning on the date it is filed with the Service. Reg. 301.6104(d)-1(b)(4)(iii)

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**In-person disclosure requests – general rules**

A tax-exempt organization must make its disclosable documents available for public inspection at its principal, regional, or district offices during regular business hours. During an inspection, the tax-exempt organization may have an employee present in the room. The tax-exempt organization must allow the individual making the inspection to take notes freely and to make a photocopy of the documents for a reasonable fee. However, if the individual provides his/her own photocopying equipment, the organization must allow him/her to photocopy the documents without charge. Reg. 301.6104(d)-1(c). See also the “Widely Available” rules below.

While the tax-exempt organization must make its documents available for public inspection without charge, if the requestor asks for copies of the documents, it may charge a reasonable fee for the copies. The organization may ask for payment before the copies are turned over to the requestor. It must accept cash and money order payments and may accept credit card, personal check and other types of payment. Reg. 301.6104(d)-(3)(ii)(A)

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**No permanent offices or limited office hours**

A tax-exempt organization that does not maintain a permanent office must permit public inspection of the requested documents within a reasonable amount of time after it receives a request for inspection (normally not more than two weeks). It must permit public inspection at a reasonable location of its choice and at a reasonable time of day. Alternatively, the tax-exempt organization may choose to mail a copy of the requested documents to the requester within two weeks after it receives the request. It may charge the requester for copying and actual postage costs only if the requestor consents to the charge prior to the mailing. A tax-exempt organization that has a permanent office, but has no office hours or has very limited hours during certain times of the year, must respond to requests made during those periods when office hours are limited or not available as though it were an organization without a permanent office. Reg. 301.6104(d)-1(c)(2)

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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### Unusual circumstances

Generally, a tax-exempt organization must respond to an in-person request for copies of disclosable documents on the same day of the request. If, due to unusual circumstances, it cannot provide the documents on the same day, it must provide them no later than the next business day following the day the unusual circumstances cease to exist or the fifth business day after the day of the request, whichever occurs first. Some examples of unusual circumstances are when:

- A high volume of requests exceeds the tax-exempt organization's capacity to make copies.
- The request is made shortly before the end of regular business hours and it requires an extensive amount of copying.
- The request is made on a day when the tax-exempt organization's staff that would be charged with fulfilling the request are conducting special duties such as student registration, tallying (on election day) election projections, or attending an off-site meeting.

Reg. 301.6104(d)-1(d)(1)(ii)

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### Responding agent

A tax-exempt organization may retain a local agent, within reasonable proximity of the applicable principal, regional or district office, to process in-person requests for copies of its documents. The agent must provide the copies to the requestor within the same time limits and under the same conditions that apply to the tax-exempt organization. When an individual makes an in-person request for copies of the documents, the tax-exempt organization must immediately provide the name, address, and telephone number of its local agent. It is not required to respond further. However, if the agent fails to respond to the request, the responsible person of the organization may become liable for penalties for failure to comply with the requirements of IRC 6104(d) under IRC 6652(c)(1)(C), (D) and IRC 6685. Reg. 301.6104(d)(1)(iii)

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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**Written requests for copies**

A tax-exempt organization must respond to a written request for copies of its disclosable documents in accordance with IRC 6104(d). The requestor must:

- Address and deliver the request by mail, electronic mail (e-mail), facsimile (fax), or a private delivery service (as defined in IRC 7502(f)) to its principal, regional or district office; and
- Set forth the address to which the copy of the documents should be sent. Reg. 301.6104(d)-1(d)(2)(i).

The tax-exempt organization must provide the copies within 30 days from the date it receives the request. If it requires payment for the requested documents in advance, it must provide the documents 30 days from the date it receives the payment. The organization must accept certified checks, money orders, personal checks and credit card payments and may accept other types of payment. Reg. 301.6104(d)-1(d)(3)(ii)(B).

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**Deemed dates of receipt and delivery**

In the absence of contrary evidence, a mailed request or a payment for documents is deemed to be received by the tax-exempt organization seven days after the date of the postmark. When a requestor e-mails or faxes the request to the organization, it is considered received the day it is successfully transmitted. Copies are deemed to be delivered by the tax-exempt organization on the date of the postmark (or private delivery mark, or if sent by certified mail or registered mail, the date of registration or the date of the postmark on the sender's receipt). Reg. 301.6104(d)-1(d)(2)(ii)(A).

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## **IRC 6104(d), Tax-Exempt Organizations Disclose, Continued**

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### **Regional and district offices**

A tax-exempt organization's regional or district offices must satisfy the same rules and regulations for disclosure as its principal office. However, they have until thirty days after the date the annual return is required to be filed (including the extension) or is actually filed, whichever is later, to make the annual return available for public inspection.

An office is a regional or district office of a tax-exempt organization if it is not the principal office and:

- Has paid part-time or full-time employees, and
- Normally pays an aggregate number of at least 120 hours.

Reg. 301.6104(d)-1(b)(5)(i).

An office is not a regional or district office of a tax-exempt organization if:

- It only provides services at the site which further the organization's exempt purpose; and
- It does not serve as an office for management staff other than managers involved solely in managing the exempt function activities at the site.

Reg. 301.6104(d)-1(b)(5)(ii).

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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### Local or subordinate organizations

A tax-exempt organization's local or subordinate organization, covered by a group exemption letter, must also respond to requests for disclosable documents. It must make available, for public inspection and copying, the following:

- The application for recognition of exemption submitted to the Service by its parent or central organization to obtain the group exemption letter,
- Any additional documents submitted to bring the subordinate organization under the group exemption letter. If the parent or central organization provides the Service a list or directory of subordinate organizations covered by the group exemption letter, the local or subordinate need only provide the exemption application and the pages of the list or directory that specifically refer to it, and
- The parent or central tax-exempt organization's annual information returns, if the local or subordinate organization does not file its own annual information return. If the group information return includes separate schedules for each subordinate organization, a subordinate organization may omit those schedules relating only to the other subordinate organizations.

Local or subordinate organizations must respond to an in-person request for inspection or copying of its disclosable documents within a reasonable amount of time (normally not more than two weeks). They may mail copies and charge for copying and postage costs (if the requestor agrees beforehand), instead of providing for personal inspection.

The requestor can choose to direct the request for the inspection or copying of a local or subordinate's disclosable documents to the parent or central organization. The parent or central organization must respond as if it received the request for its own disclosable documents as specified in Reg. 301.6104(d)-1(c) and (d). Reg. 301.6104(d)-1(f).

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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**“Widely available”**

A tax-exempt organization is not required to respond to requests for copies of its disclosable documents if it has made them “widely available”. It can make its documents widely available by posting them on a World Wide Web page that it establishes and maintains or, as part of a database of similar documents of other tax-exempt organizations that another entity establishes and maintains. Reg. 301.6104(d)-2. A document is “widely available” if:

- the World Wide Web page states clearly that the document is available and provides downloading instructions,
- the organization posts the document in a format that exactly reproduces the image of the document as it was originally filed with the Internal Revenue Service, except for information permitted to be withheld, and
- any individual with Internet access can download, view and print the document without special computer hardware or software that is not readily available and without payment of a fee to the entity that maintains the World Wide Web page. Portable Document Format (pdf) currently meets these criteria. Ann. 99-62, June 21, 1999, 1999-25 I.R.B. 13.

