

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

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date: July 27, 2011

to: Kathryn A. Green  
Director  
(Servicewide Policy, Directives, and Electronic Research (SPDER))

from: Donald M. Squires  
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(Procedure & Administration)

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subject: Request for Review of Opinion - Instructions to Staff under 5 U.S.C. § 552(a)(2)(C)

This memorandum responds to your request for assistance dated March 7, 2011. This advice may not be used or cited as precedent.

ISSUES

1. Whether a Counsel opinion dated March 8, 2007 regarding the IRS's requirements to disclose instructions to staff under the Freedom of Information Act [FOIA], 5 U.S.C. § 552(a)(2)(C), remains an accurate reflection of the law in light of the Open Government Initiative.
2. Whether SPDER's e-FOIA decision tool accurately reflects the law the IRS must apply when it determines whether particular instructions to staff must be made available for public inspection under 5 U.S.C. § 552(a)(2)(C).

CONCLUSIONS

1. The March 8, 2007 Counsel opinion interpreted the standard requiring affirmative disclosure of instructions to staff as those that adversely affect a member of the public under 5 U.S.C. § 552(a)(2)(C). Administrative staff manuals and instructions must be disclosed to the public if the instructions to staff have any affect on a member of the public. The Open Government Initiative does not affect the FOIA criteria.
2. Accordingly, the e-FOIA decision tool used by SPDER and SERP, which had been based upon this previous interpretation, should be amended to instruct

release of administrative staff manuals and instructions that affect a member of the public in any respect.

## FACTS

Authors of documents issued to IRS employees through the IRS's Servicewide Policy, Directives, and Electronic Research (SPDER) office use an e-FOIA decision tool created by SPDER to determine whether a particular document must be made available to the public in the electronic FOIA reading room. SPDER created the decision tool based on advice contained in a March 8, 2007 opinion authored by our predecessor office. Since the issuance of the opinion and the implementation of the e-FOIA decision tool, the Taxpayer Advocate Service has raised the issue of whether the decision tool results in certain documents not being made publicly available that otherwise should be available pursuant to the FOIA.

## LAW AND ANALYSIS

The FOIA requires federal agencies to make certain records available to the public for public inspection and copying. 5 U.S.C. § 552(a)(2). Such records include administrative staff manuals and instructions to staff that affect a member of the public. 5 U.S.C. § 552(a)(2)(C). The intent behind the requirement is to ensure that the public knows how to interact with federal agencies and how to conform their actions to the requirements of the law. If an agency fails to make staff manuals and instructions available for public inspection, then the agency may not rely on, use, or cite the instruction as precedent against a party or other agency unless the other party had actual notice of the instruction. 5 U.S.C. § 552(a)(2).

With respect to the March 8, 2007 Counsel opinion's discussion of the requirements of section 552(a)(2)(C), a few minor points should be addressed –

First, information disclosed under section 552(a)(2)(C) must be promptly made available to the public. The 1996 e-FOIA amendments created a one-year transition period within which agencies were required to establish systems to make records electronically available to the public. After the conclusion of that one-year period, however, all agency records made available pursuant to section 552(a)(2) are to be promptly made available electronically. The March 8, 2007 opinion erroneously interpreted the one-year requirement to apply to all documents created after the enactment of the 1996 e-FOIA amendments. As to the meaning of the phrase "promptly available," because the FOIA also requires agencies to make publicly available indexes to the records they place in their reading rooms on a quarterly basis, we have previously opined, and continue to recommend, that qualifying instructions to staff be made available to the public by the close of the quarter in which they are issued.

Second, under the FOIA, agencies must disclose all instructions to staff that affect a member of the public. As stated in the March 8, 2007 memo, there is very little guidance, either in case law or legislative history, as to what may or may not affect the

public. Instead, agencies must each interpret the statute and decide whether an instruction will affect the public. The IRS must make IRM provisions that provide basic guidelines for the investigation of various members of the public available for public inspection. Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972). If a manual clarifies procedural or substantive law, then the manual should be released under section 552(a)(2)(C). Cox v. DOJ, 576 F.2d 1302 (8th Cir. 2002). Any other instruction to staff, the publication of which could alter the public's behavior, should also be made available under section 552(a)(2)(C). Smith v. Nat'l Transp. Safety Bd., 981 F.2d 1326 (D.C. Cir. 1993).

