

**Internal Revenue Service
Memorandum**

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Br3:AMGulas

date: Oct 2, 1996

to: Rose Pronel
Taxpayer Feedback Task Force

from: Chief, Branch 3 (Disclosure Litigation) CC:EL:D

Subject: Response to Field Questions Re: Taxpayer Feedback Form 10004

You have received several questions from the field with regard to the treatment of the Taxpayer Feedback Form 10004, the paper component of the exempt system of records created to comply with the Congressional mandate requiring the Secretary to make annual reports of taxpayer complaints of Internal Revenue Service employee misconduct. We will set forth the questions and the appropriate responses seriatim. In answering these questions, we have assumed that the notice of system of records has been published and the exemption at 5 U.S.C. § 552(k) (4) has been properly asserted.¹ Our responses are premised upon the 8/96 draft version of Form 10004.

Question 1:

Is the Form 10004 exempt from disclosure to the taxpayer/complainant under the Privacy Act?

Answer 1:

Yes, both the statistical database used to store the information and the paper Form 10004 are exempt from the disclosure provisions of the Privacy Act pursuant to exemption (k)(4). That exemption permits an agency to exclude a system of records from access by the individual about whom the record is maintained so long as the record is

¹ Much of the discussion in the memorandum is premised on the idea that the taxpayer feedback will be oral, either as a walk-in or a telephone contact. In the event the complaint is received by mail, we have addressed the issues in this memorandum as though the initiating letter is directed and maintained in the taxpayer's tax file, the employee's personnel file, or some other system of records other than the Taxpayer Feedback system. We have not addressed the status of that incoming correspondence in this memorandum.

maintained solely for statistical use and not used in whole or in part in making any determination about an identifiable individual. Because the paper Form 10004 is the initial input document used to start the Taxpayer Feedback procedure, it is subject to the same exemption as the electronic database.

It should be noted that, as a result of the interplay between the Privacy Act and the FOIA, a record which is exempt from disclosure under the Privacy Act will only remain undisclosed if there is an exemption under the FOIA to cover the record or portions of the record. Consequently, just because the Form 10004 is exempt from disclosure pursuant to the Privacy Act, does not mean the entire Form 10004 will remain exempt if a request for the form is made pursuant to the FOIA. 5 U.S.C. § 552a(t)(2) .

Question 2:

If a taxpayer submits a Freedom of Information Act (FOIA) request for a particular Form 10004, or all Form 10004s, can the taxpayer receive copies of the forms, and, more importantly, will the taxpayer receive the individual Service employees' names, social security numbers and disposition of the cases?

Answer 2:

Because the Forms 10004 are agency records, they are subject to the disclosure provisions of the FOIA. Therefore, a taxpayer requester can receive copies of his own complaints, and copies of other complainants' forms, with certain pertinent information withheld. Case law requires that responses to FOIA requests in which individual privacy interests are asserted be administered on a case-by-case basis. Consequently, there can be no bright line rules regarding the treatment of the items of information on the Form 10004. Nonetheless, the program managers of the National Office of Government Liaison and Disclosure may wish to issue guidance to the Disclosure Officers with regard to the treatment of FOIA requests for the Form 10004.

EXAMPLE A:

John Smith initiates a complaint against Revenue Agent Joe Brown. He then wishes to learn the outcome of his complaint, so he submits a FOIA request. John Smith would be able to receive a copy of the Form 10004 created as a result of his complaint, however, the employee's social security number and any other employee identifying information may be redacted pursuant to FOIA Exemption 6.

Exemption 6 provides that the FOIA does not apply to matters that "are personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Hence, personal privacy interests are protected by Exemption 6: The exemption does not provide a blanket withholding, however, but

involves a balancing test between the individual privacy interest and the public's interest in having the information released.²

Moreover, the information in block 15, the disposition code, would likely be exempt pursuant to Exemption 6 because, in conjunction with the identifying matter related to the employee of which the complainant is already aware, release of disciplinary material would likely constitute a clearly unwarranted invasion of personal privacy. See, e.g., Ripskis v. HUD, 746 F.2d 1, 3-4 (D.C. Cir. 1984) (withholding names and identifying data on evaluation forms of HUD employees receiving outstanding performance ratings), Stern v. FBI, 737 F.2d 84, 94 (D.C. Cir. 1984) (protecting identities and details of low or mid-level employees accused of improprieties.) In order to sustain such an assertion, the person responding to the FOIA request for the Service will be required to follow normal FOIA procedures and perform the balance between the public's interest in disclosure, which would appear to be minimal, and the individual's privacy interest, which could be significant.³

Consequently, the releasable information to a taxpayer-requester asking for his own form would appear to be blocks 1-7, 10, 11, (possibly) 12, 13, 14 and 16. The balance of the form is potentially subject to a privacy based exemption which the Disclosure Officer may assert on a case-by-case basis.

EXAMPLE B:

John Smith has learned the Service maintains Forms 10004 relating to complaints and requests copies of all Forms 10004 maintained by the district in which he resides. None of the complaints relate to him. Because these are agency records, the forms are subject to the FOIA. However, the requester should receive little information, because most of the information on the forms would appear to be subject to being withheld pursuant to FOIA exemption 6.

We have approached this response under the assumption that all data entered on the Form 10004 in Section I, "Customer Information," will be supplied by the complainant during the initial contact. **Nothing in Section I will be "retrieved" from the IDRS or other tax records by the manager while completing the form.** If this assumption is correct, then there is no return information protected by I.R.C. § 6103 on the form.