In order to continue to meet the “widely available” rules, the entity that maintains the World Wide Web page must have procedures that ensure the reliability and accuracy of the posted documents. It must take reasonable precautions to prevent alteration, destruction or accidental loss of the posted documents. If the posted document is altered, destroyed or lost, the entity must replace it. Reg. 301.6104(d)-2(b)(2)(iii).

The tax-exempt organization must notify the requestor where the documents are available (i.e., the website address). If the request is made in-person, the organization must immediately provide notice. If the request is made in writing, the organization must provide notice within seven days of receiving the request. Reg. 301.6104(d)-2(d).

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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**“Widely available” – other methods**

The law does not prescribe any other methods of making disclosable documents “widely available” besides posting them on the World Wide Web. Political organizations, described in IRC 527, file some of their documents electronically with the IRS. Anyone can locate these documents at the IRS website [www.irs.gov/polorgs](http://www.irs.gov/polorgs). The documents posted at this website meet the definition of “widely available”. 2000-44 I.R.B. 430; 2000-2 C.B. 430; Rev. Rul. 2000-49 and Reg. 301.6104(d)-3.

Note: Although the Guidestar website ([www.guidestar.com](http://www.guidestar.com)) provides public access to many disclosable documents that are filed with the Internal Revenue Service, a tax-exempt organization may not meet the “widely available” rules simply by providing Guidestar’s website address.

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**Penalties for failure to disclose**

A responsible person that fails to comply with the disclosure requirements of IRC 6104(d) may be liable for these penalties:

- IRC 6652(c)(1)(C) – Public Inspection of Annual Returns and Reports.
- IRC 6652(c)(1)(D) – Public Inspection of Applications for Exemption and Notice of Status.
- IRC 6685.

A tax-exempt organization’s responsible person is its officer, director, trustee, employee or any other individual who is under a duty to meet the disclosure requirements of IRC 6104(c). IRC 6652(c)(4)(C)

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**Penalty for failure to disclose annual returns and reports**

This section imposes a penalty for failure to comply with the disclosure requirements of IRC 6104(d) and to allow public inspection of the tax-exempt organization’s disclosable annual returns and reports. The person who fails to meet these requirements must pay \$20 a day for each day the failure continues. The law limits the penalty to a maximum of \$10,000 on all persons with respect to any one return or report. IRC 6652(c)(1)(C)

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**Penalty for failure to disclose application**

This section imposes a penalty for failure to comply with the disclosure requirements of IRC 6104(d) and to allow public inspection of the tax-exempt organization’s disclosable application for exemption and notice of status. The person who fails to meet these requirements must pay \$20 a day for each day the failure continues. IRC 6652(c)(1)(D)

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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**Penalty for willful failure to disclose**

This section imposes a penalty for failure to comply with the disclosure requirements of IRC 6104(d) and to allow public inspection of the tax-exempt organization's disclosable application for exemption and notice of status. The person who willfully fails to meet these requirements must pay a penalty of \$5,000 with respect to each return or application. IRC 6685

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**Harassment campaigns – general**

The law provides some relief for a tax-exempt organization that becomes the subject of a harassment campaign. The relief is available only if the organization first requests and receives a harassment determination letter from the Service. The Exempt Organizations Technical office is currently responding to such requests. After the requests are received by an IRS Area Office as described below, the Service analyzes:

- If there is a harassment campaign, and
  - Whether compliance with the requests would not be in the public interest.
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**Harassment - defined**

A group of requests may constitute a harassment campaign if the relevant facts and circumstances indicate that the requests are part of a single coordinated effort to disrupt the operations of the tax-exempt organization. Reg. 301.6104(d)-3(b). In order to qualify as the subject of a "harassment campaign", a tax-exempt organization must first receive a group of requests for its disclosable documents. The regulations do not quantify how many or how few requests constitute a "group of requests" or specify the time period over which a "group of requests" is measured. However, they do include four examples that provide guidance. Reg. 301.6104(d)-3(f).

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**Special rule**

Exempt organizations may disregard requests in some situations. The regulations specifically state that a tax-exempt organization may disregard any request for copies of all or part of an exemption application or annual information returns beyond the first two requests received within any 30-day period or the first four requests received within any one-year-period from the same individual or from the same address. The organization may follow this rule regardless of whether the IRS office has determined that it is the subject of a harassment campaign. Reg. 301.6104(d)-3(c).

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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### Indirect “harassment” is not harassment

The harassment must flow directly from the requests. The fact that a request or compliance with a request causes a negative effect is not harassment within the meaning of the regulations. For example, a union in negotiation with a tax-exempt employer might request a copy of its annual return. The union may find the information reported on the return helpful in the negotiations. This request is not a harassment campaign within the meaning of IRC 6104(d). Similarly, an individual might request an organization’s application for recognition of exemption and the supporting documents because they wish to change board policy. The disclosure may cause an effect on or a failure to effect board policy. This result also does not describe a harassment campaign within the meaning of the regulations. Each case rests on its particular facts and circumstances.

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### Facts and circumstances that indicate harassment

Some facts and circumstances which indicate that an organization is the subject of a harassment campaign include:

- A sudden increase in the number of requests;
- An extraordinary number of requests made through form letters or similarly worded correspondence;
- Evidence of a purpose to significantly deter the organization’s employees or volunteers from pursuing the organization’s exempt purpose;
- Requests that contain language hostile to the tax-exempt organization;
- Direct evidence of bad faith on the part of the organizers of the purported harassment campaign;
- Evidence that the tax-exempt organization has already provided the requested documents to a member of the purported harassing group; and
- A demonstration by the tax-exempt organization that it routinely provides copies of its documents upon request.

The regulations suggest that one indicator is not determinative of a harassment campaign. See example 2 in Reg. 301.6104(d)-3(f).

Note: A tax-exempt organization can avoid responding to requests for copies simply by posting its application for recognition of exemption and its annual information returns on the World Wide Web in a manner that would demonstrate that they are “widely available” as described before.

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## IRC 6104(d), Tax-Exempt Organizations Disclose, Continued

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### **Request for a harassment determination letter - procedures**

A tax-exempt organization may apply for a determination that it is the subject of a harassment campaign by submitting a signed application to the IRS Exempt Organization Area Office where its principal office is located. The application must contain the following:

- A written statement giving the organization's name, address, and employer identification number,
- The name, address and telephone number of the person to contact regarding the application, and
- A detailed description of the facts and circumstances that the organization believes supports a determination that it is the subject of a harassment campaign.

A tax-exempt organization may suspend compliance with any request it receives if it reasonably believes it is part of a harassment campaign, provided that it files the application within ten business days from the first day of suspension. The organization may continue suspension until it receives a response from the Service. Reg. 301.6104(d)-3(d).

If the Service determines that the tax-exempt organization is the subject of a harassment campaign and it is not in the public interest to require that the organization continue to respond to the disclosure requests, then the organization is not required to comply with requests that it reasonably believes are part of the campaign. The Service may impose other terms and conditions.

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### **Suspension of penalties**

The Service will suspend the assessment of penalties under IRC 6652(c)(1)(C) and (D) and 6685 while it considers a reasonable request for a harassment campaign determination. If the Service makes a determination that the tax-exempt organization is not the subject of a harassment campaign, it must fulfill the requests for disclosure.

In addition, if the Service determines that the tax-exempt organization did not have a reasonable basis for requesting a determination that it is the subject of a harassment campaign or a reasonable belief that a particular request was part of a harassment campaign, the responsible person remains liable for any penalties that result from failing to provide the copies of the requested documents in a timely fashion. For example, an organization would find it difficult to show it had a reasonable basis for a determination request if only one individual made one request for a disclosable document. Reg. 301.6104(d)-3(e). For specific examples, see Reg. 301.6104(d)-3(f).

