

**memorandum**

CC:INTL-0336-96

Br1:WEWilliams

date: MAR 29 1996

to: Assistant Commissioner (International) CP:IN

from: Associate Chief Counsel (International) CC

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subject: Group of Four post-meeting press release - disclosure issues

This responds to your request for our views on a proposal that will be discussed at the up-coming meeting of the Group of Four. The proposal is that the Group issue a post-meeting press release. The exact format and content of the press release is undecided, although it may touch on all or some of the topics discussed at the meeting. You have asked for our views on whether the Service could protect from disclosure (e.g., under the Freedom of Information Act, 5 U.S.C. § 552 (1986) (hereafter "FOIA") certain information relating to meetings of the Group of Four if the Group were to issue a press release.

We understand that representatives of the member States of the Group of Four do not discuss individual cases and that taxpayer-specific information is not exchanged at the Group's meetings. We have identified the following documents/records that relate to a Group of Four meeting:

1. Pre-meeting correspondence between the competent authorities which discuss the dates and location of a meeting; identify the representatives from each country; set the agenda of the meeting; and identify the discussion topics and discussion leaders, etc.

2. Discussion papers - A discussion paper is prepared for each discussion topic on the agenda. It is prepared by the country that is responsible for leading the discussion. When the discussion topic is the responsibility of the U.S. competent authority, the discussion paper is prepared in the Office of the Assistant Commissioner (International), the Associate Chief Counsel (International), or at Treasury, depending on the subject matter and the person with the most expertise.

3. Talking outline - A talking outline is essentially the outline of a speech.

4. Overviews of each discussion topic are prepared for U.S. participants. An overview is prepared for the discussion

topics for which a U.S. participant is responsible as well as the discussion topics of the other governments.

5. Handwritten notes taken by U.S. participants.
6. Official minutes of the meeting. It is the responsibility of the host government to prepare official minutes. Drafts of the minutes are circulated among the competent authorities before the minutes are finalized.

Your question has been the subject of previous discussion. By memorandum dated June 18, 1976, the Chief Counsel forwarded to the International Counsel a draft of a memorandum entitled "Confidentiality of Materials Exchanged in Connection with the Working and Policy Group Meetings of the Group of Four". The draft memorandum, a copy of which is attached, was a joint project of the General Litigation and Disclosure Divisions.<sup>1/</sup>

5 U.S.C. § 552(b)(3)

Title 5 U.S.C. § 552(b)(3) provides an exemption from disclosure under the FOIA for records that are "specifically exempted from disclosure by statute." For this purpose, a treaty is a statute. The exchange of information articles in the U.S. treaties with France and Germany provide that information will be kept secret by the State receiving it.<sup>2/</sup>

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<sup>1/</sup> We forwarded a copy of the 1976 memoranda to the Office of the Assistant Chief Counsel (Disclosure Litigation) and requested the views of that office on the issues discussed herein. By memorandum dated March 20, 1996, a copy of which is attached, Disclosure advised us that "there has been no case law development significantly altering the legal analyses in the prior position papers addressing the potential disclosure of information exchanged by treaty partners." Conclusions similar to the ones in the draft memorandum were reached in a undated paper titled "United States Report - Disclosure of Information Received from Treaty Partner". This paper addressed a question raised at a 1975 Group of Four meeting concerning the extent to which the Group's activities are protected from the disclosure requirements under the FOIA and the Privacy Act. It was apparently prepared at or about the time of the draft memorandum. A copy of the undated paper is attached.

<sup>2/</sup> While the language of the secrecy clause in the treaty with the U.K. protects "information exchanged", we have found no authority that this clause is intended to provide a wider protection than the secrecy clauses in the treaties with France and Germany.

In general, the effect of a treaty secrecy clause is to protect information that is not disclosable under the laws of the sending country. Accordingly, most information (including documents, minutes, and notes reflecting communications from a treaty partner) received by the U.S. from a treaty partner is protected from disclosure under subsection (b)(3) of the FOIA pursuant to treaty secrecy clauses. In general, the secrecy clauses will protect from disclosure information relevant to the taxes covered by the treaty, to the administration of the domestic tax laws of the treaty partners, or to implementation of the treaty itself ~~(e.g., the mutual agreement procedure)~~. For example, under the U.S.-U.K. Convention (Article 26(1)), the secrecy provision applies to

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information ... as is necessary for carrying out the provisions of ... [the] Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of ... [the] Convention.

