

**Internal Revenue Service
memorandum**

date: MAR 23 1998

to: Chief Counsel CC

from: Deputy Assistant Chief Counsel (Disclosure Litigation)
CC:EL:D

subject: Treatment of Appeals Settlement Guidelines under the
Freedom of Information Act

This memorandum is in response to your request for clarification of Disclosure Litigation's position regarding the treatment of Appeals Settlement Guidelines ("ASGs") under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

By way of background, in the early 1990s Disclosure Litigation was asked to consider whether ASGs were subject to mandatory disclosure under the FOIA. It was understood that the primary purpose for developing these settlement guidelines was the need to achieve a greater degree of settlement consistency and to improve the overall quality of Appeals settlements. The content of ASGs consisted generally of a neutral discussion of the relevant legal issues under applicable statutes, regulations, and case law, and suggested settlement strategies, including acceptable ranges or percentages, assessments of litigating hazards, policy considerations, and the like. It was also envisioned that the guidelines would be updated as taxpayers became aware of acceptable settlement parameters.

Attorneys in the Field Service Division, as well as in Appeals, expressed to Disclosure Litigation the concern that disclosure of the guidelines, with articulation of the Service's ultimate objectives, specific settlement ranges or percentages, and assessments of litigating hazards and vulnerabilities associated with the Service positions set forth in the guidelines, would upset the balance between the taxpayers and the Service, according taxpayers an unfair advantage in the negotiation process. Further, disclosure of the guidelines could prejudice the Service's interests in identifying the "best" cases to litigate in an attempt to establish correct principles of tax law. Based upon the above, it was Disclosure Litigation's conclusion that, while the neutral discussion of the relevant legal issues must be

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disclosed¹, settlement strategies, assessments of litigating hazards, and acceptable ranges or percentages for settlement, and similar "tolerance" information, could be withheld from disclosure pursuant to FOIA exemption (b) (7) (E).

Exemption (b) (7) (E) exempts from disclosure "records or information compiled for law enforcement purposes ... [which] 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." 5 U.S.C. § 552(b) (7) (E), as amended by Pub. L. 99-570, § 1802, 100 Stat. 3207-48, 49 (1986).

ASGs set parameters by which appeals officers enforce the Internal Revenue Code. As such, they meet the threshold requirement of exemption (b) (7) that they be "records or information compiled for law enforcement purposes."

Based upon the assessment of Field Service and Appeals personnel that disclosure of the guideline portions of the ASGs generally could reasonably be expected to adversely impact the quality of settlements by informing taxpayers of acceptable settlement terms, Disclosure Litigation opined that a reasonable argument could be made that exemption (b) (7) (E)'s circumvention test was met. To date, the Service has not been faced with FOIA litigation challenging the nondisclosure of the guideline portions of ASGs.

Whether 5 U.S.C. § 552(b) (7) (E) actually applies to the guideline portions of the ASGs must be made on a case-by-case basis. It is incumbent upon the Service to determine whether any particular ASG's content satisfies the exemption claimed.

Disclosure Litigation recently disclosed the ASG on Capitalization of Costs to Obtain Management Contracts, in almost its entirety, to the Investment Company Institute in response to its FOIA administrative appeal. A review of the case file reflects that the proposed administrative appeal response was circulated to Appeals for concurrence; in the absence of an articulation by Appeals personnel of the "harms" as set forth above, Disclosure Litigation recommended release, to which Appeals apparently concurred.

¹ Disclosure Litigation advised that the preparation, approval, distribution, and use of ASGs would likely lead a court to conclude that ASGs constitute the "working law" of the Service, such that the ASGs would have to be made available to the public under subsection (a) (2), absent the determination that subsection (b) (7) (E) applies.

With respect to future FOIA requests, appeals, or litigation involving ASGs, Disclosure Litigation personnel will be coordinating not only with Appeals, but with the Field Service Division, to consider thoroughly the impact of proposed disclosure of the guideline portions of the particular ASG and the applicability of exemption (b) (7) (E) to the settlement guidelines. In general, I expect that the guidelines portion of the ASG will not be disclosed except where the guideline is so general that it could not be protected, where there have been so many settlements entered into under the ASG that the settlement guideline has become public knowledge, or where the settlement guideline has been changed and disclosure of the former guideline cannot be said to cause the harms designed to be protected by exemption (b) (7) (E).


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