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## IRC 6110 – The Service Discloses Written Determinations

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**General statement of law**

IRC 6110(a) opens the text of written determinations for public inspection. When a written determination becomes available for public inspection, we disclose the related ‘background file documents’ only in response to written requests. IRC 6110(e). The law provides exceptions to this general disclosure mandate. The most important exception protects the identity of the taxpayer that is the subject of the written determination.

- We delay making technical advice and chief counsel advice memoranda involving civil fraud, criminal investigations, jeopardy and termination assessments available for public inspection until the underlying matter is closed. IRC 6110(g)(5)(A).
- The regulations require written requests for the disclosure of written determinations relating to the adoption of, or changes in, accounting methods or periods. IRC(g)(5)(B).

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**“Written determination”**

The phrase “written determinations” includes these tax-exempt organization documents:

- **A ruling** - is a written statement issued by the Exempt Organizations Technical office to a taxpayer or his or her authorized representative. Reg. 301.6110-2(d). It generally recites the relevant facts, sets forth the applicable provisions of the law and interprets and applies the law to the taxpayer’s specific set of facts. Rev. Proc. 2002-4, 2002-1 I.R.B. 127, 132.
- **A determination letter** - is a written statement issued by the Exempt Organization Determinations office, or in certain cases, Exempt Organizations Technical office, which applies principles and precedents previously announced to a specific set of facts. Reg. 301.6110-2(e). It is issued only when a determination can be made based on clearly established rules in the statute, tax treaty, regulations, or can be based on a conclusion in a revenue ruling, opinion, or court decision published in the Internal Revenue Bulletin. Rev. Proc. 2002-4, 2002-1 I.R.B. 127, 132.
- **A technical advice memorandum (TAM)** - is advice or guidance issued by the Exempt Organizations Technical office in response to a request from an Exempt Organizations Examinations Area Manager, Determinations Manager, or Appeals Area Director. The TAM must be issued in response to a technical or procedural question that develops during any proceeding on the interpretation and proper application of tax law, tax treaties, regulations, revenue rulings, notices or other precedents published by the Exempt Organizations Technical office, to a specific set of facts. Rev. Proc. 2002-5, 2002-1 I.R.B. 173.

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## IRC 6110 – The Service Discloses Written Determinations, Continued

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### “Background file document”

When a written determination becomes available for public inspection, we also disclose the related background file; but only in response to a written request. IRC 6110(e) The phrase “Background File Document” includes:

- The request for the written determination;
- Any written material submitted in support of the request; and
- Any communication (written or otherwise) between the Service and persons outside the Service in connection with the written determination.

The phrase “background file document” **does not** include any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation. We are not authorized to disclose letters, rulings, and determinations unrelated to an organization’s tax-exempt, private foundation or public charity status. IRC 6110.

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### Exceptions to IRC 6110

We do not disclose certain issuances under IRC 6110 disclosure requirements. Reg. 301.6110-2(a) Some examples are:

- Opinion letters
- Information letters
- Technical **assistance** memoranda

Other sections of the Code and Regulations clarify:

- IRC 6110 does not apply to matters to which IRC 6104 applies.
  - Information arising under treaty obligations is not disclosable. IRC 6105.
  - Closing agreements along with any similar agreements, any background information related to the agreement and any requests for such agreements are not disclosable. IRC 6110(b)(1)(B) and 6103(b)(2)(D)
  - Advance pricing agreements entered into by the taxpayer and the Service and any background information related to the agreement or any application for an advance pricing agreement are not disclosable. IRC 6110(b)(1)(B) and 6110(b)(2)(C).
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## **IRC 6110 – The Service Discloses Written Determinations,**

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### **Deletion of identifying details**

Before we release written determination or background file documents, we must protect certain types of information. First, we must redact names, addresses and identifying numbers of the person about whom the determination pertains as well as any other person. We also must redact any other identifying details. An identifying detail is any information that would permit a person generally knowledgeable with respect to the appropriate community to identify any person.

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### **Communications from third parties**

The regulations require the IRS or Office of Chief Counsel to make a record of all written, telephonic or meeting communications received from any person other than a person about whom the written determination pertains prior to issuing a written determination. Reg. 301.6110-4. We should make a notation of the date and the category of the person making the communication. Any person can make a disclosure request for the name of any person about whom such a notation is made. However, we are not required to make this type of notation when we receive a communication from:

- IRS employees and the Office of Chief Counsel,
  - Chief of Staff of the Joint Committee on Internal Revenue Taxation,
  - The Department of Justice with regard to a pending civil or criminal case or investigation, or
  - Another government agency in response to a request from the IRS to such agency for expert assistance.
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### **Deletions of other information**

We also redact the portion of disclosable documents that contain:

- Information that is specifically mandated to be kept secret by an Executive order because it is in the interest of national defense or foreign policy and it is properly classified,
  - Information specifically exempted from disclosure by statute, such as IRC 6103,
  - Trade secrets and confidential commercial or financial information. Data meets the definition of “trade secret” for this purpose if it is not generally known to the public or in the trade or business, Reg. 301.6110-3(4)(B)(ii)
  - Information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Personal privacy information is sensitive information that a reasonable person would not reveal to the public under ordinary circumstances such as a pending divorce, medical treatment, adoption, or amount of a gift. If the potential harm caused by the disclosure of the personal information outweighs any public interest purpose, recognizing that the person is unidentified, a clearly unwarranted potential invasion of personal privacy exists.
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## **IRC 6110 – The Service Discloses Written Determinations,** Continued

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**An anomaly –  
Some written  
determinations  
are not  
disclosable  
under either  
IRC 6110 or  
IRC 6104.**

Some written determinations pertaining to tax-exempt organizations are not disclosable under either IRC 6110 or IRC 6104 and are protected by IRC 6103. Here is why. IRC 6110(l)(1) provides, in relevant part, that the disclosure provisions of IRC 6110 do not apply to any matter to which IRC 6104 applies. This means that IRC 6110 does not apply to written determinations for which the determination of whether public inspection should occur is made pursuant to IRC 6104. Reg. 301.6110-1(a).

The Regulation goes on to say that, ‘ . . . Matters within the ambit of section 6104 include:

- Any application filed with the Internal Revenue Service with respect to the qualification or exempt status of an organization, plan, or account described in section 6104(a)(1), . . .
- Any document issued by the Internal Revenue Service in which the qualification or exempt status of an organization, plan or account described in section 6104(a)(1) is granted, denied or revoked or the portion of any document in which technical advice with respect thereto is given to an [area manager],
- The portion of any document issued by the Internal Revenue Service in which is discussed the effect on the exempt status of an organization described in section 6104(a)(1) of proposed transactions by such organization, and
- Any document issued by the Internal Revenue Service in which is discussed the qualification or status of an organization described in section 509(a) or 4942(j)(3), but not including any document issued to nonexempt charitable trusts described in section 4947(a)(1).’