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Under Article 26(1) of the treaty with Germany, the secrecy clause applies to

information as is pertinent for carrying out the provisions of ... [the] Convention and of the domestic laws of the Contracting States concerning taxes covered by ... [the] Convention insofar as the taxation thereunder is not contrary to ... [the] Convention.

Article 27(1) of the treaty with France contains language almost identical to the corresponding provision in Article 26(1) of the treaty with Germany.

On the other hand, information that is sent by the U.S. to another member State and is not otherwise protected from disclosure under a statutory provision such as section 6103 is not protected from disclosure by subsection (b)(3) of the FOIA by virtue of being exchanged pursuant to a treaty. An argument can be made, however, that communications sent by the U.S. competent authority are protected from disclosure under the (b)(3) exemption to the extent such communications reveal a communication from a foreign competent authority. This argument would obviously require an analysis of the particulars of each communication in question.

5 U.S.C. § 552(b)(7)

In addition to the (b)(3) exemption in the FOIA for information protected by statute, an exemption provided by 5 U.S.C. § 552(b)(7) might apply to some information exchanged at a Group of Four meeting. Under (b)(7), certain records or information compiled for law enforcement purposes are protected from disclosure. Specifically, subsection (b)(7)(E) protects records that

would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law ....

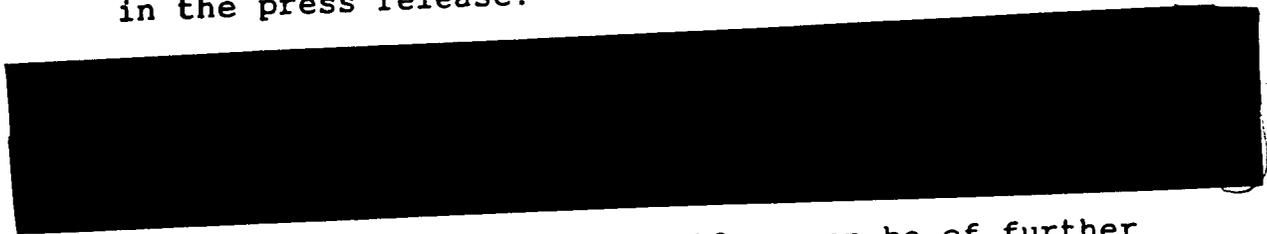
While there is no direct precedent on the question, certain communications of the U.S. competent authority in connection with Group of Four meetings and activities may be protectible under the (b)(7) exemption. Depending upon the content of the communication, such protection may be necessary to ensure the success of the competent authority process. It is our view that disclosing a competent authority communication could reveal the procedures by which the U.S. and its treaty partners administer the provisions of the treaties and their domestic tax laws in the international context and could seriously impair the competent authority process. Communications originating with the U.S. competent authority are critical to the mutual agreement process under tax treaties, the resolution of double tax cases and other disagreements between treaty partners, and the obtaining information from treaty partners for use in domestic tax examinations, collection proceedings, and litigation. Therefore, we could take the position that such communications, including the fact of a communication, originating with the U.S. competent authority, are protected from disclosure under the (b)(7) exemption in the FOIA.

Press Release

The March 1996 memorandum from Disclosure Litigation concludes that a press release might effect a waiver by the U.S. of the exemptions under section 552(b). Disclosure's memo includes the following:

In a FOIA case, an agency does not waive its right to assert a FOIA exemption for information, despite an earlier release of information, if the earlier release is materially different from that in the remaining records. Consequently, if the members decide to issue a joint press release, we would reasonably anticipate that a court would construe the release as a waiver of the

information contained elsewhere in meeting-related materials, to the same extent the information is divulged in the press release.



If you have any questions or if we can be of further assistance in this matter, please call Ed Williams at 874-1490.



MICHAEL DANILACK

Attachments:  
Copies of 3 memos.