

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:07:ALMielke
DL-115304-10

date: April 16, 2010

to: Frank Weber
Program Analyst
(Headquarters Disclosure Office)

from: Special Counsel to the Associate Chief Counsel
(Procedure & Administration)

subject: Electronic Return Originator/VITA Volunteer Disclosures

This responds to your request for assistance concerning the continued inclusion of VITA volunteers in the list of Electronic Return Originators (EROs) currently released through the Freedom of Information Act (FOIA) Electronic Reading Room. You have advised that several VITA volunteers who are EROs have contacted the Service to express concern about the Service's release of ERO contact information after commercial entities utilized this information to market tax related products and services to the VITA volunteers. For the reasons that follow, the Service should not remove VITA volunteers from the list of EROs currently released under the FOIA.

Upon request, the list of EROs must be disclosed unless one of the FOIA's nine exemptions applies. 5 U.S.C. § 552(b)(1)-(9). The exemption found in (b)(6) is the only applicable provision that could authorize the withholding of the information. Subsection(b)(6) provides that the FOIA, "does not apply to matters that are personnel and medical files and similar files that disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has stated that all information that "applies to a particular individual" meets the threshold requirement for exemption 6 protection. U.S. Dept. of State v. Washington Post Co., 456 U.S. 595 (1982). Further, information such as names, complete addresses, phone numbers and email addresses are a part of a person's right to privacy, and an agency cannot waive that right.

The Supreme Court, however, has created a balancing test where the right to privacy is weighed against the public's right to disclosure. See Dept of State v. Ray, 502 U.S. 164 (1991). Pursuant to this balancing test, "unless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail.... FOIA's basic policy ... focuses on the citizens' right to be informed about what their government is up to.

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Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.” Id. at 177-78 (citations and quotations omitted). The public interest is whether the information would further the public’s understanding of the workings of an agency.

The majority of individuals who are EROs are professionals engaged in commercial activity and have no or a minimal privacy interest in their names. Ackerson & Bishop Chartered v. USDA, No. 92-1068, clip. Op. at 1 (D.D.C. July 15, 1992) (concluding that commercial mushroom growers operating under individual names have no expectation of privacy); See, also, Or. Natural Desert Ass’n v. U.S. Dept. of the Interior, 24 F.Supp.2d 1088, 1089 (D. Or. 1998) (concluding that cattle owners who violated federal grazing laws have “diminished expectation of privacy” in their names when such information relates to commercial interests); Washington Post Co. v. USDA, 943 F.Supp. 31, 34-36 (D.D.C. 1996) (finding that farmers who received subsidies under cotton price support program have only minimal privacy interest in home addresses from which they also operate businesses). Analogously, there is no privacy interest in the complete mailing address or email address of these EROs. Electronic Frontier Foundation v. ODNI, 2010 WL 431765 *9 (9th Cir. Feb. 9, 2010) (concluding that email addresses of lobbyists for telecommunication carriers could be withheld under FOIA exemption (b)(6) when not needed to identify the party communicating with the government).

Additionally, inasmuch as the information, including the information collected from the VITA volunteers who are EROs, was deemed significant enough to be collected and maintained in the ERO database, it would be inconsistent to argue that this information does not shed light upon the agency’s performance of its statutory duties. EROs are granted unique access to the IRS system for electronic filing. Indeed, the IRS deems it necessary to conduct a background check in screening ERO applicants, meaning that the ERO designation is not one with negative connotations. The public has a need to know who the IRS favors with this designation. Further, it is critical that the public have access to information that will facilitate contacting EROs. Although some EROs also may be VITA volunteers, they nonetheless have been favored with this sensitive access as an ERO. A VITA volunteer’s charitable purpose, although distinguishable from a commercial motive is not enough to undercut the public’s right to know. Furthermore, though these individuals may currently use the ERO designation for in connection with their volunteer efforts, this exclusively charitable purpose could change at any time with the ERO entering the commercial marketplace.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call 622-4570 if you have any further questions.