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*Continued on next page*



## IRC 6110 – The Service Discloses Written Determinations,

Continued

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### **An anomaly – continued – IRC 6104 regulations**

The IRC 6104 regulations refer to the IRC 6110 regulations and then go on to state that some determination letters and other documents relating to tax exempt organizations that are not open to public inspection under section 6104(a)(1)(A) and this section are nevertheless within the ambit of section 6104 for purposes of section 6110. These determination letters and other documents are therefore not available for public inspection under either section 6104 or section 6110. They include, but are not limited to:

- (1) Unfavorable rulings or determination letters,
- (2) Rulings or determination letters revoking or modifying a favorable determination letter,
- (3) Technical advice memoranda relating to a disapproved application for tax exemption or the revocation or modification of a favorable determination letter,
- (4) Any letter or document filed with or issued by the Internal Revenue Service relating to whether a proposed or accomplished transaction is a prohibited transaction under section 503, and
- (5) Any letter or document filed with or issued by the Internal Revenue Service which, although it relates to an organization's tax exempt status as an organization described in section 501(c) or (d), does not relate to that organization's application for tax exemption, within the meaning of paragraph (d).

Reg. 301.6104(a)-1(i)

Very recently, a U.S. District court ruled that rulings that deny or revoke an organization's tax exempt status are exempt from FOIA disclosure because they are return information under IRC 6103. The court agreed with the IRS interpretation of IRC 6110 which, “. . . specifically mandate(s) that sections 6110 and 6104 do not apply to EO revocation or denial rulings.” *Tax Analyst v. IRS*, No. 00-2914 (D.D.C., 2002)

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### **Proposed Legislation**

Under the proposed *Charity Aid, Recovery, and Empowerment (CARE) Act of 2002*, Congress is considering the 6110/6104 anomaly. The CARE Act would require the disclosure, in accordance with IRC 6110, of documents that are not required to be disclosed by section 6104(a)(1)(A), but that are within the scope of section 6104 and thus are not presently disclosed. The CARE Act was still under consideration by Congress the time this article was submitted for publication. Stay tuned for future developments.

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## The Freedom of Information Act

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### **FOIA – a light on agency operations**

Congress enacted The Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended (1994 & Supp. IV 1998) to give any person access to federal agency records. This act brings government agency operations into the sunshine and promotes public trust in our government. FOIA is designed to “. . . guarantee the right of persons to know about the business of their government.” H.R. Rep. No. 876, 93d Cong., 2d Sess. 4 (1974). FOIA strives to disclose as much of the requested information as possible. Most states have also enacted their own FOIA statutes similar to the statutes discussed in this segment. Any member of the public can find a list of all federal agency FOIA websites at <http://www.usdoj.gov/04foia/index.html>.

Although FOIA gives anyone a right, enforceable in court, to obtain certain federal agency records; there are certain exemptions to this statute. FOIA contains provisions that respect individual privacy and prevent harms that might result from certain types of disclosure. For example, it protects individual privacy, proprietary secrets of government contractors, and law enforcement techniques that cannot be disclosed to the public without material harm to the agency’s mission. The IRS Office of Governmental Liaison and Disclosure (GLD) facilitates the public’s rights of access to FOIA records. At the same time, GLD provides oversight and education to the Service and to external partners to ensure protection of taxpayer and employee confidentiality rights. Only GLD can respond to a FOIA request for the IRS (except for certain background investigation cases). 5 U.S.C. 552

### **The Attorney General’s position on FOIA**

On October 12, 2001, Attorney General John Ashcroft issued a new statement of FOIA policy to all federal departments and agencies to establish his position on the Freedom of Information Act. He directs us to continue, “. . . making discretionary disclosures of exempt information under the Act . . .” but cautions us that the disclosures are “. . . subject to statutory prohibitions and careful agency consideration of all institutional, commercial, and personal interests involved.”

### **FOIA implementing regulations**

The Statement of Procedural Rules contains the agency regulations that implement the FOIA. Reg. 601.702. These regulations contain information useful to a requestor such as the location of the Freedom of Information Reading Room, specific instructions for making a records request, fee information and identification of and the addresses for the officials to whom a FOIA request should be made. Any member of the public can find a link to these regulations on the IRS FOIA website: <http://www.irs.gov/foia/display/0,,i1%3D49%26genericId%3D16992,00.html>

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## The Freedom of Information Act, Continued

**The Federal Register** FOIA requires three types of disclosure for three different groups of Federal agency records. First, the IRS must publish basic agency information about its structure and operations in the Federal Register. 5 U.S.C. 552(a)(1) and Reg. 601.702(a)(1). Any member of the public can find the Federal Register through this link, [http://www.gpo.gov/su\\_docs/aces/aces140.html](http://www.gpo.gov/su_docs/aces/aces140.html)

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**The Freedom of Information Reading Room** The second type of disclosure is usually referred to as Reading Room access. See 5 U.S.C. 552(a)(2) and Reg. 601.702(b)(3)(i). Generally, FOIA requires the disclosure of documents specifically to prevent the making of “secret law”. It requires the disclosure of authoritative agency documents that carry the force and effect of law. The IRS Freedom of Information Reading Room holds instructions to staff and interpretations of law adopted by the agency ready for public inspection and copying. Additionally, the IRS may place documents that are the subject of frequent requests in the Freedom of Information Reading Room. Any member of the public can find information about our Freedom of Information Reading Room at the IRS FOIA website: <http://www.irs.gov/foia/display/0,,i1%3D49%26genericId%3D16992,00.html>

The IRS makes the following documents, along with a general index, available for viewing and copying in the Freedom of Information Reading Room:

- Final opinions, including concurring and dissenting opinions and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudication,
- Statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register,
- Administrative staff manuals and instructions, or portions thereof, that establish Department of the Treasury policy that affect a member of the public, and
- Records that have been located and processed in response to a request that have become or are likely to become the subject of numerous subsequent requests for substantially the same records, regardless of form or format.

The Freedom of Information Reading Room is located at the Internal Revenue Service Headquarters at 1111 Constitution Avenue, NW, Washington, DC. If a member of the public wants to inspect material at IRS Headquarters, they should make a written request to:

Commissioner of Internal Revenue  
Attention: Freedom of Information Reading Room  
1111 Constitution Avenue, NW  
Washington, D.C. 20224.

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## The Freedom of Information Act, Continued

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### Individual FOIA requests

A requestor can only obtain the third type of record through a written FOIA request. 5 U.S.C. 552(a)(3). Any member of the public can find instructions about making a FOIA request at <http://www.usdoj.gov/oip/oip.html>. A person should not make an (a)(3) FOIA request for records that are available in the Federal Register or the Freedom of Information Reading Room.

Any member of the public can find the directions for making a FOIA request to the Internal Revenue Service at this website:

<http://www.ustreas.gov/foia/guide.pdf>. This site contains the correct address for FOIA requests to the Internal Revenue Service as well as the other bureaus of the Department of the Treasury. Any person can also contact the IRS FOIA office by phone at 202-622-6250 or fax at 202-622-5165.

A FOIA request is a request for access to or for copies of records. FOIA does not require agencies to:

- Do research.
- Analyze data.
- Answer questions.
- Create new records.
- Search for records over which they have no control.
- Recreate records that were properly disposed of.
- Ask for the delivery of records held by private entities.
- Check on the status of an application for exemption.
- Request the return of original documents.

Office of Information and Privacy, U.S. Department of Justice. Freedom of Information Act Guide & Privacy Act Overview. Washington, D.C., May 2000 Ed., Pgs. 40-44.

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### Short deadlines

GLD makes the initial determination to release or deny a record and sends a letter to the requestor within 20 working days after the responsible official receives the request. The agency has an option to extend the response time if:

- There is a need to extend the search to offices or facilities such as the federal records center that are separate from the processing office;
- The request requires a search and review of a voluminous amount of separate and distinct records; or
- The request produces a need for consultation with another bureau or agency.