Third, the March 8, 2007 memo states that a staff manual or instruction affects a member of the public if a member of the public would be adversely impacted by the instruction or could have taken an alternative course had the instruction been released. Whether a staff manual or instruction adversely affects the public or whether a member of the public could have taken an alternative course had the IRS released the instruction is not determinative of whether to release the instruction under section 552(a)(2)(C). The publication requirement is triggered by the agency's determination that the instruction may have any affect, positive or negative, on a member of the public. What does remain true is that a member of the public must show an adverse effect or the possibility of taking an alternative course in order to establish a claim under section 552(a)(1) to set aside the agency's action of which he was not given knowledge. Coos-Curry Elec. Coop. v. Inc. v. Jura, 821 F.2d 1341 (9th Cir. 1987); Zaharakis v. Heckler, 744 F.2d 711, 714 (9th Cir. 1984).

Fourth, all instructions to staff that may affect the public, regardless of format or type of issuance are subject to section 552(a)(2)(C), including e-mails, job aids, training materials, Servicewide Electronic Research Program (SERP) alerts, delegations orders, and local guidance.

Finally, instructions to staff that disclose techniques and procedures for law enforcement investigations or prosecutions, that, if known to the public, could enable a member of the public to circumvent the law are exempt from the section 552(a)(2)(C) requirement by virtue of their exemption under section 552(b)(7)(E).<sup>1</sup> Where an instruction to staff constitutes, or includes, this type of sensitive law enforcement information (e.g., DIF scores, freeze codes, tolerances, etc.), then the IRS should not make this information publicly available through the reading room.

Since the issuance of the March 8, 2007 Counsel opinion, the United States government has implemented an Open Government Initiative. The Open Government Initiative encourages agencies to exercise their discretion to make a broader range of records available beyond the minimum required by the statute. See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (stating that federal agencies should

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<sup>1</sup> But, in a change from our March 8, 2007 opinion, such documents are not exempt pursuant to section 552(b)(2). Milner v. Dep't of Navy, 79 U.S.L.W. 4169 (2011).

automatically disclose information about "what is known and done by...Government"); Attorney General Holder's FOIA guidelines, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf> (calling for an increase in the systematic online posting of information in advance of FOIA requests); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines—Creating a New Era of Open Government" (posted 4/17/2009) (advising that making more information public is a "key area where agencies should strive for significant improvement"). The Open Government Initiative primarily encourages agencies to release agency records that are of sufficient public interest to warrant public disclosure if no harm would occur as a result of the release of the record even if a record may technically be exempt from disclosure pursuant to section 552(b). Additionally, agencies should not withhold records from the public on the basis that the release of the records would reveal errors or failures that may embarrass the agency. See *FOIA Post*, above.

Generally, under section 552(a)(2)(C), agencies only withhold staff manuals or instructions that do not affect the public or are guidelines for law enforcement investigations or prosecutions where disclosure is reasonably expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). Simply to designate more staff manuals and instructions for public release regardless of whether they affect the public may only make it more difficult for the public to discern the instructions that they need to handle IRS matters. However, where the agency's determination whether a particular instruction to staff affects a member of the public is a "close call," deciding to make such an instruction available to the public would be in keeping with the Open Government Initiative. However, the Open Government Initiative does not contemplate the release of staff instructions that relate to law enforcement techniques if their release would risk the circumvention of law. Accordingly, the Open Government Initiative should not have an appreciable affect on the release of information under section 552(a)(2)(C).

Based on the March 8, 2007 Counsel opinion, SPDER designed an e-FOIA decision tool to aid authors of staff instructions with their determination of whether their instructions to staff must be made publicly available. While the e-FOIA decision tool certainly assists authors with this determination, some improvements to the tool would give users a more accurate way to determine whether release of particular staff manuals and instructions is appropriate under the FOIA. The attachment to this memorandum contains our recommendations to improve the tool. In addition, we also wish to call to your attention a recent undertaking within the Executive Branch to create a single set of standards for classifying non-national security but otherwise sensitive

information. The new designation is to be called Controlled Unclassified Information (CUI). Information the IRS currently designates as Official Use Only (OUO) will fall within the CUI umbrella. Treasury is coordinating the Department's compliance with the new CUI standard and you may expect to hear more about it, including any need to replace the OUO designation with the CUI designation in the near future.

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 (202) 622-7950 if you have any further questions.

Attachment (1) - **Redacted**