² We are assuming here that the complainant would have spoken with the manager initiating the Form 10004, and therefore, would be aware of the manager's identity. If the complainant was unaware of the identity of the manager initiating the form, then the manager's identity in Block 12 may be withheld as well.

³ One reason a bright line test is not feasible is if the facts underlying the complaint were so egregious that prosecution and conviction of the employee occurred, the balance between individual privacy and public interest may shift.

Therefore, the only exemption available for the "Customer Information" section will be the privacy based exemption in Exemption 6."⁴

If this assumption is incorrect, and there is data entered in the "Customer Information" section which has been retrieved from the IDRS, or other tax records, the Disclosure Officer responding to the FOIA request would be obligated to redact that data prior to disclosure pursuant to Exemption 3 in conjunction with I.R.C. § 6103.⁵ This will place a huge burden on the Disclosure Officer inasmuch as the Disclosure Officer will not know, at the time of the FOIA request, which information on the Form 10004 had been retrieved from the IDRS or other tax records.⁶ To accommodate this need, we should ensure that no return information is recorded on the Form 10004 by explicitly instructing employees completing the form that they are not to retrieve any data from IDRS or tax files which completing the form. Alternatively, if you perceive a need to include "return information" on the Form 10004, those data elements should be marked in some fashion to alert the Disclosure Officer that there is "return information" included on the form.⁷

The taxpayer's name, address, social security number and telephone number, *i.e.*, blocks 1-6 of the form, to the extent they had not been retrieved from the IDRS, could be withheld pursuant to Exemption 6. Likewise, the name and social security number of the Service employee could be withheld pursuant to Exemption 6, as could the identity of the manager initiating the form. *See New England Apple Council v. Donovan*, 725 F.2d 139, 142-44 (1st Cir. 1984) (potential for annoyance or harassment need not rise to physical endangerment before the exemption may be invoked). The public interest prong of the test, as the Supreme Court noted in *U.S. Department of Justice v. Reporter's Committee*, 489 U.S. 749 (1989), is the public's interest in shedding light on the agency's performance of its statutory duties, not the individual's interest in obtaining a particular document. Here, the public interest in the names of the Service employees and third party taxpayers is minimal while the employees and taxpayers have a significant privacy interest.

Thus, the only information which must be released to a FOIA requester, who is not the taxpayer from whom the Form 10004 information was received, would be blocks

⁴ Exemption 6 would not be available if the entity described in item 2 is not an individual.

⁵ Unlike Exemption 6, the Disclosure Officer has no discretion whether to assert Exemption 3. If the data is "return information," the Disclosure Officer is mandated to assert the exemption.

⁶ In the event the FOIA requester chose to challenge the Service's denial of the release of certain information on the basis of Exemption 3 in conjunction with I.R.C. § 6103, the Service could encounter evidentiary problems in providing that a specific piece of information was "return information." *See generally Kamman v. IRS*, 46 F.3d 56 (9th Cir. 1995).

⁷ It would also help subsequent evidentiary proof if a trail was maintained showing from where the particular data element originated.

10, 11, 13, 14, and 16. The balance of the form is potentially subject to a privacy based exemption which the Disclosure Officer may assert on a case-by-case basis.

Question 3:

Whether a taxpayer involved in litigation with the Service can subpoena the Forms 10004 to learn whether the revenue agent or revenue officer involved in the tax case has been the subject of misconduct complaints.

Answer 3:

In the event a taxpayer litigant subpoenaed the Forms 10004 in order to determine whether the revenue agent or revenue officer had been the subject of misconduct complaints,⁸ the Service would recommend to the Department of Justice or United States Attorney that the subpoena be quashed and a protective order be obtained on the grounds of a lack of relevancy. Under the Federal Rules of Civil Procedure (FRCP), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” FRCP 26(b). “While the scope of relevance in discovery is far broader than that allowed for evidentiary purposes⁹, it is not without limits. The facts and circumstances of a case determine and limit the relevancy of information sought to be obtained.” *Huang. v. Dalton, Secy of the Navy*, 1994 WL 325944 (June 30, 1994 E.D. Pa.), slip op. at 1. Even in an I.R.C. § 7433 suit, relating to civil damages for certain unauthorized collection activities, the relevance of past complaints about a revenue officer or revenue agent would be questionable.

Additionally, the employee’s social security number, the alleged misconduct, and the disposition codes sections could be protected from discovery because the Privacy Act precludes disclosure except under certain conditions. One of those conditions is “pursuant to the order of a court of competent jurisdiction.” 5 U.S.C. § 552a(b)(11). Therefore, we would recommend that the Service object to the discovery of the employee’s social security number, the Feedback Codes, and the Disposition. While the Privacy Act does not create a statutory privilege from discovery under the FRCP, the fact

⁸ We are assuming here that the litigant is going to subpoena forms initiated by third party taxpayers in which the complaint is focused on a particular named employee.

⁹ Under the Federal Rules of Evidence, other crimes, wrongs or acts are generally not admissible evidence at trial with regard to the character of a witness, see Fed. R. Evid. 404(a)(3), except that “The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to the [] limitation [] [that] the evidence may refer only to character for truthfulness or untruthfulness....” Fed. R. Evid. 608(a). Evidence of specific conduct can be admitted for the purpose of attacking the credibility of a witness only if it is “evidence that a witness ... has been convicted of a crime” Fed. R. Evid. 609(a)(1) or, “if it involved dishonesty or a false statement....” Fed. R. Evid. 609(a)(2). Therefore, data obtained from third party Forms 10004 should not be admissible evidence unless they go to the employee’s veracity. The issue of admissibility, however, is not dispositive of relevance.