FOIA 5 U.S.C. 552(a)(6)(B)(iii)

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## The Freedom of Information Act, Continued

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### A reasonable search

Agencies are only required to conduct a reasonable search for the requested records. The Service is not required to reorganize a filing system to respond to a request or to search every record in the office to locate the responsive records. For example, in one case, the court found that a requester made an unreasonably broad request. He requested:

...all records pertaining to contacts between Mr. . . . or Ms. . . . and companies, entities, and/or persons related or doing or conducting business in any way with People's Republic of China.

The court stated that a request “. . . can be inadequate if it imposes an unreasonable burden.” *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C 2000) Another court stated that an agency “. . . need not honor a request that requires an unreasonably burdensome search.” *AFGE v. U.S. Department of Commerce*, 907 F.2d 203 (D.D.C 1986).

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### Who can make a FOIA request?

The Service will provide copies of their agency records, for a fee, to any person, worldwide. Generally, courts follow the Supreme Court conclusion that “. . . the identity of the requesting party has no bearing on the merits of his or her FOIA request.” *United States Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989). Foreign individuals, partnerships, corporations, associations, federal employees, state agencies and governments, and foreign companies and governments have all successfully filed FOIA requests.

However, agencies will not respond to some requests. FOIA does not consider federal agencies persons, so a federal agency cannot make a FOIA request. Agencies are not required to respond to FOIA requestors who owe money for previous FOIA requests. An agency need not respond to a FOIA request from a fugitive. In D.C., a court dismissed a federal fugitive's FOIA claim to obtain records from the Department of Justice as long as he evaded federal authority. *Doyle v. United States Dep't of Justice*, 668 F. 2d 1365 (D.C. Cir. 1981).

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## The Freedom of Information Act, *Continued*

<b>Does the reason for the FOIA request matter?</b>	“Congress granted the scholar and the scoundrel equal rights of access to agency records.” <i>Durns v. Bureau of Prisons</i> , 804 F.2d 701(D.C. Cir. 1986). Generally, FOIA does not take the reason for the request or the intended use of the documents into consideration. Agencies will only consider the reason for the request to decide the fee category of the requestor. Assistant Chief Counsel, Office of the Chief Counsel (Disclosure Litigation), Department of the Treasury, Internal Revenue Service, <u>Disclosure Litigation Reference Book</u> , June, 1999, 9-4.
<b>What is an agency record?</b>	Agencies will only provide agency documents in response to a FOIA request. FOIA also does not require an agency to provide the personal records of a government employee. Government officials’ or employees’ appointment calendars, phone logs, and daily agendas that are maintained by that official or employee for their own personal use, that are not integrated into or used by agency systems are not agency records subject to disclosure under FOIA. <i>Bureau of National Affairs, Inc. v. United States Department of Justice</i> , 742 F.2d 1484 (D.C. Cir. 1984)
<b>Judicial and legislative branches are not subject to FOIA.</b>	FOIA only applies to records that are in the possession and control of agencies in the executive branch of our government. The judicial and legislative branches are not subject to FOIA. In 1989, the Supreme Court made a landmark decision as to whether the Tax Division of the Department of Justice should, under FOIA, disclose copies of judicial opinions it receives in tax cases adjudicated by Federal district courts nationwide. The court held that these <b>were</b> agency records because they were in the possession and control of the agency when requested under FOIA. <i>Department of Justice v. Tax Analysts</i> , 492 U.S. 136 (1989). In a recent decision, the DC district court concluded that Joint Committee of Taxation oversight inquiry letters and documents that the IRS generated in response to the committee were congressional, rather than agency, records and thus were not subject to FOIA. <i>United We Stand America v. IRS</i> , 2002 U.S. Dist. LEXIS 14531, (D.D.C. 2002).

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## The Freedom of Information Act, *Continued*

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**File carefully!**

We must take care of our agency records and produce them when they are requested under FOIA. In one action, the court imposed a fine against the United States Department of Justice, awarded attorney fees to the requestor, and referred an agency attorney for investigation to the Justice Department's Office of Professional Responsibility. In that case, the plaintiff requested the complete criminal file pertaining to an indictment against him. At the time of his request, he had appealed his conviction. The agency office denied his FOIA request. The plaintiff filed suit. At first, the Assistant United States Attorney informed the court that the file had been purged. The court later discovered that he destroyed the file while plaintiff's petition for writ of certiorari was still pending. Jefferson v. Reno, 123 F. Supp. 2d 1 (D. D.C. 2000).

**Think before you destroy a record!**

You must always follow the agency and the National Archives and Records Administration (NARA) approved record retention schedules. However, once you receive a FOIA request for records in your possession, you may not destroy the records, even if the records ought to have been destroyed in accordance with applicable record retention schedules. Reg. 601.702(c)(12) When you give your disclosure recommendations for records that are the subject of a FOIA request, you should explain the nature of any concerns you have with the disclosure office, who can then determine whether any FOIA exemptions should be claimed.

**Nine FOIA exemptions provide protection from harm.**

FOIA requires Federal agencies to disclose agency records unless one of nine exemptions listed in 5 U.S.C. 552(b) or the three special law enforcement exclusions in 5 U.S.C. 552(c) apply. Congress set these exemptions in place to prevent the statute from causing certain harms. Following is a short discussion of each of the exemptions that are most commonly applicable to Exempt Organizations FOIA requests.

**Exemption (b)(1) - classified**

This exemption protects properly classified national security or foreign policy information.

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## The Freedom of Information Act, *Continued*

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**Exemption  
(b)(2) – internal  
personnel rules  
and practices**

This exemption protects records related solely to the internal personnel rules and practices of an agency. We may protect two types of records under this exemption. The first type is called a “low2” for trivial internal matters. Some examples of low 2 documents are routing memos; cover sheets, and “buc slips”. An agency may be able to avoid an overly burdensome response to a FOIA request for “low 2” records using this exemption if the requestor cannot demonstrate a real public interest. One court upheld the FBI when it did not disclose sensitive notations that held no significant public interest. *Founding Church of Scientology, Inc. v. Smith*, 721 F. 2d 828 (D.C. Cir, 1983). Usually, agencies withhold very few “low2” documents because there is no real harm from disclosure.

The second type of record is called “high 2”. These are documents, which, if disclosed, may seriously hinder or risk circumvention of agency regulations or statutes. For example, in one case, the ATF was able to delete sensitive portions of its training manual in its FOIA response. The court decided that the manual was used for predominantly internal purposes; it was designed to establish rules and practices for agency personnel; it involved no "secret law" of the agency; and public disclosure would have risked circumvention of agency regulations. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F. 2d 1051 (D.C. Cir. 1981).

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**Exemption  
(b)(3) – protects  
information  
prohibited from  
disclosure by  
statute**

Exemption (b)(3) protects records concerning matters that are specifically exempted from disclosure by statute (other than FOIA), if the statute either (A) leaves no discretion on whether the information will be withheld or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Generally, we apply this exemption to information described in IRC 6103, which does not allow a person access to tax returns or tax return information.

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## The Freedom of Information Act, *Continued*

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**Exemption  
(b)(3) –  
litigation  
protects list of  
contributors  
and third  
parties**

This exemption also protects information about contributors and third parties. For example:

In the FOIA request underlying [\*11] this litigation plaintiff sought the list of contributors attached to the 1997 Form 990 annual tax return filed by the Page Education Foundation ("Foundation"), a public charity exempt from tax under IRC 501 (c)(3). The Government asserted that FOIA exemption (b)(3), in connection with IRC 6103(a) and IRC 6104(b), prohibited the disclosure of the list of contributors. FOIA exemption (b)(3) provides for the withholding of information specifically exempted from disclosure by statute. I.R.C. 6103(a), which prohibits the disclosure of returns and return information, and I.R.C. 6104(b), which prohibits the disclosure of the name or address of contributors to any organization or trust (other than a private foundation, as defined in 509(a)) required to furnish such information, are statutes within the coverage of FOIA exemption (b)(3). In opposition, plaintiff maintained that the list of contributors attached to the Foundation's Form 990 was "return information" that the Service was required to release, unless the Service determined that release would seriously impair federal tax administration under I.R.C. 6103(e)(7). Plaintiff also argued that the Service could release the list of contributors if it exercised its discretion to classify the Page Education Foundation as a private foundation. The court rejected plaintiff's arguments, holding that the information requested was clearly exempt from disclosure pursuant to FOIA exemption (b)(3), in conjunction with 6103(a) and 6104(b).

*Stanbury Law Firm P. A. v. United States IRS*, 1999 U.S. Dist. LEXIS 12170 (D. Minn. 1999).

In a recent case, a legal foundation asked for the identities of third parties that requested audits or investigations of tax-exempt organizations. At issue were the letters that third parties wrote to the IRS raising questions about tax-exempt organizations' practices. Since this correspondence was referred to field offices having examination jurisdiction over them, the court found that it was data exempt from FOIA under exemption (b)(3) because it was IRC 6103 confidential return information. *Landmark Legal Found. v. IRS*, 267 F. 3d 1132 (D.C.Cir. 2001); *Belisle v. Commissioner*, 462 F. Supp. 460 (W. D. Okla. 1978); *Breuhaus v. IRS*, No. 78-240 (W.D.N.Y., Mar 13, 1979), aff'd 609 F. 2d 80 (2d Cir., 1979).

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## The Freedom of Information Act, *Continued*

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**Exemption  
(b)(4) – trade  
secrets and  
commercial or  
financial  
information**

Exemption (b)(4) – protects trade secrets and commercial or financial information that is privileged or confidential and that is obtained from a person. This exemption provides submitters of business information some assurance that their competitive position in the marketplace will not be compromised by a FOIA disclosure. An agency is required to make notice to a business submitter if their information becomes the subject of a FOIA request. Reg. 601.702(g). The submitter is then entitled to an opportunity to object to the disclosure. If a state collects exemption (b)(4) information and submits it to a Federal agency, the courts will look through the state to the business submitter to see if a harm will result from disclosure.

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**Exemption  
(b)(5) –  
inter/intra  
agency records**

Here, FOIA protects inter/intra agency records that would not be available by law to a party in litigation with the agency. To qualify for (b)(5) protection, a document must pass a two-part test. First, it must be an intra or inter agency memorandum. This type of memorandum is a document that is generated within an agency and stays either within the agency or is shared with another agency.

Second, it must be a document that would be privileged in the context of discovery. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The (b)(5) exemption generally protects documents that fall under three privileges, the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege as discussed below.

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## The Freedom of Information Act, *Continued*

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**The (b)(5)  
deliberative  
process  
privilege**

FOIA protects records that are part of the deliberative process for three reasons. First, it seeks to encourage frank, open discussions regarding matters of policy between subordinates and superiors. Second, it recognizes the need to prevent the premature disclosure of proposed policies before they are adopted in final form. Last, it seeks to prevent the public confusion that might result from the disclosure of rationales that may or may not be a part of the final agency action.

**Predecisional**

To fall under this exemption as a part of the deliberative process, a document must be both predecisional and deliberative. To be predecisional, the agency doesn't have to specifically point to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the document in the course of that process." Coastal States v. Dept. of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980). Unless an agency decision-maker subsequently adopts a predecisional document or incorporates it by reference into an agency's final decision, the document does not lose its predecisional character. In fact, it does not lose its predecisional character even after the decision to which the document relates has been made. NLRB v. Sears, Roebuck & Co.

**Deliberative**

To be deliberative, the document must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaugh v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Generally, a document, or any part thereof, is not considered deliberative if it contains purely factual matter. EPA v. Mink, 410 U.S. 73 (1973). The courts have, however, generally allowed agencies to withhold factual matter in an otherwise deliberative document in two general types of circumstances. First, when an author selects specific facts out of a larger group of facts, the author's act of extracting or distilling facts from a larger universe of facts constitutes an exercise of judgement that is entitled to protection under the deliberative process privilege. Second, when the facts are so inextricably connected to the deliberative matter in a document that its disclosure would reveal the agency's deliberations, then the document falls within the deliberative process privilege. Not every document created during an agency's decision-making process will fall within the deliberative process privilege. Whether a document falls within the deliberative process privilege depends on the particular content of the document. Drafts are generally regarded as deliberative process privileged material.

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## The Freedom of Information Act, *Continued*

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**The (b)(5)  
deliberative  
process  
privilege - more**

Where documents explain or establish the agency's interpretation of the law, courts have held them not to be predecisional and deliberative. Instead, they're treated as the 'working law' of the agency, which must be released upon issuance. *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997). In a recent decision, the D.C. Circuit Court of Appeals upheld our partial denial of the portions of Legal Memoranda that differed from the published revenue rulings to which they related. *Tax Analysts v. IRS*, 294 F. 3d 71 (D.C. Cir. 2002). The Legal Memoranda served as briefing papers for IRS and Treasury reviewers as they considered the language of proposed revenue rulings. The court also upheld our claim for the technical assistance memoranda written by one component of the National Office of Chief Counsel to another, as part of the deliberative process that culminated in the issuance of a ruling, technical advice, or chief counsel advice.

As a result of the 1997 *Tax Analysts* decision, Congress amended IRC 6110 to include a new type of written determination called Chief Counsel advice. Chief Counsel advice consists of National Office of Chief Counsel interpretations of revenue provisions that are issued to IRS and Counsel field offices, including Field Service Advice, Service Center Advice, Litigation Guideline Memoranda, and Bulletins. We make these documents available for public inspection upon issuance, in a manner similar to rulings, technical advice, and determination letters. We will delete taxpayer identifiers and information subject to certain FOIA exemptions.

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**The (b)(5)  
attorney work-  
product  
privilege**

The second (b)(5) privilege, the attorney work-product privilege, protects the adversary trial process by shielding documents prepared by an attorney in contemplation of litigation. To fall under this privilege, a document must be prepared in reasonable anticipation of litigation, but the litigation need not have begun. In fact, it is not even necessary to identify the specific claim. *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, (D.C. Cir. 1987). So long as it can be said that a primary purpose of creating the document was a reasonably foreseen litigation, the attorney work product privilege may be claimed.

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## The Freedom of Information Act, *Continued*

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**The (b)(5)  
attorney client  
privilege**

The third (b)(5) privilege, the attorney client privilege, protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” *Mead Data Central, Inc. v. United States Dep’t of Air Force*, 566 F. 2d 242 (D.C. Cir. 1977).

However, one court rejected the attorney-client privilege for the portions of Field Service Advice that discuss the law generally, in contrast to the scope and direction of a particular taxpayer’s examination. The court decided that, in this case, the rendering of a legal opinion by counsel is, in effect, making law. *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997).

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**Exemption  
(b)(6) –  
personal  
privacy and  
public interest -  
generally**

Exemption (b)(6) protects an individual’s personnel, medical and similar files, the disclosure of which would cause a clearly unwarranted invasion of personal privacy. In essence, any file that contains the names of individuals will be considered a similar file. Records contained in agency personnel files are also protected by the Privacy Act, as discussed below. FOIA exemption (b)(6) requires a balancing act between an identified privacy interest and the public interest.

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## The Freedom of Information Act, *Continued*

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**Exemption  
(b)(6) – identify  
a privacy  
interest**

It is not easy to identify and evaluate a privacy interest. “People have widely differing notions of privacy and what constitutes an invasion thereof.” Section III-65, Department of Justice, Office of Legal Education, FOIA for Attorneys and Access Professionals, April, 2002. A person can usually rest assured that facts about them such as marital status, payments, and medical information will be protected under a (b)(6) exemption.

However, much information is not considered information that has a privacy interest. Generally, information about corporations, deceased individuals, and the identities of FOIA requesters are not protected as privacy interest information. Departmental Disclosure Office, U.S. Department of the Treasury, The Freedom of Information Act Handbook, January 2000, 43.

The Office of Personnel Management regulations allow basic information about Federal employees, such as names, present and past position titles, grades, salaries, duty stations and position descriptions, to be disclosed. Anyone can find this information at the Office of Personnel Management website at [www.opm.gov](http://www.opm.gov). Just type “feddata” in the search function. The names and duty stations of military personnel will be protected if they may be “potential targets of threats and terrorist attacks”. Falzone v. Department of the Navy, No. 85-3862, 1986 U.S. Dist. LEXIS 17349 (D.D.C. 1986):

Public figures do not lose all rights of privacy, but they are diminished. Disclosure of sensitive personal information has been found to be appropriate only where exceptional interests mitigate in favor of disclosure. Examples: Federal employees found guilty of accepting bribes, misuse of government vehicles, and misconduct.

Departmental Disclosure Office, U.S. Department of the Treasury, The Freedom of Information Act Handbook, January, 2000, 43.

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**Exemption  
(b)(6) – define  
the public  
interest**

**Public Interest:**

One court defined a public interest as one where disclosure would serve the core purpose of the FOIA, which is to make a significant contribution to the public’s understanding of the operations or activities of government agencies. In one case, historians investigated the types of conduct that earned meritorious service awards in the Vietnam War. The court decided the privacy interest of military personnel outweighed the public interest of their disclosure and balanced the two interests by disclosing the awards, but protecting the social security numbers on the awards. See Sherman v. United States Dep’t of the Army, 244 F.3d 357 (5<sup>th</sup> Cir. 2001).

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## The Freedom of Information Act, *Continued*

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**Exemption  
(b)(6) – the  
balancing act**

As demonstrated in *Sherman* above, in every exemption (b)(6) case, agencies and courts will perform a balancing of privacy interests against an identifiable public interest. Usually information about an individual does not serve a public interest. The particular way that one requestor can use the information is irrelevant. Whether a disclosure is warranted turns on the nature of the requested document and its relationship to the basic purpose of the FOIA. Section III-66, Department of Justice, Office of Legal Education, FOIA for Attorneys and Access Professionals, April, 2002.

In one case, news groups unsuccessfully tried to request the FBI's criminal records (rap sheets) of millions of persons. However, the news groups in this case did not intend to discover anything about the conduct of the agency, and response to the request would not shed any light on the agency's conduct. *United States Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989).

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**Exemption  
(b)(7) – law  
enforcement  
records**

This exemption protects records compiled for law enforcement purposes. Many types of records can be described as records compiled for a law enforcement purpose, including, but not limited to the following:

- Records of civil, criminal, administrative and regulatory proceedings;
- Records compiled to enforce state law and foreign law;
- Records that refer or relate to background security investigations; and
- Records that refer or relate to investigations of government employees if they focus on civil or criminal acts.

Office of Information and Privacy, U.S. Department of Justice. Freedom of Information Act Guide & Privacy Act Overview. Washington, D.C., May 2000 Ed., Pgs. 337-339.

An agency can invoke exemption (b)(7) if disclosure would cause the harms explained below in (b)(7)(A) through (b)(7)(F).

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**(b)(7)(A) –  
Interference  
with  
enforcement  
proceedings**

If disclosure could reasonably be expected to interfere with specific and pending enforcement proceedings, then the agency can invoke this exemption.

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## The Freedom of Information Act, *Continued*

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**(b)(7)(B) –  
Pretrial  
information**

An agency will invoke this exemption when disclosure would deprive a person of a right to a fair trial or an impartial adjudication.

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**(b)(7)(C) –  
Personal  
information in  
law  
enforcement  
records**

An agency will use this exemption when disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy (similar to exemption (b)(6), but only applies to law enforcement records). This exemption also requires a balancing act between personal and public interests.

The identities of federal, state, and local law enforcement personnel referenced in investigatory files are also routinely withheld, usually for reasons similar to those described quite aptly by the Court of Appeals for the Fourth Circuit:

One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

Nix v. United States, 572 F.2d 998, 1006 (4<sup>th</sup> Cir. 1978).

Office of Information and Privacy, U.S. Department of Justice. Freedom of Information Act Guide & Privacy Act Overview. Washington, D.C., May 2000 Ed., Pgs. 337-339.

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**(b)(7)(D) –  
confidential  
sources**

An agency will apply this exemption if disclosure could reasonably be expected to disclose the identity of a confidential source. It can only use this exemption if an express or implied promise of confidentiality can be established. It will protect a State, local, or foreign agency or authority or any private institution that furnishes information on a confidential basis. Federal law enforcement agencies and federal employees acting in their official capacity do not receive (b)(7)(D) protection. Departmental Disclosure Office, U.S. Department of the Treasury, The Freedom of Information Act Handbook, January, 2000, 46.

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## The Freedom of Information Act, *Continued*

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**(b)(7)(E) – law enforcement techniques**

An agency will invoke this exemption if the records 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. Recently, the IRS used this exemption to prevent disclosure of the amount of money it was authorized to expend in its investigations of the plaintiff because it would allow:

...similarly situated taxpayers to learn the monetary limitations on certain types of IRS investigations, and to undermine the economic viability of those types of investigations in the future.

*Leveto v. IRS*, C.A. 98-285 E (Consolidated with C.A. Nos. 99-3 E, 99-101E), 2001 U.S. Dist. LEXIS 5791 (W.D. Pa., 2001).

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**Exemption (b)(7)(F) – endangerment**

An agency will use this exemption if disclosure could reasonably be expected to endanger the life or physical safety of any individual. This exemption will protect personal information about law enforcement personnel as well as third parties and other individuals.

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## **E-FOIA**

### **E-FOIA – electronic records**

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The Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 5 U.S.C. 552 (as amended), became effective on March 31, 1997 and apply to certain records created on or after November 1, 1996. They require Federal agencies to make the information required to be in reading rooms electronically available to the public on their FOIA web sites commonly referred to as “electronic reading rooms”. You can find the IRS E-FOIA Reading Room at <http://www.irs.gov/foia/display/0,,i1%3D49%26genericId%3D16992,00.html>

The amendments also altered agency responses to individual FOIA requests. They explicitly require agencies to include electronic records in a FOIA search and, upon request and, if readily reproducible, respond to a FOIA request in an electronic format.

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## The Privacy Act

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**Privacy Act –  
its purpose and  
objectives**

Unlike FOIA, which seeks to disclose as much as possible, the Privacy Act seeks to protect certain records from disclosure. The Privacy Act of 1974, 5 U.S.C. 552a, as amended, (1994 & Supp. IV 1998), became effective on September 27, 1975. Broadly stated, the Privacy Act balances the government's need to maintain information about individuals with the individual's right to be protected against unwarranted invasions of privacy caused by federal agencies' collection, maintenance, use, and disclosure of their personal information.

It is important to place the Privacy Act into its historical context to understand its purpose. In 1974, because of the Watergate scandal, Congress became concerned that federal agencies were practicing illegal surveillance and investigation of individuals. It also became aware that the government's increasing use of computers for storing and retrieving data created a potential for abuse. They focused the Act on four basic policy objectives:

1. To restrict disclosure of personally identifiable records maintained by agencies.
2. To grant individuals increased rights of access to agency records maintained on them.
3. To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely or complete.
4. To establish a code of "fair information practices" which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

Departmental Disclosure Office, U.S. Department of the Treasury, The Freedom of Information Act Handbook, January, 2000, 665.

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## The Privacy Act, *Continued*

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### Privacy Act – definitions

The Privacy Act contains four important definitions.

- **Agency:**

Any Executive department, military department, Government corporation, Government controlled establishment in the executive branch of the (federal) government, (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. 552(a) (1)

- **Individual:**

A citizen of the United States or an alien lawfully admitted for permanent residence.

5 U.S.C. 552(a)(2)

- **Record:**

Any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

This definition includes an employee's personnel records. 5 U.S.C. 5 U.S.C. 552(a)(4)

- **System of Records:**

A group of records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

5 U.S.C. 552(a)(5).

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## The Privacy Act, *Continued*

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**Privacy Act –  
first objective,  
to restrict  
disclosure**

Section 552(b) of the Privacy Act contains the “No Disclosure Without Consent” rule for all federal agencies and their contractors:

... no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains ....

The Act provides the following 12 exceptions to its prohibition against disclosure:

1. To officers and employees of the agency who have a need for the record in the performance of their official duties; commonly referred to as “need to know”.
2. As required by FOIA.
3. For routine use.
4. To the Census Bureau.
5. For statistical research and reporting.
6. To the National Archives and Records Administration.
7. To domestic federal and local law enforcement agencies upon the written request of the head of the agency.
8. When there are compelling circumstances that affect the health and safety of an individual. (This is sometimes used to identify missing persons.)
9. To Congress, its committees, joint committees and subcommittees.
10. To the Comptroller General in the course of the performance of the duties of the General Accounting Office.
11. Pursuant to a signed court order from a court of competent jurisdiction--this does not include foreign courts, clerks, grand jury subpoenas or state courts.
12. To a consumer reporting agency in accordance with the Dept Collection Act.

If you receive a subpoena, an *ex parte* court order, a grand jury inquiry, or a request from another agency for Privacy Act information related to a law enforcement effort or intelligence gathering such as the anti-terrorism effort, contact your local disclosure office before you make any disclosure. They will give you guidance and assistance in the matter.

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## The Privacy Act, *Continued*

**Privacy Act –  
second and  
third objectives  
- to grant  
increased rights  
of access and  
amendment**

The Privacy Act of 1974 afforded individuals certain rights as to records contained in agency systems of records. Such rights, subject to various exemptions and restrictions, include the rights of being notified in response to his or her request if any system of records named contains a record pertaining to him or her; obtaining access to such records; requesting amendment of such records; and securing an accounting of disclosures made from such records.

IRM 11.3.18, *Privacy Act Access and Amendment of Records* (12/2001).

The Privacy Act provides access to records much like FOIA, but it is more restrictive. The Act allows only individuals, as defined above, to gain access to their own record if it can be located by the agency within a system of records and retrieved by means of a personal identifier. The agency will not locate individual records in response to a Privacy Act request if the records are filed by an identifier other than the individual's name or identifying number such as an organization name or event. The Act contains 10 exemptions to access for certain types of information, such as classified information.

Any member of the public can make a Privacy Act (PA) request simply by writing a letter and sending it to their local disclosure officer. Anyone can find information about FOIA and PA requests at The Office of Personnel Management website at <http://www.usdoj.gov/oip/oip.html>. IRM 11.3.18, *Privacy Act Access and Amendment of Records* (12/2001) contains instructions to disclosure officers for processing PA requests.

Note: An individual may not correct their own tax records under the Privacy Act.

26 USC 7852(e) provides that subsections (d)(2), (d)(3), (d)(4) and (g) of the Privacy Act of 1974 (i.e., the amendment provisions) shall not be applied, directly or indirectly, to the determination of liability of any person for any tax, penalty, interest, fine, forfeiture, other imposition or offense to which the provisions of the Internal Revenue Code apply.

IRM 11.3.18.5, *Requests to Amend Records* (12/2001)

After individuals exhaust all administrative remedies in an attempt to amend their record, they may file amendment lawsuits. When an individual makes a request for amendment of their records and the agency makes the determination that they will not amend the record or if they fail to act, the Privacy Act allows an individual to bring a civil action against the agency. The requester **must** exhaust all administrative remedies first. 5 U.S.C. 552a(g)(1)(a).

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## The Privacy Act, *Continued*

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**Privacy Act –  
fourth objective  
- “fair  
information  
practices”,  
generally**

The Service is required to carry out the publication and reporting requirements of the Privacy Act. IRM 11.3.15, *Privacy Act Publication and Reporting Requirements* contains guidance on these requirements. The Act requires every agency to publish in the Federal Register a notice of the existence and character of each system of records it maintains. Anyone can find the IRS systems of records at <http://www.treas.gov/privacy/irspa.html> (Use ctrl F to search for a specific topic)

Agency employees should not collect, maintain, use or disseminate information concerning taxpayers, except as necessary for the enforcement and administration of the internal revenue laws. Any officer or employee of an agency who willfully maintains a system of records without meeting the Privacy Act notice requirements may be found guilty of a misdemeanor and be fined up to \$5,000. 5 U.S.C. 552a(i)(1)

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**Privacy Act –  
agencies must  
meet conditions**

The Privacy Act of 1974, 5 U.S.C. 552(e) sets the conditions by which agencies will maintain a system of records about an individual. Here are a few relevant examples.

- Agencies must limit the records they keep. An agency must maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President. 5 U.S.C. 552a(e)(1).
  - Agencies are required by the Privacy Act to collect as much information directly from you as possible before they contact third parties. They are directed to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs. 5 U.S.C. 552a(e)(2)
  - Agencies must not maintain any record describing how an individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless it is pertinent to and within the scope of an authorized law enforcement activity. 5 U.S.C. 552a(e)(7).
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**Privacy Act -  
references**

An employee can find The Privacy Act Handbook on the IRS website at <http://www.hq.irs.gov/disclosure>. The Privacy Act appears in the Treasury Regulations at Title 31, Part I, Subpart C. Additional information specific to the IRS is in Appendix B of these regulations.

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## The Privacy Act, *Continued*

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**Office of the  
Privacy  
Advocate**

IRM 11.2.1, *Privacy Advocate* (05/2002) contains updated material explaining the roles and responsibilities of the Privacy Advocate. The Privacy Advocate sets agency policy for compliance with the Privacy Act. It also explains the Privacy Impact Assessment Process and documents the IRS's commitment to privacy protection.

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## In Summary

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**Privacy and  
Disclosure – A  
Delicate  
Balance**

Just as Congress and the courts strive to strike a good balance between privacy and the public's right to know, you must also work to protect individual rights to privacy as you carry out your tax administration duties. It is important because when you reliably and consistently protect taxpayer's privacy rights, you add strength and confidence to our tax system.

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